

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	HARRY J.F. KORRELL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	GEN PAUL D. CLEMENT, ESQ.	
7	As amicus curiae, supporting the	
8	Petitioner	17
9	ORAL ARGUMENT OF	
10	MICHAEL F. MADDEN, ESQ.	
11	On behalf of the Respondent	27
12	REBUTTAL ARGUMENT OF	
13	HARRY J.F. KORRELL, ESQ.	
14	On behalf of Petitioner	51
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in 05-908, Parents Involved in Community Schools versus Seattle School District Number 1.

Mr. Korrell.

ORAL ARGUMENT OF HARRY J.F. KORRELL

ON BEHALF OF PETITIONER

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

In an effort to achieve its desired racial balance in its popular high schools, the Seattle school district denied over 300 children, both white and minority children, admission to their chosen schools solely because of their race and without any individualized consideration. This strikes at the heart of the Equal Protection Clause which commands that Government treat people as individuals, not simply as members of a racial class.

This fundamental equal protection principle was reiterated in Grutter and in Gratz. The central question in this case is not, as the school district and many of its allies suggest, whether integration is important or whether desegregation is compelling. The central question in this case is whether outside of the

1 remedial context, diversity defined as the school
2 district does, as a white/non-white racial balance, can
3 be a compelling interest that justifies the use of race
4 discrimination in high school admissions.

5 JUSTICE GINSBURG: Mr. Korrell --

6 JUSTICE KENNEDY: Do you agree in general
7 with the Solicitor General's brief? Do you agree in
8 general with the brief submitted by the Government or do
9 you have differences with it in its approach?

10 MR. KORRELL: Justice Kennedy, we -- we
11 agree mostly with the Solicitor General's brief. I
12 believe the Solicitor General might take a different
13 position on whether race neutral mechanisms can be used
14 to accomplish race specific purposes.

15 JUSTICE KENNEDY: Well, I can --

16 MR. KORRELL: But that's not an issue the
17 Court needs to reach in this case.

18 JUSTICE KENNEDY: Well, it -- it is a point
19 that I -- I'd like both him and you to discuss at some
20 point during your argument. If -- can you use race for
21 site selection? You have -- you need to build a new
22 school. There are three sites. One of them would be
23 all one race. Site two would be all the other race.
24 Site three would be a diversity of races. Can the
25 school board with, with the intent to have diversity

1 pick site number 3?

2 MR. KORRELL: Justice Kennedy, I think the
3 answer turns on the reason that the schools have the
4 racial compositions that they do.

5 JUSTICE KENNEDY: It -- there's -- well, we
6 can have all different kinds of hypotheticals, but
7 there's residential housing segregation, and it wants,
8 it wants, the board wants to have diversity.

9 MR. KORRELL: Your Honor, our position is
10 that if, if the resulting -- if the racial composition
11 of those schools is not the result of past de jure
12 segregation --

13 JUSTICE KENNEDY: No. It is a new school.
14 It's a new school.

15 MR. KORRELL: In that case, Your Honor,
16 Parents' position is that the Government can't be in the
17 position of deciding what the right racial mix is.

18 JUSTICE KENNEDY: So it has to take the
19 three sites, all of them in the hypothetical, all of
20 them equal, and just flip a coin, because otherwise it
21 would be using a --

22 MR. KORRELL: Your Honor, obviously it is
23 not the facts of the Seattle case. In the hypothetical
24 Your Honor posits, perhaps the right analogy is
25 something similar to the -- the redistricting cases,

1 where a court could look and see whether the racial
2 motive was a predominant factor as opposed to the sole
3 factor motivating --

4 JUSTICE KENNEDY: No, no. The school board
5 says we want, right up front, we want racial diversity
6 in our new school. Illicit under the Fourteenth
7 Amendment in your case?

8 MR. KORRELL: Your Honor, school districts
9 can do many, many things through race neutral means that
10 they could not do with race discrimination, which is
11 what is going in this --

12 JUSTICE GINSBURG: But can they have a race
13 conscious objective? I think that that's the question
14 that Justice Kennedy is asking you, and I don't get a
15 clear answer. You say you can't use a racial means.
16 But can you have a racial objective? That is, you want
17 to achieve balance in the schools.

18 MR. KORRELL: Justice Ginsburg, our position
19 is that that is prohibited by the Constitution
20 absent past discrimination.

21 JUSTICE SCALIA: You would object, then, to
22 magnet schools? You would object to any system that is
23 designed to try to cause people voluntarily to go into a
24 system that is more racially mixed?

25 MR. KORRELL: Justice Scalia, our objection

1 to the Seattle program is that it is not a race neutral
2 means.

3 JUSTICE SCALIA: No, I understand. But I'm
4 trying to find what, you know, the outer limits of your
5 contentions are. It doesn't seem to me that your briefs
6 indicated that you would object to something like magnet
7 schools. The -- even if one of the purposes of those
8 schools is to try to cause more white students to go to
9 schools that are predominantly non-white. It's just
10 voluntary, I mean, but the object is to achieve a
11 greater racial mix.

12 MR. KORRELL: Your Honor, we object to
13 the -- if that is the sole goal of a school district
14 absent past discrimination, we object. But that kind of
15 hypothetical situation, I think, isn't necessary for the
16 Court to reach in the current case.

17 JUSTICE SCALIA: I understand.

18 JUSTICE KENNEDY: Well, it may not be
19 necessary for you but it might be necessary for us when
20 we write the case. We're not writing just on a very
21 fact-specific issue. Of course, the follow-up question,
22 and the Solicitor General can address it too, is this:
23 Assuming some race-conscious measures are permissible to
24 have diversity, then isn't it odd to say that you can't
25 use race as a means? I mean, that's the next question.

1 That may, in fact, be why you give the -- seem to give
2 the answer that you do. You just don't want to embrace
3 that contradiction.

4 MR. KORRELL: Your Honor, it is certainly
5 difficult if race -- if racial balance can be a goal of
6 government, then it is more difficult to defend a racial
7 balancing plan as unconstitutional, or to attack one as
8 constitutional.

9 JUSTICE KENNEDY: That is true.

10 MR. KORRELL: This Court has said repeatedly
11 that racial balancing is unconstitutional.

12 JUSTICE SOUTER: Well, we have said it
13 repeatedly in contexts different from this. I mean, the
14 paradigm context in which we've made remarks to that
15 effect, stated that, are affirmative action cases. The
16 point of the affirmative action case is that some
17 criterion which otherwise would be the appropriate
18 criterion of selection is being displaced by a racial
19 mix criterion. That is not what is happening here.
20 This is not an affirmative action case.

21 So why should the statements that have been
22 made in these entirely different contexts necessarily
23 decide this case?

24 MR. KORRELL: Justice Souter, we disagree
25 that the analysis in the Grutter and Gratz cases is

1 entirely different from the analysis in this case.

2 JUSTICE GINSBURG: But you have to agree
3 that those cases left someone out of the picture
4 entirely so we were talking about a selection of one
5 person or another. The word "sorting" has been used in
6 this context because everybody gets to go to school.
7 Indeed, they are required to go to school. So no one
8 gets left out of the system, and I think there have been
9 Court of Appeals judges who have noted, we have never
10 had that case before, it's not like the affirmative
11 action cases.

12 MR. KORRELL: Your Honor, I agree that this
13 Court has not had a case like this before. I disagree,
14 however, that it's not like the Grutter or the Gratz
15 decision. The plaintiff in Gratz, as the Court
16 undoubtedly is aware, attended the University of
17 Michigan at Dearborn. He got into a school. He didn't
18 get into the school that he wanted to go to. Similarly,
19 in our case, with the plaintiffs, they wanted to go to
20 their preferred schools, schools that the school
21 district acknowledges provided different educational
22 opportunities, produced different educational outcomes,
23 and they were preferable to the parents and children who
24 wanted to go.

25 JUSTICE SCALIA: Why do you agree that this

1 is not an affirmative action case? Is it not? Wherein
2 does it differ? I thought that the school district was
3 selecting some people because they wanted a certain
4 racial mix in the schools, and were taking the
5 affirmative action of giving a preference to students of
6 a certain race. Why isn't -- why doesn't that qualify
7 as affirmative action?

8 MR. KORRELL: If that's what affirmative
9 action is, Your Honor, then this case is certainly that
10 --

11 JUSTICE SCALIA: Well, I don't know what
12 else it is. What do you think it is that causes you to
13 seemingly accept the characterization that this is not
14 it?

15 MR. KORRELL: Your Honor, perhaps I
16 misspoke. I didn't mean to accept the characterization
17 that this case does not involve selection --

18 JUSTICE SOUTER: Let me help you out by
19 taking you back to my question. One of the
20 characteristics of the affirmative action cases was the
21 displacement of some other otherwise generally
22 acknowledged relevant criterion such as ability as shown
23 in test scores, grade point averages, and things like
24 that; and that was a characteristic of those cases.

25 It is not a characteristic of this case, as

1 I understand it.

2 MR. KORRELL: I'm not sure that's exactly
3 right, Your Honor. In this case, the school district
4 admitted in the response to the request for admissions
5 that had the identified children been of a different
6 race, they would have been admitted into the schools.

7 JUSTICE SOUTER: No, we realize that, but --

8 JUSTICE SCALIA: I thought the criterion
9 here -- I thought there was a criterion here, and that
10 is, you can go to whatever school you want. You are
11 allowed to go to a certain choice of school. The
12 criterion was your choice.

13 MR. KORRELL: Justice Scalia, you're right.
14 And there's another criterion which I think is getting
15 to Justice Souter's point --

16 JUSTICE SOUTER: Well, when you say Justice
17 Scalia is right, you are assuming, I think as your brief
18 assumes, that the definition of the benefit to be
19 received here is the active choice, not the provision of
20 an education.

21 Now the active choice may be of value, and I
22 do not suggest that it is not. Clearly the school
23 district thinks it does or it wouldn't provide choice.
24 But it is not the entire benefit that is being provided,
25 and the principal benefit is the education, not the

1 choice of schools. Isn't that correct?

2 MR. KORRELL: Your Honor, they are both
3 benefits, but I would point Your Honor back to this
4 Court's decision in Gratz, where the same analysis would
5 apply. And if Your Honor's analysis is correct, that
6 would mean, I think, that the Gratz case would have been
7 decided differently.

8 JUSTICE BREYER: But I think that the point
9 that Justice Souter is trying to make, as I understand
10 it, is of course there is a similarity with Gratz,
11 people choose, but there's a big difference. The
12 similarity in Grutter, or the difference in Grutter and
13 Gratz is that you had a prize, a school that was
14 supposed to be better than others, that the members of
15 that school, the faculty and the administration tried to
16 make it better than others. It was an elite merit
17 selection academy. And if you put the black person in,
18 the white person can't get the benefit of that.

19 Here we have no merit selection system.
20 Merit is not at issue. The object of the people who run
21 this place is not to create a school better than others,
22 it is to equalize the schools. That's in principle and
23 in practice, if you look at the numbers, you see that
24 the six schools that were at the top, their position
25 would shift radically from year to year, preferences was

1 about equal among them. They have the same curriculum,
2 they have similar faculties, and I don't think anyone
3 can say either in theory or in practice, that one of
4 these schools happened to be like that prize of
5 University of Michigan, a merit selection system. That,
6 I think, was a major difference that he was getting at.
7 Why is this not the same kind of thing that was at issue
8 in Grutter and Gratz? Now what is your response to
9 that?

10 MR. KORRELL: Your Honor, we have several
11 responses. The first is that the premise of Your
12 Honor's question is that the schools are in essence
13 fungible for purposes of providing a high school
14 education. And I would direct Your Honor to the
15 District Court judge's decision, and there's a footnote
16 in the decision in which she acknowledged that the
17 schools were not of equal quality, that they provided
18 different levels of education.

19 JUSTICE SCALIA: Of course they're not.
20 That's why some of them were oversubscribed. That's why
21 others were undersubscribed.

22 JUSTICE BREYER: I didn't say that they
23 were. What I said was that the object of the school
24 board and the administering authorities was to make them
25 roughly equal. I said that in terms of curriculum and

1 faculty, they're about roughly equal. And in terms of
2 choice, what you see is a wide variation in choice by
3 those who want to go as to which is their preference
4 among six schools over a period of five years.

5 And that suggests a rough effort to create
6 equality, not an effort as in Michigan, to run a merit
7 selection system.

8 MR. KORRELL: I agree with Your Honor that
9 there's not a merit selection system in --

10 JUSTICE BREYER: Fine. Now the question is,
11 why doesn't that fact that this is not a merit selection
12 system put a different kind of thing, a sorting system
13 or a system designed to maintain a degree of
14 integration, why doesn't that difference make a
15 difference?

16 MR. KORRELL: Your Honor, because I think
17 that the fundamental command of the Equal Protection
18 Clause is that government treats citizens as
19 individuals, not as members of a racial group. And that
20 command I don't think is suspended because of the nature
21 of a school's admissions process. That right is still
22 possessed by the individual students, and if a student
23 is entitled to be treated as an individual as opposed to
24 a member of a racial group at a university level, it's
25 Parents' position they are entitled to that same

1 protection at the high school level.

2 JUSTICE GINSBURG: Mr. Korrell, before your
3 time runs out, I did want to clarify something about the
4 standing of the plaintiffs here.

5 Do I understand correctly that none of the
6 parents who originally brought this lawsuit have
7 children who are now pre-ninth grade, but that
8 newcomers, people who recently joined, do have children
9 of pre-ninth grade age?

10 MR. KORRELL: Your Honor, that is mostly
11 correct. There is also a family that joined the parents
12 association back in 2000 that has a child in seventh
13 grade, that will be approaching high school by the time
14 this Court decides this case.

15 CHIEF JUSTICE ROBERTS: But the lawsuit was
16 originally brought by a corporate entity, correct?

17 MR. KORRELL: That's correct, Your Honor.

18 CHIEF JUSTICE ROBERTS: Not by individual
19 parents.

20 MR. KORRELL: That's correct.

21 JUSTICE GINSBURG: But you don't dispute
22 that membership, for standing purposes, the membership
23 is what counts, not the association but the members?

24 MR. KORRELL: Your Honor, my understanding
25 of the Court's jurisprudence on associational standing

1 is that as long as a member of the association has
2 standing, then the association has it, and we submit
3 that that has been established by the complaint, the
4 interrogatory responses, and --

5 JUSTICE GINSBURG: Well, if it is a member,
6 jurisdictional questions generally, don't we go by what
7 the membership was when the complaint was filed and not
8 what it has become in the course of the litigation?

9 MR. KORRELL: I don't think that's right,
10 Your Honor, and we cited to the Court the Pannell case,
11 the Associated General Contractors case, and Roe versus
12 Wade, all of which look at post-filing factors to
13 confirm that there's standing.

14 JUSTICE GINSBURG: Yes, but the class action
15 case situation is different.

16 MR. KORRELL: You're right, Your Honor, none
17 of those were class action cases. Pannell and
18 Associated General Contractors were association cases
19 much like this one. Roe, of course, was an individual
20 plaintiff. If I may, Your Honor, I'd like to reserve --

21 JUSTICE STEVENS: May I ask this one quick
22 question, if you could. Does the record tell us, the
23 300 people who have failed to get into the schools they
24 wanted, the racial composition of that group?

25 MR. KORRELL: It does, Justice Stevens. The

1 record shows that 100, roughly 100 students who were
2 denied admission to their preferred schools were
3 non-white and roughly 200 who were denied admission were
4 white students.

5 If there are no further questions, Mr. Chief
6 Justice, I'd like to reserve my time.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 General Clement.

9 ORAL ARGUMENT OF PAUL D. CLEMENT
10 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
11 SUPPORTING THE PETITIONER

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

14 Respondents assert an interest in addressing
15 the most racially isolated schools in the district, yet
16 their plan does not address the two most racially
17 concentrated high schools in their district. They
18 likewise assert an interest in diversity, yet their plan
19 does not directly address diversity other than pure
20 racial diversity, and they do nothing to assemble the
21 kind of critical mass that was at issue in the Grutter
22 case.

23 In fact, if you look at the program and how
24 it operates in practice, the triggering critical mass
25 for the use of the racial tie breaker is when a

1 student -- when a school has less than 25 percent white
2 students or when it has less than 45 percent non-white
3 students. There is nothing in the record or in social
4 science that suggests that there's a radical difference
5 in the critical mass based on the race of the students.

6 Of course what explains that difference in
7 the triggering critical mass of white students versus
8 non-white students, the answer to that does not lie in
9 educational theory, the answer lies in the demographics
10 of the district. The district happens to have 20
11 percent more non-white students than white students, so
12 they trigger the race tie breaker at a different point
13 under those circumstances.

14 With all respect to respondents, the answer
15 to how this program works lies not in diversity but in
16 demographics. They are clearly working backwards from
17 the overall demographics of the school district rather
18 than working forward to any clearly articulated
19 pedagogical goal.

20 CHIEF JUSTICE ROBERTS: Counsel, if I could
21 get back to Justice Kennedy's question earlier, how do
22 you distinguish decisions like citing magnet schools,
23 clustering, from the consideration of race in this case?

24 GENERAL CLEMENT: Well, Mr. Chief Justice, I
25 think that those decisions are different primarily

1 because the resulting decision is not a racial
2 classification. And if you think about it, when you
3 have an overt racial classification, like you clearly do
4 in these cases, then you naturally ask the strict
5 scrutiny questions and look for a compelling interest.
6 If instead you start with a race-neutral government
7 action that doesn't classify people directly based on
8 race, then I suppose you could try to do some kind of
9 Arlington Heights-Washington Davis type analysis.

10 JUSTICE KENNEDY: Well, what would you do
11 with strategic site selection in order to create racial
12 diversity?

13 GENERAL CLEMENT: Well, Justice Kennedy, I
14 think --

15 JUSTICE KENNEDY: And that's the expressed
16 and principal purpose. You know the hypothetical.

17 GENERAL CLEMENT: Okay. And Justice
18 Kennedy, I will answer the hypo, but let me just say
19 that it's very easy for purposes of the hypo to say the
20 sole reason was for race. In the real world, in fact I
21 can't imagine that a site decision won't be based at
22 least in part on concerns about the overall educational
23 benefits. And I think that's important. The reason I
24 start with that preface is because when you have mixed
25 motives and a variety of factors I think you'd be

1 unlikely to strike down that kind of motive.

2 JUSTICE STEVENS: But General Clement, are
3 you suggesting there was no consideration of overall
4 educational benefits in this plan?

5 GENERAL CLEMENT: No, Justice Stevens. I'm
6 saying that you basically start at a different departure
7 point when you have an express racial classification. I
8 think I'm trying to answer Justice Kennedy's question
9 about what if you have a sort of a race-conscious goal
10 at some level and that's why you select a particular
11 site or you decide that you're going to invest in magnet
12 schools and you want to put a magnet school in a
13 particular school district. My humble point is simply
14 that in the real world I think you're unlikely to have
15 the pure racial motive type objective. I would say that
16 --

17 JUSTICE GINSBURG: Suppose it was faculty,
18 and the school district makes a deliberate effort to
19 have members of the white race and members of other
20 races represented in -- on the faculty of every school,
21 so you won't have one school with all white teachers, so
22 that you'll have a mix, and that's quite explicit.
23 That's their objective and they're using a racial
24 criterion to get there.

25 Would that be impermissible, to have a mix

1 of teachers in all the schools?

2 GENERAL CLEMENT: Well, Justice Ginsburg, I
3 think if what they wanted to do is have a mix of
4 teachers that might be okay. If they're going to start
5 assigning teachers to particular schools and have sort
6 of racial quotas for the faculty at the various schools,
7 I think that crosses a line.

8 JUSTICE GINSBURG: Well, what would be okay?
9 How would you get there other than having -- the point
10 I'm trying to make has been made by others, and let me
11 read from Judge Boudin's decision. He says: "The
12 choice is between openly using race as a criterion or
13 concealing it through some clumsy or proxy device."

14 If you want to have an integrated school and
15 you site the school deliberately to achieve that
16 objective, it's very hard for me to see how you can have
17 a racial objective but a nonracial means to get there.

18 GENERAL CLEMENT: Well, with respect,
19 Justice Ginsburg, I think there's a fundamental
20 difference between how the same intent with two
21 programs, there's a fundamental difference if one of
22 them necessarily classifies people on the basis of their
23 skin color and the other does not.

24 JUSTICE SCALIA: General Clement, is there
25 anything unconstitutional about desiring a mingling of

1 the races and establishing policies which achieve that
2 result but which do not single out individuals and
3 disqualify them for certain things because of their
4 race? Is there anything wrong with a policy of wanting
5 to have racial mix?

6 GENERAL CLEMENT: Justice Scalia, we would
7 take the position that there's not and that there's a
8 fundamental difference between whether or not the policy
9 manages to avoid classifying people on the basis of
10 their race.

11 JUSTICE KENNEDY: Alright, so at page 7 of
12 your brief you say: "School districts have an
13 unquestioned interest in reducing minority isolation."
14 If I put a period there, then I would get to my
15 strategic site selection, and I still haven't got your
16 answer on that. You don't put a period there. You say:
17 "Have an unquestioned interest in reducing minority
18 isolation through race-neutral means." And this brings
19 up this same question Justice Ginsburg had. Isn't it
20 odd jurisprudence where we have an objective that we
21 state in one set of terms but a means for achieving it
22 in another set of terms, unless your answer is that
23 individual classification by race is, is impermissible,
24 but other, more broad measures based on, with a racial
25 purpose are all right?

1 GENERAL CLEMENT: I think that's ultimately
2 the answer, Justice Kennedy, which is there's a
3 fundamental difference between classifying people and
4 having the real world effects. I mean, in this case
5 don't forget that there were 89 minority students that
6 wanted to attend Franklin High School. They could not
7 solely based on their race. At the same time, every
8 white student who applied to Franklin High School was
9 allowed in solely base would on their race.

10 JUSTICE KENNEDY: And what is the answer to
11 my strategic site selection hypothetical?

12 GENERAL CLEMENT: We would say that's fine.
13 We would say that that is permissible, for the school to
14 pursue that.

15 Just to get back, though, again, we say that
16 that avoiding racial isolation is -- I just wanted to
17 make the point, we say that racial isolation is an
18 important government interest. I think if you put this
19 plan up against that objective, it sorely fails, because
20 there are two high schools that I think you would look
21 at as being racially isolated. They're Cleveland and
22 Rainier Beach, and this plan does nothing to directly
23 address those high schools.

24 JUSTICE SOUTER: My question is really Judge
25 Boudin's question. You are in effect saying that by

1 siting the school they can achieve exactly the objective
2 they are seeking here. It's a question of do the -- the
3 question comes down to whether they can do it candidly
4 or do it by clumsier means. That is, it seems to me, an
5 unacceptable basis to draw a constitutional line.

6 GENERAL CLEMENT: With respect,
7 Justice Souter, first of all I think the kind of
8 interests we're talking about, avoiding racial isolation
9 and the like, do not lend themselves to absolutely
10 targeted, it has to be 15 percent, it has to be 50, it
11 has to be 25, it has to be 45, and I would actually
12 suggest that the danger is in the opposite direction.

13 JUSTICE SOUTER: Well, you were dealing --
14 that isn't what they said here. I mean, they were
15 dealing with a zone within which they operated, and it
16 was only when the numbers got to the outer limits that
17 they said, okay, we're going to use a racial criterion
18 to prevent anything more, any more extreme disparity.

19 GENERAL CLEMENT: Well, I mean, in the
20 second stage --

21 JUSTICE SOUTER: That's what they do when
22 they site the school. They said, you know, we'll get a
23 rough whatever it is, 40-60 mix.

24 GENERAL CLEMENT: Well, I think in the
25 second case you'll see that, you know, the same logic

1 that leads to this leads itself to stricter bands. But
2 let me say, I would have thought the analysis would run
3 the exact opposite way, and I would think that if you
4 got to the point, which the Ninth Circuit did on page
5 58a of its opinion, where it says, you know, with this
6 objective that we've allowed, the most narrowly tailored
7 way to get there is to expressly use race. I would have
8 thought that might have suggested there was something
9 wrong with the compelling interest, if that's the way
10 that it works.

11 JUSTICE BREYER: While you're talking about
12 the ways, let me ask a practical question. 35 years ago
13 in Swann, this Court said that a school board,
14 particularly an elected one -- it didn't say that
15 -- "could well conclude that to prepare students to live
16 in a pluralistic society each school should have a
17 prescribed ratio of Negro to white students reflecting
18 the proportion of the district as a whole." Far more
19 radical than anything that's at issue here.

20 Then it adds: "To do this as an educational
21 policy is within the broad discretionary powers of
22 school authorities." That's what this Court said 35
23 years ago. Thousands of school districts across the
24 country, we're told, have relied on that statement in an
25 opinion to try to bring about a degree of integration.

1 You can answer this in the next case if you want. So
2 think about it.

3 CHIEF JUSTICE ROBERTS: You can answer in
4 this case, General.

5 (Laughter.)

6 JUSTICE BREYER: My question, of course, is
7 simply this. When you have thousands of school
8 districts relying on this to get a degree of integration
9 in the United States of America, what are you telling
10 this Court is going to happen when we start suddenly
11 making -- departing from the case? Do you want us to
12 overrule it? Why? Why practically?

13 CHIEF JUSTICE ROBERTS: General?

14 GENERAL CLEMENT: If I could answer the
15 question, I think that the fact that you point to the
16 specific language of Swann is helpful, because the Court
17 there in dictum -- I think everybody would agree that
18 was dictum -- said that you could achieve a prescribed
19 ratio. And that's exactly where the logic of the other
20 side, of the Ninth Circuit, of Judge Boudin, with all
21 respect, that's where it takes you.

22 And I think anybody that relied on that
23 language in the wake of cases like Crosson, in the wake
24 of Freeman against Pitts, that said achieving a racial
25 balance for its own sake is not constitutional, and

1 Bakke and Grutter against Gratz, that all said that
2 racial balancing is verboten, I think those school
3 districts would have been misguided in relying on that
4 language. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, General.
6 Mr. Madden.

7 ORAL ARGUMENT OF MICHAEL F. MADDEN
8 ON BEHALF OF RESPONDENTS

9 MR. MADDEN: Mr. Chief Justice and may it
10 please the Court:

11 When Seattle was last before this Court you
12 struck down a State law that prevented bussing for
13 integration purposes because that law prevented the
14 school board from seeking to provide the educational
15 benefits of integrated schools. At that time you said
16 it was clear enough that all children benefit from
17 exposure to ethnic and racial diversity in the classroom
18 by preparing them for citizenship in our pluralistic
19 society and teaching them to live in harmony and mutual
20 respect.

21 JUSTICE SCALIA: Mr. Madden, that's
22 certainly an admirable goal. Could a local unit, a
23 municipality, or even a State have another goal? Let's
24 say what used to be great about the United States was
25 the presence of various ethnic groups. I mean, there

1 were the Pennsylvania Dutch, there were the Amish, there
2 were Little Italy's, there were Chinatowns, and these
3 things are beginning to disappear. And we think that we
4 should encourage the continuation of that diversity, as
5 the Federal Government has done with respect to American
6 Indian tribes.

7 And therefore, we're going to use public
8 funds for such things as street festivals, a Chinatown
9 street festival, an Italian street festival. We're
10 going to encourage those organizations that maintain
11 that separateness.

12 Is there anything unconstitutional about
13 that objective?

14 MR. MADDEN: Providing funding for street
15 festivals?

16 JUSTICE SCALIA: About the objective? I
17 mean, I think we should foster separateness? Is there
18 anything wrong --

19 MR. MADDEN: I think that in the context
20 that you've described it that would be constitutionally
21 very problematic.

22 JUSTICE SCALIA: Fine -- it would be
23 problematic?

24 MR. MADDEN: Yes.

25 JUSTICE SCALIA: Why?

1 MR. MADDEN: Because I can conceive that
2 it's not -- unlike education, where the goal is to
3 educate the entire community and to help to prepare the
4 community, the students to live in that community, it's
5 not a traditional role of government --

6 JUSTICE KENNEDY: Well then, let me change
7 Justice --

8 JUSTICE SCALIA: Please let me finish the
9 line of questioning.

10 Assume with me that it is not an
11 unconstitutional objective, which I am sure it's not.
12 Could the -- could the government achieve that objective
13 by barring people from moving into Little Italy or
14 giving a preference to some people to buy real estate in
15 Little Italy if they are of Italian ancestry? Could it
16 do that? Absolutely not, right?

17 MR. MADDEN: I would agree with you.

18 JUSTICE SCALIA: So it would appear that
19 even if the objective is okay, you cannot achieve it by
20 any means whatever. And the mere fact that the
21 objective of achieving a diverse balanced society is
22 perfectly all right, although certainly not the only
23 objective in the world. The mere fact that it's okay
24 doesn't mean you can achieve it by any means whatever?

25 MR. MADDEN: I would submit that there's a

1 fundamental difference between the circumstances you've
2 described and a school system which takes all comers and
3 is asked to educate them by preparing them to live in a
4 pluralistic society.

5 JUSTICE KENNEDY: Well, my slight
6 modification of Justice Scalia's hypothetical -- and it
7 proceeds on the same theory -- is suppose there's a huge
8 demand for housing. A developer has a plan to build 500
9 units. Can the city say, we'll grant you the permit on
10 the ground, on the condition that 30 percent of all the
11 houses go to minorities? This means people will live
12 together. Then we can have a school, the school can be
13 diverse.

14 MR. MADDEN: I would say not, because
15 housing decisions are inherently private, unlike public
16 education. And there's no way to know how those
17 benefits are being distributed, if they're going to be
18 comparable. I mean, I would say no, it is not
19 comparable to the schools.

20 JUSTICE KENNEDY: Well, your system is the
21 one that gives a choice to the individual.

22 MR. MADDEN: It does, and when there are
23 more choices than there are seats available.

24 CHIEF JUSTICE ROBERTS: Does that make a
25 difference? What if you adopted a plan that insisted on

1 a more or less rigid 60-40 ratio at every school and
2 assignments were made on that basis. It was not a
3 follow-on to a choice system.

4 MR. MADDEN: Well, I think --

5 CHIEF JUSTICE ROBERTS: Would that be
6 unconstitutional?

7 MR. MADDEN: Excuse me, Mr. Chief Justice.
8 I'm sorry to interrupt.

9 I think in each circumstance it depends on
10 the status of the school system.

11 CHIEF JUSTICE ROBERTS: The same -- the
12 facts are otherwise the same, except you conclude that
13 private choice contributes to further division rather
14 than integration and so the assignments are made on a
15 60-40 basis.

16 MR. MADDEN: I think that is roughly the
17 circumstance that existed in the first Seattle case,
18 Mr. Chief Justice. And additionally, I think that you
19 then have to move into the realm of what's
20 constitutionally permissible and can in a
21 constitutionally permissible use of race a school system
22 accommodate other values like choice and neighborhood
23 ties and family connections to the school system.

24 CHIEF JUSTICE ROBERTS: I still don't have
25 your answer.

1 Is strict assignment 60-40 without regard to
2 choice constitutional or not?

3 MR. MADDEN: I -- I would want to know more
4 about the system because I think strictly if there's
5 nothing else and there's no flexibility, I think it
6 presents narrow tailoring problems.

7 CHIEF JUSTICE ROBERTS: And how does this
8 not present narrow tailoring problems if -- if the --
9 when you get to the fact of choice, the sole criteria at
10 that level is the same as would be the case in a 60-40
11 assignment?

12 MR. MADDEN: Well, we have accommodated
13 choice to the extent there are seats available. And
14 then we go to family connections. And then we -- in
15 operation, admit everyone who lives close to the school.
16 And then as to those that live further away, we look to
17 see what's the school's racial demographic. Is it
18 significantly different than the community's? These
19 schools we have talked about have been the objects of
20 significantly more aggressive integration efforts, and
21 the board wanted to preserve those.

22 CHIEF JUSTICE ROBERTS: One of the, one of
23 the factors our prior cases have looked to was whether
24 the plan has a logical end point. What is the logical
25 end point in this plan?

1 MR. MADDEN: Well, the board actually at
2 every turn reflected in the record discussed whether it
3 was necessary to continue the use of race, whether to
4 narrow it, and eventually to end it. And I think it is
5 in the joint appendix at 408, is the superintendent's
6 testimony of the -- simultaneously the measures that the
7 board was implementing in terms of resource allocation,
8 implementation of new programs, because they realized
9 that by diversifying choice, they could hopefully
10 achieve some of these same ends, not as quickly, not as
11 efficiently, but that they could achieve them. And
12 that's been indeed the entire trajectory of Seattle's
13 integration efforts since the first Seattle plan.

14 JUSTICE KENNEDY: But in Grutter we said,
15 and I'll shorten it just a little bit, at page 329-330
16 of the U.S. Reports, 539, "the law school's interest is
17 not simply to assure within its student body some
18 specified percentage of a particular group because of
19 race ...
20 that would amount to outright racial balancing which is
21 patently unconstitutional." And that seems to be what
22 you have here.

23 MR. MADDEN: I think that the term racial
24 balancing has two significant meanings. One is a plan
25 that does not foster a compelling interest. And second,

1 a plan that is too rigid, a quota, for instance, that
2 might not pass narrow tailoring given the context.

3 In this case we're not after a rigid set of
4 numbers, and certainly not after a rigid set of numbers
5 for their own sake. The purpose was to have schools
6 that had become diverse through integration efforts not
7 stray too far from the community's demographic because
8 we're trying to prepare students to live in those
9 communities.

10 JUSTICE KENNEDY: The problem is that unlike
11 strategic siting, magnet schools, special resources,
12 special programs in some schools, you're characterizing
13 each student by reason of the color of his or her skin.

14 That is quite a different means. And it
15 seems to me that that should only be, if ever allowed,
16 allowed as a last resort.

17 MR. MADDEN: The board here was trying to
18 distribute, sort out seats that were available at these
19 popular schools; and so it devised a system whereby
20 every student had the opportunity to be assigned to at
21 least one of those popular schools; and as far as the
22 record shows in plaintiffs' briefing, there's no
23 material differences between those -- those popular
24 schools.

25 JUSTICE SCALIA: Do you have quotas for, for

1 racial hiring of your faculty in these schools?

2 MR. MADDEN: No.

3 JUSTICE SCALIA: Why not?

4 MR. MADDEN: I don't think the board has
5 ever found that necessary to, to achieve diversity in
6 the faculty.

7 JUSTICE BREYER: Justice Kennedy's question,
8 I think was, is this basically a kind of last resort?
9 Or how close to a last resort is it? What's the history
10 of this? I thought the history involved a lawsuit to
11 desegregate the schools, a much more rigid system of
12 racial -- of use of race. Ultimately you come to this.
13 Now you've stopped this. And what happened after you
14 stopped it?

15 MR. MADDEN: What happened is that, that it
16 -- the board kept --

17 JUSTICE BREYER: Well, what is the history
18 basically there? Am I right?

19 MR. MADDEN: The history is that the board
20 had both narrowed the use of the integration tie breaker
21 in '99 and 2000 and then continued it for the 2001
22 school year. We were -- in 2000-2001 school year, we
23 were enjoined in 2001 to use it in that year, which was
24 considerably disruptive. But the board was also -- the
25 measures that it had implemented, implementing magnet

1 schools at Rainier Beach and Chief South high schools in
2 the South End, implementing it in a national --

3 JUSTICE BREYER: But that's not what I'm
4 thinking.

5 MR. MADDEN: I'm sorry.

6 JUSTICE BREYER: I mean I'm thinking that, I
7 thought as I read this, and you have to correct me
8 because you have a better knowledge, originally the
9 schools were highly segregated in fact. People brought
10 a lawsuit. Then to stop that Seattle engaged in a plan
11 that really bused people around on the basis of race.
12 That led to white flight. That was bad for the schools.
13 They then try a voluntary choice plan. This is part of
14 that plan. Then when they abandon this plan, they
15 discover more segregation. Is that basically right or
16 not?

17 MR. MADDEN: When, when this plan has --
18 this -- the description is yes, basically right.

19 When this plan was suspended in, after the
20 Court of Appeals enjoined it, the board had, as I said,
21 experienced some considerable disruption in the
22 assignments because of the timing of the injunction.
23 But the board was also looking at the effect of the
24 race-neutral, if you will, program measures that it had
25 implemented.

1 Such that now, Ingram High School in the
2 north end of Seattle is much more popular. Nathan Hale
3 is no longer over-subscribed. There's less demand for
4 Ballard, but there have been --

5 JUSTICE ALITO: Do you think your -- do you
6 think your schools as they are operated now are
7 segregated?

8 MR. MADDEN: We have some change of
9 conditions, but the basic conditions remain, the trend
10 has not been positive. For example, and I think that
11 the petitioner picked --

12 JUSTICE SCALIA: To say segregated,
13 segregated -- you refer to some of the schools as
14 segregated. And I, that's not what I understand by
15 segregated.

16 MR. MADDEN: Not, not in the sense --

17 JUSTICE SCALIA: I mean, you know, if you
18 belong to a country club that, that -- that has 15
19 percent black members, I would not consider that a
20 segregated country club. So what you are complaining
21 about is -- is not segregation in any -- in any
22 reasonable sense of that word. You're complaining about
23 a lack of racial balance.

24 MR. MADDEN: We are not complaining about
25 segregation resulting from purposeful discrimination.

1 That's --

2 JUSTICE SCALIA: That's the only meaning of
3 segregation.

4 MR. MADDEN: I --

5 JUSTICE SCALIA: You're talking about racial
6 balance.

7 MR. MADDEN: Talking about schools that are
8 on the one end racially isolated. The Solicitor General
9 mentioned two of those. And talking on the other end
10 about preserving the diversity that we had achieved
11 through these years of effort in these north end
12 schools.

13 JUSTICE SOUTER: Well, I think you're also
14 --

15 JUSTICE KENNEDY: Justice Alito and Justice
16 Breyer and I myself am interested: Can you tell us what
17 has happened since the plan's been enjoined?

18 MR. MADDEN: Yes.

19 JUSTICE KENNEDY: I mean, have you gone back
20 to square one? And it's just, there's no diversity at
21 all? Or is there substantially more diversity? Can you
22 tell us about that? Because it's important. It may
23 mean that you don't need to identify students by the
24 color of their skin in assignment.

25 MR. MADDEN: It -- it may mean the board

1 confronted with the circumstances might well make that
2 decision independent of this litigation. But let me
3 answer the specific.

4 Let's take Franklin High School to begin
5 with. In -- in 2000, that school was -- had 25 percent
6 white enrollment. In 2005, it had 10 percent white
7 enrollment. In the ninth grade, which is really the,
8 the level at which we see the effect of the integration
9 tie breaker, in 2000, the white enrollment was 21
10 percent; it was 8 percent in 2005.

11 Go to Ballard High School on the other end.
12 Ballard was 56 percent white students in 2000; it's 62
13 percent in 2005. The ninth grade class has moved from
14 46 percent white students to 58 percent white students.
15 Keeping in mind that that school is now significantly
16 less popular than it was, I think those effects would
17 probably be, be more extreme.

18 But the plan -- I want to emphasize, the
19 plan was to try to disperse demand and to foster choices
20 that would result in diversity, not to compel it. We do
21 not --

22 JUSTICE ALITO: How do, how do you square
23 your objective of achieving racial balance with your
24 disinterest in the situation at Cleveland and Rainier
25 Beach? Those are the most unbalanced schools under your

1 definition, and yet those are not affected at all by
2 this plan. Why, why are you not concerned about that?

3 GENERAL CLEMENT: Well, they are affected by
4 the plan in this way, that in the past the district had
5 used mandatory measures, busing students across town, to
6 try to integrate those schools. And the board decided
7 after many years of effort that it would no longer do
8 that, but it was also at the firm conviction that it
9 would allow students who wanted the opportunity to opt
10 out of those schools to do so.

11 At the same time, it implemented magnet
12 schools at Rainier Beach, there's a new building under
13 construction at Cleveland. And so --

14 JUSTICE ALITO: Are the students who are
15 attending those schools getting the benefits of
16 attending a school that's racially balanced? And if
17 they're not, why are you not concerned about that, if
18 that's an important objective of your program?

19 MR. MADDEN: We, we are concerned about
20 improving the quality of education in all the schools,
21 but we do not mandate that a student attend a school for
22 integration purposes as we once did.

23 JUSTICE SOUTER: Why?

24 MR. MADDEN: Because it, it's important to
25 the credibility and functionality of the school system

1 to have a system that is accepted by the public, by our
2 constituents. And so people like choice; they also like
3 neighborhood schools; they also like diverse schools.
4 And the board recognized when it set about to develop
5 this plan that accommodating all of those values would
6 require some trade-offs. And the board, familiar with
7 the local conditions, familiar with the history, did
8 just that in what I submit was a narrowly tailored and
9 appropriate way.

10 JUSTICE STEVENS: May I go back to the
11 Cleveland school that Justice Alito mentioned? Am I
12 correct that there was 16 percent white under the plan?
13 And I'm just wondering what happened to it during the
14 last couple of years?

15 MR. MADDEN: Cleveland is now about 8
16 percent.

17 JUSTICE STEVENS: And it was -- about half
18 as many whites as there were under the plan.

19 MR. MADDEN: I don't remember the precise
20 number in 2000, but that sounds about right.

21 JUSTICE GINSBURG: Mr. Madden, there was a
22 question raised about your categories, that is, you have
23 white and then everything else. And it was suggested
24 that if you are looking for diversity, what was -- the
25 schools that you just mentioned had a large percentage

1 of Asian-Americans, but they don't count.

2 What is your response to that?

3 MR. MADDEN: Well, the -- the problem that
4 the board was addressing was principally a, a problem of
5 the distribution of white and non-white students. The
6 -- as a generality, 75 percent of all non-white students
7 in the district lived in South Seattle. And that was
8 true for all the ethnic groups except Native Americans,
9 who are a very small --

10 JUSTICE ALITO: Why is that the problem?
11 Suppose you have a school in which 60 percent of the
12 students are either of Asian ancestry or Latino
13 ancestry, and 40 percent are white as you classify
14 people. And there are no African-American students at
15 all. You would consider that to be a racially balanced
16 school, would you not?

17 MR. MADDEN: I would say that if that
18 circumstance occurred, that that would be something that
19 the board would have to pay attention to and consider.
20 But the fact of the matter is that --

21 CHIEF JUSTICE ROBERTS: Nothing under the
22 plan requires that, does it?

23 MR. MADDEN: No, because the numbers in
24 terms of the distribution of ethnic groups, separate
25 ethnic groups and the benefits or impacts of the plan

1 were spread proportionately --

2 JUSTICE ALITO: And what is the theory
3 behind that? Is, the theory is that the white students
4 there or the Asian students or the Latino students would
5 not benefit from having African-American classmates? It
6 is enough if they have either Asian classmates or Latino
7 classmates or white classmates?
8 How do you -- how do square that with your, your
9 objective of providing benefits that flow from racial
10 balance?

11 MR. MADDEN: I may, I may have confused the
12 answer to the hypothetical with the -- with the
13 rationale on the ground, which was that we did not have
14 that kind of single minority ethnic group disparity
15 existing in any school. I was saying, however, that if
16 that existed, I think that would be something the board
17 would have to be mindful of. But as a practical matter,
18 because our non-white ethnic neighborhoods in South
19 Seattle are themselves quite integrated, that the
20 movement under this plan did not produce disparities for
21 or against any particular ethnic group. And so I think
22 in the end it might have been more divisive to have
23 individual tiebreakers for the separate minority ethnic
24 groups.

25 JUSTICE SCALIA: What criteria of race does

1 the school, just out of curiosity, does the school
2 district use? I mean, what if a particular child's
3 grandfather was white? Would he qualify as a white or
4 non-white.

5 MR. MADDEN: I would say -- well, the answer
6 is we --

7 JUSTICE SCALIA: I mean, there must be some
8 criterion. There are many people of mixed blood.

9 MR. MADDEN: The district has no criteria
10 itself. The district uses classifications that are
11 developed by the Federal Government but allows parents
12 to self identify children.

13 JUSTICE SCALIA: It allows parents to say
14 I'm white, no matter what?

15 MR. MADDEN: That allows the parents to self
16 identify, and the record in this case through the
17 testimony of petitioner's president is they were aware
18 of no abuse of that.

19 JUSTICE SCALIA: Seems like a big loophole.

20 MR. MADDEN: It seems like one but according
21 to the record, it's not an issue. I'd like to --

22 CHIEF JUSTICE ROBERTS: You don't defend the
23 choice policy on the basis that the schools offer
24 education to everyone of the same quality, do you?

25 MR. MADDEN: Oh, yes. Yes. They offer --

1 the popular schools to which everyone had access under
2 this plan who wanted access, I think it's -- there is no
3 dispute.

4 CHIEF JUSTICE ROBERTS: How is that
5 different from the separate but equal argument? In
6 other words, it doesn't matter that they're being
7 assigned on the basis of their race because they're
8 getting the same type of education.

9 MR. MADDEN: Well, because the schools are
10 not racially separate. The goal is to maintain the
11 diversity that existed within a broad range in order to
12 try to obtain the benefits that the educational research
13 shows flow from an integrated education.

14 CHIEF JUSTICE ROBERTS: Even though in the
15 individual cases the students, including minority
16 students, and I gather 89 or 100 of the cases are being
17 denied admission on the basis of their race?

18 MR. MADDEN: They're not being denied
19 admission. They're being distributed -- seats are being
20 distributed to them. This is not like --

21 CHIEF JUSTICE ROBERTS: They are being
22 denied admission to the school of their choice?

23 MR. MADDEN: Yes. But this is not like
24 being denied admission to a State's flagship university.
25 And I think for that proposition, I would cite Justice

1 Powell's opinion in the Bakke case where he was at some
2 pains to point out that a school integration plan is
3 wholly dissimilar to a selective university admissions
4 plan.

5 JUSTICE ALITO: If we look at things that
6 parents are concerned about when they are considering
7 where their children are going to go to high school, if
8 we look at things like SAT scores, for example, or
9 performance on statewide tests, would we see that, the
10 oversubscribed schools and the undersubscribed schools
11 have similar test scores?

12 MR. MADDEN: It depends on what school
13 you're talking about, Justice Alito. And in this case,
14 I think the most important point to start with is that
15 there was no contention that there was any material
16 difference in quality between the five popular high
17 schools.

18 JUSTICE ALITO: Well, if we looked at
19 Garfield and Cleveland, what would we find?

20 MR. MADDEN: I think you would find a
21 reasonable basis to perceive a quality difference
22 between those two schools, but this plan didn't assign
23 any students to Cleveland.

24 I want to take a moment, if I can, to turn
25 to the issue of individualized consideration, because so

1 much emphasis has been placed on it in earlier
2 discussion.

3 It seems to us, first of all, that this
4 Court in Grutter said that not all uses of race trigger
5 the same objections and that the Court must be mindful
6 of the context. This is not, as I've said, a selective
7 or merit-based system where we adjudge one student to be
8 better than another. We do consider individual factors
9 before we get to race, starting with choice and family
10 connection, and how close you live to the school.

11 But ultimately, this is a distributive
12 system which, as Justice Powell -- as I noted, Justice
13 Powell said in the Bakke case, is quite wholly
14 dissimilar to a selective or merit-based system. And
15 what it seems to us is being suggested by the United
16 States and by the petitioner is a system that would
17 force an individualized merit-based review on any kind
18 of race conscious program, specifically an assignment to
19 public schools.

20 That rule allows the means to define the
21 ends; and it ends up, I think, defeating the purpose
22 that the Court had of not stigmatizing --

23 CHIEF JUSTICE ROBERTS: But the reason that
24 our prior tests have focused on individual determination
25 is that the purpose of the Equal Protection Clause is to

1 ensure that people are treated as individuals rather
2 than based on the color of their skin. So saying that
3 this doesn't involve individualized determinations
4 simply highlights the fact that the decision to
5 distribute, as you put it, is based on skin color and
6 not any other factor.

7 MR. MADDEN: Mr. Chief Justice, in Grutter
8 you said specifically that individualized review was
9 required in the context of university admissions. In
10 this context, the kind of review, the specific kind of
11 review that I understand the United States to urge and
12 the petitioner to urge, serves no purpose, and it may
13 itself be stigmatizing in the context of public school
14 where everyone gets a seat.

15 JUSTICE GINSBURG: You're saying that
16 individual treatment makes no sense in terms of the
17 objective here. I thought that's what you were saying.

18 MR. MADDEN: Justice Ginsburg, that is
19 correct. I am saying, however, that this plan,
20 consistent with narrow tailoring, provided consideration
21 of individual circumstances, including an appeal on
22 hardship grounds for someone who felt that they had been
23 denied a school that they needed to be in.

24 JUSTICE KENNEDY: Well, the emphasis on the
25 fact that everybody gets into a school, it seems to me

1 is misplaced, but the question is whether or not you can
2 get into the school that you really prefer. And that in
3 some cases depends solely on skin color. You know, it's
4 like saying that everybody can have a meal but only
5 people with separate skin can get the dessert.

6 MR. MADDEN: Well, like the Michigan cases,
7 sometimes students in the end of the day have an
8 assignment determined by race. Just like in the
9 university cases, at some point race will be a tipping
10 factor. It's different, though, when we put someone in
11 a basically comparable school.

12 CHIEF JUSTICE ROBERTS: Well, you're saying
13 every -- I mean, everyone got a seat in Brown as well;
14 but because they were assigned to those seats on the
15 basis of race, it violated equal protection. How is
16 your argument that there's no problem here because
17 everybody gets a seat distinguishable?

18 MR. MADDEN: Because segregation is harmful.
19 Integration, as this Court has recognized in Swann, in
20 the first Seattle case, has benefits. The district was
21 --

22 JUSTICE SCALIA: Well, but it seems to me
23 you're saying you can't make an omelet without breaking
24 eggs. Can you think of any other area of the law in
25 which we say whatever it takes, so long as there's a

1 real need, whatever it takes -- I mean, if we have a lot
2 of crime out there and the only way to get rid of it is
3 to use warrantless searches, you know, fudge on some of
4 the protections of the Bill of Rights, whatever it
5 takes, we've got to do it?

6 Is there any area of the law that doesn't
7 have some absolute restrictions?

8 MR. MADDEN: There are many areas of the
9 law, certainly in the First Amendment and the Fourth
10 Amendment, that have considerable flexibility.

11 JUSTICE SCALIA: But what about the
12 Fourteenth? I had thought that that was one of the
13 absolute restrictions, that you cannot judge and
14 classify people on the basis of their race. You can
15 pursue the objectives that your school board is
16 pursuing, but at some point you come up against an
17 absolute, and aren't you just denying that?

18 MR. MADDEN: I think that in Grutter and
19 Gratz, this Court rejected the absolute and instead
20 described strict scrutiny, which we feel we need, and
21 which is why we are not urging an absolute position. We
22 say that we indeed comply with the requirements of
23 narrow tailoring, and that the plan therefore should be
24 upheld.

25 JUSTICE GINSBURG: And the question of

1 integration, whether any use of a racial criterion,
2 whether integration, using race for integration is the
3 same as segregation, it seems to me pretty far from the
4 kind of headlines that attended the Brown decision.
5 They were, at last, white and black children together on
6 the same school bench. That seems to be worlds apart
7 from saying we'll separate them.

8 MR. MADDEN: We certainly agree,
9 Justice Ginsburg, and would go one step further and note
10 that in Brown, this Court said that the effects of
11 segregated schools are worse.

12 CHIEF JUSTICE ROBERTS: There's no effort
13 here on the part of the school to separate students on
14 the basis of race. It's an assignment on the basis of
15 race, correct?

16 MR. MADDEN: And it is in effect to bring
17 students together in a mix that is not too far from
18 their community.

19 I see that my time has expired. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Madden.

22 Mr. Korrell, you have four minutes
23 remaining.

24 REBUTTAL ARGUMENT OF HARRY J.F. KORRELL
25 ON BEHALF OF PETITIONER

1 MR. KORRELL: Thank you, Mr. Chief Justice.
2 There were some questions of my friend Mr. Madden about
3 the record and the statistics about enrollment, and I'd
4 like to draw the Court's attention, particularly
5 Justice Breyer and Justice Stevens' questions about what
6 the schools look like now.

7 If the Court looks at pages 6 and 7 of our
8 reply brief, we provided the enrollment data. The
9 information on page 7 comes from a school district
10 website that provides the enrollment data at the
11 individual schools. In 2005 and 2006, enrollment in the
12 oversubscribed schools is now 54 percent non-white,
13 which is greater than it was under the district's --

14 JUSTICE BREYER: This is the -- as I gather,
15 the plan where race is used, has to do only with the
16 ninth grade. And therefore, what you would like to note
17 is when you look at the ninth grade after they stopped
18 using any racial criteria at all, what happened to those
19 ninth grade classes. Did they become more heavily
20 separated or did they retain their diversity? Are the
21 numbers that you are about to read us, which I have in
22 front of me, going to do that? Tell us that? I think
23 they're about the whole school.

24 MR. KORRELL: They are, Your Honor, but
25 they're about the whole school after four years of

1 operating without the race preference. So each of the
2 four years that are represented in the aggregate shows
3 the effect that I think Your Honor was asking about.

4 So, the record in this case shows the
5 Seattle schools are richly diverse. It's very important
6 in our view that the Court not lose sight of that.
7 We've talked about integration and segregation, but I
8 urge the Court to take a look at the data the
9 petitioners submit regarding the actual enrollment in
10 these schools.

11 A couple of other record citations I'd like
12 to bring to the Court's attention. Justice Kennedy, I
13 think, asked about considering race at a last resort. It
14 is simply not the case that the school district looked
15 at race as a last resort. And I would draw the Court's
16 attention to the superintendent's testimony at joint
17 appendix 224 and 25, where he said in essence, the
18 reason we didn't consider race neutral plans is because
19 we were interested in racial diversity.

20 JUSTICE BREYER: The numbers I have here,
21 Franklin went from 25 percent white to 12.7 percent.
22 Roosevelt, which was basically a white school, jumped up
23 from about 51 to 59. Ballard jumped up from about 56 to
24 62. Then Garfield went down some; it's more mixed. But
25 those were the worst ones; am I right on that?

1 MR. KORRELL: Your Honor, I think the
2 numbers that you're reading are from the difference
3 between the 2000 and -- '99 and the 2000 enrollments.

4 JUSTICE BREYER: Okay.

5 MR. KORRELL: The numbers I was trying to
6 bring to the Court's attention were the difference
7 between the enrollment under the race-based plan and the
8 enrollment in 2005-2006, which shows significant and
9 continued racial diversity in Seattle's high schools.

10 Counsel suggested also that there is no
11 material difference among the five oversubscribed
12 schools. And I would draw the Court's attention to the
13 testimony of the board president at joint appendix 261
14 to 274, where she discusses in detail the programmatic
15 differences. It is true that those five schools were
16 oversubscribed and they were popular, but they all
17 provide unique programs, some of which as we indicated
18 in our briefs, required children to meet certain
19 prerequisites to be able to attend.

20 JUSTICE GINSBURG: Was the board
21 simultaneously trying to introduce similar programs or
22 attractive programs in the undersubscribed schools?

23 MR. KORRELL: Your Honor, I'm perhaps not
24 the best person to answer that. I believe the board has
25 been trying to introduce programs at all of its schools

1 that would make each school unique, and I think that
2 includes the undersubscribed schools as well.

3 Justice Breyer asked a question about the --
4 the process of this litigation, and my understanding is
5 there was never a lawsuit against Seattle to compel
6 desegregation, that they were always --

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

9 (Whereupon, at 11:02 a.m., the case in the
10 above-entitled matter was submitted.)

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A				
abandon 36:14	addressing	50:9,10	articulated	32:13 34:18
ability 10:22	17:14 42:4	America 26:9	18:18	averages 10:23
able 54:19	adds 25:20	American 28:5	Asian 42:12	avoid 22:9
above-entitled	adjudge 47:7	Americans 42:8	43:4,6	avoiding 23:16
1:13 55:10	administering	amicus 1:21 2:7	Asian-Americ...	24:8
absent 6:20 7:14	13:24	17:10	42:1	aware 9:16
absolute 50:7,13	administration	Amish 28:1	asked 30:3	44:17
50:17,19,21	12:15	amount 33:20	53:13 55:3	a.m 1:15 3:2
absolutely 24:9	admirable 27:22	analogy 5:24	asking 6:14 53:3	55:9
29:16	admission 3:14	analysis 8:25 9:1	assemble 17:20	
abuse 44:18	17:2,3 45:17	12:4,5 19:9	assert 17:14,18	B
academy 12:17	45:19,22,24	25:2	assign 46:22	back 10:19 12:3
accept 10:13,16	admissions 4:4	ancestry 29:15	assigned 34:20	15:12 18:21
accepted 41:1	11:4 14:21	42:12,13	45:7 49:14	23:15 38:19
access 45:1,2	46:3 48:9	answer 5:3 6:15	assigning 21:5	41:10
accommodate	admit 32:15	8:2 18:8,9,14	assignment 32:1	backwards
31:22	admitted 11:4,6	19:18 20:8	32:11 38:24	18:16
accommodated	adopted 30:25	22:16,22 23:2	47:18 49:8	bad 36:12
32:12	affirmative 8:15	23:10 26:1,3	51:14	Bakke 27:1 46:1
accommodating	8:16,20 9:10	26:14 31:25	assignments	47:13
41:5	10:1,5,7,8,20	39:3 43:12	31:2,14 36:22	balance 3:12 4:2
accomplish 4:14	African-Amer...	44:5 54:24	Associated	6:17 8:5 26:25
achieve 3:11	42:14 43:5	anybody 26:22	16:11,18	37:23 38:6
6:17 7:10	age 15:9	apart 51:6	association	39:23 43:10
21:15 22:1	aggregate 53:2	appeal 48:21	15:12,23 16:1	balanced 29:21
24:1 26:18	aggressive 32:20	Appeals 9:9	16:2,18	40:16 42:15
29:12,19,24	ago 25:12,23	36:20	associational	balancing 8:7,11
33:10,11 35:5	agree 4:6,7,11	appear 29:18	15:25	27:2 33:20,24
achieved 38:10	9:2,12,25 14:8	APPEARAN...	Assume 29:10	Ballard 37:4
achieving 22:21	29:17 51:8	1:16	assumes 11:18	39:11,12 53:23
26:24 29:21	agrees 26:17	appendix 33:5	assuming 7:23	bands 25:1
39:23	AL 1:8	53:17 54:13	11:17	barring 29:13
acknowledged	Alito 37:5 38:15	applied 23:8	assure 33:17	base 23:9
10:22 13:16	39:22 40:14	apply 12:5	attack 8:7	based 18:5 19:7
acknowledges	41:11 42:10	approach 4:9	attend 23:6	19:21 22:24
9:21	43:2 46:5,13	approaching	40:21 54:19	23:7 48:2,5
action 8:15,16	46:18	15:13	attended 9:16	basic 37:9
8:20 9:11 10:1	allies 3:23	appropriate	51:4	basically 20:6
10:5,7,9,20	allocation 33:7	8:17 41:9	attending 40:15	35:8,18 36:15
16:14,17 19:7	allow 40:9	area 49:24 50:6	40:16	36:18 49:11
active 11:19,21	allowed 11:11	areas 50:8	attention 42:19	53:22
actual 53:9	23:9 25:6	argument 1:14	52:4 53:12,16	basis 21:22 22:9
additionally	34:15,16	2:2,5,9,12 3:3	54:6,12	24:5 31:2,15
31:18	allows 44:11,13	3:7 4:20 17:9	attractive 54:22	36:11 44:23
address 7:22	44:15 47:20	27:7 45:5	authorities	45:7,17 46:21
17:16,19 23:23	Alright 22:11	49:16 51:24	13:24 25:22	49:15 50:14
	Amendment 6:7	Arlington 19:9	available 30:23	51:14,14

<p>Beach 23:22 36:1 39:25 40:12 beginning 28:3 behalf 1:17,22 2:4,11,14 3:8 17:10 27:8 51:25 believe 4:12 54:24 belong 37:18 bench 51:6 benefit 11:18,24 11:25 12:18 27:16 43:5 benefits 12:3 19:23 20:4 27:15 30:17 40:15 42:25 43:9 45:12 49:20 best 54:24 better 12:14,16 12:21 36:8 47:8 big 12:11 44:19 Bill 50:4 bit 33:15 black 12:17 37:19 51:5 blood 44:8 board 4:25 5:8 6:4 13:24 25:13 27:14 32:21 33:1,7 34:17 35:4,16 35:19,24 36:20 36:23 38:25 40:6 41:4,6 42:4,19 43:16 50:15 54:13,20 54:24 body 33:17 Boudin 26:20 Boudin's 21:11 23:25 breaker 17:25</p>	<p>18:12 35:20 39:9 breaking 49:23 Breyer 12:8 13:22 14:10 25:11 26:6 35:7,17 36:3,6 38:16 52:5,14 53:20 54:4 55:3 brief 4:7,8,11 11:17 22:12 52:8 briefing 34:22 briefs 7:5 54:18 bring 25:25 51:16 53:12 54:6 brings 22:18 broad 22:24 25:21 45:11 brought 15:6,16 36:9 Brown 49:13 51:4,10 build 4:21 30:8 building 40:12 bused 36:11 busing 40:5 bussing 27:12 buy 29:14</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 candidly 24:3 case 3:22,25 4:17 5:15,23 6:7 7:16,20 8:16,20,23 9:1 9:10,13,19 10:1,9,17,25 11:3 12:6 15:14 16:10,11 16:15 17:22 18:23 23:4 24:25 26:1,4 26:11 31:17</p>	<p>32:10 34:3 44:16 46:1,13 47:13 49:20 53:4,14 55:8,9 cases 5:25 8:15 8:25 9:3,11 10:20,24 16:17 16:18 19:4 26:23 32:23 45:15,16 49:3 49:6,9 categories 41:22 cause 6:23 7:8 causes 10:12 central 3:21,25 certain 10:3,6 11:11 22:3 54:18 certainly 8:4 10:9 27:22 29:22 34:4 50:9 51:8 change 29:6 37:8 characteristic 10:24,25 characteristics 10:20 characterizati... 10:13,16 characterizing 34:12 Chief 3:3,9 15:15,18 17:5 17:7,12 18:20 18:24 26:3,13 27:5,9 30:24 31:5,7,11,18 31:24 32:7,22 36:1 42:21 44:22 45:4,14 45:21 47:23 48:7 49:12 51:12,20 52:1 55:7 child 15:12 children 3:13,14</p>	<p>9:23 11:5 15:7 15:8 27:16 44:12 46:7 51:5 54:18 child's 44:2 Chinatown 28:8 Chinatowns 28:2 choice 11:11,12 11:19,21,23 12:1 14:2,2 21:12 30:21 31:3,13,22 32:2,9,13 33:9 36:13 41:2 44:23 45:22 47:9 choices 30:23 39:19 choose 12:11 chosen 3:14 Circuit 25:4 26:20 circumstance 31:9,17 42:18 circumstances 18:13 30:1 39:1 48:21 citations 53:11 cite 45:25 cited 16:10 citing 18:22 citizens 14:18 citizenship 27:18 city 30:9 clarify 15:3 class 3:19 16:14 16:17 39:13 classes 52:19 classification 19:2,3 20:7 22:23 classifications 44:10 classifies 21:22 classify 19:7</p>	<p>42:13 50:14 classifying 22:9 23:3 classmates 43:5 43:6,7,7 classroom 27:17 Clause 3:17 14:18 47:25 clear 6:15 27:16 clearly 11:22 18:16,18 19:3 Clement 1:19 2:6 17:8,9,12 18:24 19:13,17 20:2,5 21:2,18 21:24 22:6 23:1,12 24:6 24:19,24 26:14 40:3 Cleveland 23:21 39:24 40:13 41:11,15 46:19 46:23 close 32:15 35:9 47:10 club 37:18,20 clumsier 24:4 clumsy 21:13 clustering 18:23 coin 5:20 color 21:23 34:13 38:24 48:2,5 49:3 come 35:12 50:16 comers 30:2 comes 24:3 52:9 command 14:17 14:20 commands 3:17 communities 34:9 community 1:4 3:4 29:3,4,4 51:18 community's 32:18 34:7</p>
---	--	--	--	--

<p>comparable 30:18,19 49:11</p> <p>compel 39:20 55:5</p> <p>compelling 3:24 4:3 19:5 25:9 33:25</p> <p>complaining 37:20,22,24</p> <p>complaint 16:3 16:7</p> <p>comply 50:22</p> <p>composition 5:10 16:24</p> <p>compositions 5:4</p> <p>concealing 21:13</p> <p>conceive 29:1</p> <p>concentrated 17:17</p> <p>concerned 40:2 40:17,19 46:6</p> <p>concerns 19:22</p> <p>conclude 25:15 31:12</p> <p>condition 30:10</p> <p>conditions 37:9 37:9 41:7</p> <p>confirm 16:13</p> <p>confronted 39:1</p> <p>confused 43:11</p> <p>connection 47:10</p> <p>connections 31:23 32:14</p> <p>conscious 6:13 47:18</p> <p>consider 37:19 42:15,19 47:8 53:18</p> <p>considerable 36:21 50:10</p> <p>considerably 35:24</p> <p>consideration 3:16 18:23</p>	<p>20:3 46:25 48:20</p> <p>considering 46:6 53:13</p> <p>consistent 48:20</p> <p>constituents 41:2</p> <p>Constitution 6:19</p> <p>constitutional 8:8 24:5 26:25 32:2</p> <p>constitutionally 28:20 31:20,21</p> <p>construction 40:13</p> <p>contention 46:15</p> <p>contentions 7:5</p> <p>context 4:1 8:14 9:6 28:19 34:2 47:6 48:9,10 48:13</p> <p>contexts 8:13,22</p> <p>continuation 28:4</p> <p>continue 33:3</p> <p>continued 35:21 54:9</p> <p>Contractors 16:11,18</p> <p>contradiction 8:3</p> <p>contributes 31:13</p> <p>conviction 40:8</p> <p>corporate 15:16</p> <p>correct 12:1,5 15:11,16,17,20 36:7 41:12 48:19 51:15</p> <p>correctly 15:5</p> <p>counsel 17:7 18:20 54:10 55:7</p> <p>count 42:1</p> <p>country 25:24</p>	<p>37:18,20</p> <p>counts 15:23</p> <p>couple 41:14 53:11</p> <p>course 7:21 12:10 13:19 16:8,19 18:6 26:6</p> <p>court 1:1,14 3:10 4:17 6:1 7:16 8:10 9:9 9:13,15 13:15 15:14 16:10 17:13 25:13,22 26:10,16 27:10 27:11 36:20 47:4,5,22 49:19 50:19 51:10 52:7 53:6,8</p> <p>Court's 12:4 15:25 52:4 53:12,15 54:6 54:12</p> <p>create 12:21 14:5 19:11</p> <p>credibility 40:25</p> <p>crime 50:2</p> <p>criteria 32:9 43:25 44:9 52:18</p> <p>criterion 8:17 8:18,19 10:22 11:8,9,12,14 20:24 21:12 24:17 44:8 51:1</p> <p>critical 17:21,24 18:5,7</p> <p>crosses 21:7</p> <p>Crosson 26:23</p> <p>curiae 1:21 2:7 17:10</p> <p>curiosity 44:1</p> <p>current 7:16</p> <p>curriculum 13:1 13:25</p>	<p style="text-align: center;">D</p> <p>D 1:19 2:6 3:1 17:9</p> <p>danger 24:12</p> <p>data 52:8,10 53:8</p> <p>Davis 19:9</p> <p>day 49:7</p> <p>de 5:11</p> <p>dealing 24:13,15</p> <p>Dearborn 9:17</p> <p>December 1:11</p> <p>decide 8:23 20:11</p> <p>decided 12:7 40:6</p> <p>decides 15:14</p> <p>deciding 5:17</p> <p>decision 9:15 12:4 13:15,16 19:1,21 21:11 39:2 48:4 51:4</p> <p>decisions 18:22 18:25 30:15</p> <p>defeating 47:21</p> <p>defend 8:6 44:22</p> <p>define 47:20</p> <p>defined 4:1</p> <p>definition 11:18 40:1</p> <p>degree 14:13 25:25 26:8</p> <p>deliberate 20:18</p> <p>deliberately 21:15</p> <p>demand 30:8 37:3 39:19</p> <p>demographic 32:17 34:7</p> <p>demographics 18:9,16,17</p> <p>denied 3:13 17:2 17:3 45:17,18 45:22,24 48:23</p> <p>denying 50:17</p> <p>departing 26:11</p> <p>Department</p>	<p>1:20</p> <p>departure 20:6</p> <p>depends 31:9 46:12 49:3</p> <p>described 28:20 30:2 50:20</p> <p>description 36:18</p> <p>desegregate 35:11</p> <p>desegregation 3:24 55:6</p> <p>designed 6:23 14:13</p> <p>desired 3:11</p> <p>desiring 21:25</p> <p>dessert 49:5</p> <p>detail 54:14</p> <p>determination 47:24</p> <p>determinations 48:3</p> <p>determined 49:8</p> <p>develop 41:4</p> <p>developed 44:11</p> <p>developer 30:8</p> <p>device 21:13</p> <p>devised 34:19</p> <p>dictum 26:17,18</p> <p>differ 10:2</p> <p>difference 12:11 12:12 13:6 14:14,15 18:4 18:6 21:20,21 22:8 23:3 30:1 30:25 46:16,21 54:2,6,11</p> <p>differences 4:9 34:23 54:15</p> <p>different 4:12 5:6 8:13,22 9:1 9:21,22 11:5 13:18 14:12 16:15 18:12,25 20:6 32:18 34:14 45:5 49:10</p>
--	---	--	---	---

differently 12:7	distributive 47:11	29:2 30:16	9:4	39:17
difficult 8:5,6	district 1:7 3:5	40:20 44:24	entitled 14:23	
direct 13:14	3:13,22 4:2	45:8,13	14:25	F
direction 24:12	7:13 9:21 10:2	educational	entity 15:16	F 1:22 2:10 27:7
directly 17:19	11:3,23 13:15	9:21,22 18:9	equal 3:17,20	fact 8:1 14:11
19:7 23:22	17:15,17 18:10	19:22 20:4	5:20 13:1,17	17:23 19:20
disagree 8:24	18:10,17 20:13	25:20 27:14	13:25 14:1,17	26:15 29:20,23
9:13	20:18 25:18	45:12	45:5 47:25	32:9 36:9
disappear 28:3	40:4 42:7 44:2	effect 8:15 23:25	49:15	42:20 48:4,25
discover 36:15	44:9,10 49:20	36:23 39:8	equality 14:6	factor 6:2,3 48:6
discretionary	52:9 53:14	51:16 53:3	equalize 12:22	49:10
25:21	districts 6:8	effects 23:4	ESQ 1:17,19,22	factors 16:12
discrimination	22:12 25:23	39:16 51:10	2:3,6,10,13	19:25 32:23
4:4 6:10,20	26:8 27:3	efficiently 33:11	essence 13:12	47:8
7:14 37:25	district's 52:13	effort 3:11 14:5	53:17	facts 5:23 31:12
discuss 4:19	diverse 29:21	14:6 20:18	established 16:3	fact-specific
discussed 33:2	30:13 34:6	38:11 40:7	establishing	7:21
discusses 54:14	41:3 53:5	51:12	22:1	faculties 13:2
discussion 47:2	diversifying	efforts 32:20	estate 29:14	faculty 12:15
disinterest	33:9	33:13 34:6	ET 1:8	14:1 20:17,20
39:24	diversity 4:1,24	eggs 49:24	ethnic 27:17,25	21:6 35:1,6
disparities	4:25 5:8 6:5	either 13:3	42:8,24,25	failed 16:23
43:20	7:24 17:18,19	42:12 43:6	43:14,18,21,23	fails 23:19
disparity 24:18	17:20 18:15	elected 25:14	eventually 33:4	familiar 41:6,7
43:14	19:12 27:17	elite 12:16	everybody 9:6	family 15:11
disperse 39:19	28:4 35:5	embrace 8:2	26:17 48:25	31:23 32:14
displaced 8:18	38:10,20,21	emphasis 47:1	49:4,17	47:9
displacement	39:20 41:24	48:24	exact 25:3	far 25:18 34:7
10:21	45:11 52:20	emphasize	exactly 11:2	34:21 51:3,17
dispute 15:21	53:19 54:9	39:18	24:1 26:19	Federal 28:5
45:3	division 31:13	encourage 28:4	example 37:10	44:11
disqualify 22:3	divisive 43:22	28:10	46:8	feel 50:20
disruption	draw 24:5 52:4	ends 33:10	Excuse 31:7	felt 48:22
36:21	53:15 54:12	47:21,21	existed 31:17	festival 28:9,9
disruptive 35:24	Dutch 28:1	engaged 36:10	43:16 45:11	festivals 28:8,15
dissimilar 46:3	D.C 1:10,20	enjoined 35:23	existing 43:15	filed 16:7
47:14		36:20 38:17	experienced	find 7:4 46:19
distinguish	E	enrollment 39:6	36:21	46:20
18:22		39:7,9 52:3,8	expired 51:19	fine 14:10 23:12
distinguishable	E 2:1 3:1,1	52:10,11 53:9	explains 18:6	28:22
49:17	earlier 18:21	54:7,8	explicit 20:22	finish 29:8
distribute 34:18	47:1	enrollments	exposure 27:17	firm 40:8
48:5	easy 19:19	54:3	express 20:7	first 3:4 13:11
distributed	educate 29:3	ensure 48:1	expressed 19:15	24:7 31:17
30:17 45:19,20	30:3	entire 11:24	expressly 25:7	33:13 47:3
distribution	education 11:20	29:3 33:12	extent 32:13	49:20 50:9
42:5,24	11:25 13:14,18	entirely 8:22 9:1	extreme 24:18	five 14:4 46:16

<p>54:11,15 flagship 45:24 flexibility 32:5 50:10 flight 36:12 flip 5:20 flow 43:9 45:13 focused 47:24 follow-on 31:3 follow-up 7:21 footnote 13:15 force 47:17 forget 23:5 forward 18:18 foster 28:17 33:25 39:19 found 35:5 four 51:22 52:25 53:2 Fourteenth 6:6 50:12 Fourth 50:9 Franklin 23:6,8 39:4 53:21 Freeman 26:24 friend 52:2 front 6:5 52:22 fudge 50:3 functionality 40:25 fundamental 3:20 14:17 21:19,21 22:8 23:3 30:1 funding 28:14 funds 28:8 fungible 13:13 further 17:5 31:13 32:16 51:9</p> <hr/> <p style="text-align: center;">G</p> <p>G 3:1 Garfield 46:19 53:24 gather 45:16 52:14</p>	<p>GEN 1:19 2:6 general 1:19 4:6 4:8,12 7:22 16:11,18 17:8 17:12 18:24 19:13,17 20:2 20:5 21:2,18 21:24 22:6 23:1,12 24:6 24:19,24 26:4 26:13,14 27:5 38:8 40:3 generality 42:6 generally 10:21 16:6 General's 4:7,11 getting 11:14 13:6 40:15 45:8 Ginsburg 4:5 6:12,18 9:2 15:2,21 16:5 16:14 20:17 21:2,8,19 22:19 41:21 48:15,18 50:25 51:9 54:20 give 8:1,1 given 34:2 gives 30:21 giving 10:5 29:14 go 6:23 7:8 9:6,7 9:18,19,24 11:10,11 14:3 16:6 30:11 32:14 39:11 41:10 46:7 51:9 goal 7:13 8:5 18:19 20:9 27:22,23 29:2 45:10 going 6:11 20:11 21:4 24:17 26:10 28:7,10 30:17 46:7</p>	<p>52:22 government 3:18 4:8 5:16 8:6 14:18 19:6 23:18 28:5 29:5,12 44:11 grade 10:23 15:7,9,13 39:7 39:13 52:16,17 52:19 grandfather 44:3 grant 30:9 Gratz 3:21 8:25 9:14,15 12:4,6 12:10,13 13:8 27:1 50:19 great 27:24 greater 7:11 52:13 ground 30:10 43:13 grounds 48:22 group 14:19,24 16:24 33:18 43:14,21 groups 27:25 42:8,24,25 43:24 Grutter 3:21 8:25 9:14 12:12,12 13:8 17:21 27:1 33:14 47:4 48:7 50:18</p> <hr/> <p style="text-align: center;">H</p> <p>Hale 37:2 half 41:17 happen 26:10 happened 13:4 35:13,15 38:17 41:13 52:18 happening 8:19 happens 18:10 hard 21:16 hardship 48:22</p>	<p>harmful 49:18 harmony 27:19 HARRY 1:17 2:3,13 3:7 51:24 headlines 51:4 hear 3:3 heart 3:16 heavily 52:19 Heights-Wash... 19:9 help 10:18 29:3 helpful 26:16 high 3:12 4:4 13:13 15:1,13 17:17 23:6,8 23:20,23 36:1 37:1 39:4,11 46:7,16 54:9 highlights 48:4 highly 36:9 hiring 35:1 history 35:9,10 35:17,19 41:7 Honor 5:9,15,22 5:24 6:8 7:12 8:4 9:12 10:9 10:15 11:3 12:2,3 13:10 13:14 14:8,16 15:10,17,24 16:10,16,20 52:24 53:3 54:1,23 Honor's 12:5 13:12 hopefully 33:9 houses 30:11 housing 5:7 30:8 30:15 huge 30:7 humble 20:13 hypo 19:18,19 hypothetical 5:19,23 7:15 19:16 23:11 30:6 43:12</p>	<p>hypotheticals 5:6</p> <hr/> <p style="text-align: center;">I</p> <p>identified 11:5 identify 38:23 44:12,16 Illicit 6:6 imagine 19:21 impacts 42:25 impermissible 20:25 22:23 implementation 33:8 implemented 35:25 36:25 40:11 implementing 33:7 35:25 36:2 important 3:24 19:23 23:18 38:22 40:18,24 46:14 53:5 improving 40:20 includes 55:2 including 45:15 48:21 independent 39:2 Indian 28:6 indicated 7:6 54:17 individual 14:22 14:23 15:18 16:19 22:23 30:21 43:23 45:15 47:8,24 48:16,21 52:11 individualized 3:16 46:25 47:17 48:3,8 individuals 3:18 14:19 22:2 48:1 information</p>
--	---	---	--	--

<p>52:9 Ingram 37:1 inherently 30:15 injunction 36:22 insisted 30:25 instance 34:1 integrate 40:6 integrated 21:14 27:15 43:19 45:13 integration 3:23 14:14 25:25 26:8 27:13 31:14 32:20 33:13 34:6 35:20 39:8 40:22 46:2 49:19 51:1,2,2 53:7 intent 4:25 21:20 interest 4:3 17:14,18 19:5 22:13,17 23:18 25:9 33:16,25 interested 38:16 53:19 interests 24:8 interrogatory 16:4 interrupt 31:8 introduce 54:21 54:25 invest 20:11 involve 10:17 48:3 involved 1:3 3:4 35:10 isolated 17:15 23:21 38:8 isolation 22:13 22:18 23:16,17 24:8 issue 4:16 7:21 12:20 13:7 17:21 25:19 44:21 46:25</p>	<p>Italian 28:9 29:15 Italy 29:13,15 Italy's 28:2</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>joined 15:8,11 joint 33:5 53:16 54:13 judge 21:11 23:24 26:20 50:13 judges 9:9 judge's 13:15 jumped 53:22 53:23 jure 5:11 jurisdictional 16:6 jurisprudence 15:25 22:20 Justice 1:20 3:3 3:9 4:5,6,10,15 4:18 5:2,5,13 5:18 6:4,12,14 6:18,21,25 7:3 7:17,18 8:9,12 8:24 9:2,25 10:11,18 11:7 11:8,13,15,16 11:16 12:8,9 13:19,22 14:10 15:2,15,18,21 16:5,14,21,25 17:6,7,12 18:20,21,24 19:10,13,15,17 20:2,5,8,17 21:2,8,19,24 22:6,11,19 23:2,10,24 24:7,13,21 25:11 26:3,6 26:13 27:5,9 27:21 28:16,22 28:25 29:6,7,8 29:18 30:5,6</p>	<p>30:20,24 31:5 31:7,11,18,24 32:7,22 33:14 34:10,25 35:3 35:7,7,17 36:3 36:6 37:5,12 37:17 38:2,5 38:13,15,15,15 38:19 39:22 40:14,23 41:10 41:11,17,21 42:10,21 43:2 43:25 44:7,13 44:19,22 45:4 45:14,21,25 46:5,13,18 47:12,12,23 48:7,15,18,24 49:12,22 50:11 50:25 51:9,12 51:20 52:1,5,5 52:14 53:12,20 54:4,20 55:3,7 justifies 4:3 J.F 1:17 2:3,13 3:7 51:24</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Keeping 39:15 Kennedy 4:6,10 4:15,18 5:2,5 5:13,18 6:4,14 7:18 8:9 19:10 19:13,15,18 22:11 23:2,10 29:6 30:5,20 33:14 34:10 38:15,19 48:24 53:12 Kennedy's 18:21 20:8 35:7 kept 35:16 kind 7:14 13:7 14:12 17:21 19:8 20:1 24:7 35:8 43:14</p>	<p>47:17 48:10,10 51:4 kinds 5:6 know 7:4 10:11 19:16 24:22,25 25:5 30:16 32:3 37:17 49:3 50:3 knowledge 36:8 Korrell 1:17 2:3 2:13 3:6,7,9 4:5,10,16 5:2,9 5:15,22 6:8,18 6:25 7:12 8:4 8:10,24 9:12 10:8,15 11:2 11:13 12:2 13:10 14:8,16 15:2,10,17,20 15:24 16:9,16 16:25 51:22,24 52:1,24 54:1,5 54:23</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 37:23 language 26:16 26:23 27:4 large 41:25 Latino 42:12 43:4,6 Laughter 26:5 law 27:12,13 33:16 49:24 50:6,9 lawsuit 15:6,15 35:10 36:10 55:5 leads 25:1,1 led 36:12 left 9:3,8 lend 24:9 Let's 27:23 39:4 level 14:24 15:1 20:10 32:10 39:8 levels 13:18</p>	<p>lie 18:8 lies 18:9,15 likewise 17:18 limits 7:4 24:16 line 21:7 24:5 29:9 litigation 16:8 39:2 55:4 little 28:2 29:13 29:15 33:15 live 25:15 27:19 29:4 30:3,11 32:16 34:8 47:10 lived 42:7 lives 32:15 local 27:22 41:7 logic 24:25 26:19 logical 32:24,24 long 16:1 49:25 longer 37:3 40:7 look 6:1 12:23 16:12 17:23 19:5 23:20 32:16 46:5,8 52:6,17 53:8 looked 32:23 46:18 53:14 looking 36:23 41:24 looks 52:7 loophole 44:19 lose 53:6 lot 50:1</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Madden 1:22 2:10 27:6,7,9 27:21 28:14,19 28:24 29:1,17 29:25 30:14,22 31:4,7,16 32:3 32:12 33:1,23 34:17 35:2,4 35:15,19 36:5 36:17 37:8,16</p>
--	--	--	---	--

37:24 38:4,7 38:18,25 40:19 40:24 41:15,19 41:21 42:3,17 42:23 43:11 44:5,9,15,20 44:25 45:9,18 45:23 46:12,20 48:7,18 49:6 49:18 50:8,18 51:8,16,21 52:2 magnet 6:22 7:6 18:22 20:11,12 34:11 35:25 40:11 maintain 14:13 28:10 45:10 major 13:6 making 26:11 manages 22:9 mandate 40:21 mandatory 40:5 mass 17:21,24 18:5,7 material 34:23 46:15 54:11 matter 1:13 42:20 43:17 44:14 45:6 55:10 meal 49:4 mean 7:10,25 8:13 10:16 12:6 23:4 24:14,19 27:25 28:17 29:24 30:18 36:6 37:17 38:19,23 38:25 44:2,7 49:13 50:1 meaning 38:2 meanings 33:24 means 6:9,15 7:2,25 21:17 22:18,21 24:4 29:20,24 30:11	34:14 47:20 measures 7:23 22:24 33:6 35:25 36:24 40:5 mechanisms 4:13 meet 54:18 member 14:24 16:1,5 members 3:19 12:14 14:19 15:23 20:19,19 37:19 membership 15:22,22 16:7 mentioned 38:9 41:11,25 mere 29:20,23 merit 12:16,19 12:20 13:5 14:6,9,11 merit-based 47:7,14,17 MICHAEL 1:22 2:10 27:7 Michigan 9:17 13:5 14:6 49:6 mind 39:15 mindful 43:17 47:5 mingling 21:25 minorities 30:11 minority 3:14 22:13,17 23:5 43:14,23 45:15 minutes 51:22 misguided 27:3 misplaced 49:1 misspoke 10:16 mix 5:17 7:11 8:19 10:4 20:22,25 21:3 22:5 24:23 51:17 mixed 6:24 19:24 44:8	53:24 modification 30:6 moment 46:24 Monday 1:11 motivating 6:3 motive 6:2 20:1 20:15 motives 19:25 move 31:19 moved 39:13 movement 43:20 moving 29:13 municipality 27:23 mutual 27:19 <hr/> N N 2:1,1 3:1 narrow 32:6,8 33:4 34:2 48:20 50:23 narrowed 35:20 narrowly 25:6 41:8 Nathan 37:2 national 36:2 Native 42:8 naturally 19:4 nature 14:20 necessarily 8:22 21:22 necessary 7:15 7:19,19 33:3 35:5 need 4:21 38:23 50:1,20 needed 48:23 needs 4:17 Negro 25:17 neighborhood 31:22 41:3 neighborhoods 43:18 neutral 4:13 6:9 7:1 53:18	never 9:9 55:5 new 4:21 5:13 5:14 6:6 33:8 40:12 newcomers 15:8 ninth 25:4 26:20 39:7,13 52:16 52:17,19 nonracial 21:17 non-white 7:9 17:3 18:2,8,11 42:5,6 43:18 44:4 52:12 north 37:2 38:11 note 51:9 52:16 noted 9:9 47:12 number 3:5 5:1 41:20 numbers 12:23 24:16 34:4,4 42:23 52:21 53:20 54:2,5 <hr/> O O 2:1 3:1 object 6:21,22 7:6,10,12,14 12:20 13:23 objection 6:25 objections 47:5 objective 6:13 6:16 20:15,23 21:16,17 22:20 23:19 24:1 25:6 28:13,16 29:11,12,19,21 29:23 39:23 40:18 43:9 48:17 objectives 50:15 objects 32:19 obtain 45:12 obviously 5:22 occurred 42:18 odd 7:24 22:20 offer 44:23,25 Oh 44:25	okay 19:17 21:4 21:8 24:17 29:19,23 54:4 omelet 49:23 once 40:22 ones 53:25 openly 21:12 operated 24:15 37:6 operates 17:24 operating 53:1 operation 32:15 opinion 25:5,25 46:1 opportunities 9:22 opportunity 34:20 40:9 opposed 6:2 14:23 opposite 24:12 25:3 opt 40:9 oral 1:13 2:2,5,9 3:7 17:9 27:7 order 19:11 45:11 organizations 28:10 originally 15:6 15:16 36:8 outcomes 9:22 outer 7:4 24:16 outright 33:20 outside 3:25 overall 18:17 19:22 20:3 overrule 26:12 oversubscribed 13:20 46:10 52:12 54:11,16 overt 19:3 over-subscribed 37:3 <hr/> P P 3:1
---	--	---	---	--

<p>page 2:2 22:11 25:4 33:15 52:9</p> <p>pages 52:7</p> <p>pains 46:2</p> <p>Pannell 16:10 16:17</p> <p>paradigm 8:14</p> <p>parents 1:3 3:4 5:16 9:23 14:25 15:6,11 15:19 44:11,13 44:15 46:6</p> <p>part 19:22 36:13 51:13</p> <p>particular 20:10 20:13 21:5 33:18 43:21 44:2</p> <p>particularly 25:14 52:4</p> <p>pass 34:2</p> <p>patently 33:21</p> <p>PAUL 1:19 2:6 17:9</p> <p>pay 42:19</p> <p>pedagogical 18:19</p> <p>Pennsylvania 28:1</p> <p>people 3:18 6:23 10:3 12:11,20 15:8 16:23 19:7 21:22 22:9 23:3 29:13,14 30:11 36:9,11 41:2 42:14 44:8 48:1 49:5 50:14</p> <p>perceive 46:21</p> <p>percent 18:1,2 18:11 24:10 30:10 37:19 39:5,6,10,10 39:12,13,14,14 41:12,16 42:6</p>	<p>42:11,13 52:12 53:21,21</p> <p>percentage 33:18 41:25</p> <p>perfectly 29:22</p> <p>performance 46:9</p> <p>period 14:4 22:14,16</p> <p>permissible 7:23 23:13 31:20,21</p> <p>permit 30:9</p> <p>person 9:5 12:17 12:18 54:24</p> <p>petitioner 1:5,18 1:21 2:4,8,14 3:8 17:11 37:11 47:16 48:12 51:25</p> <p>petitioners 53:9</p> <p>petitioner's 44:17</p> <p>pick 5:1</p> <p>picked 37:11</p> <p>picture 9:3</p> <p>Pitts 26:24</p> <p>place 12:21</p> <p>placed 47:1</p> <p>plaintiff 9:15 16:20</p> <p>plaintiffs 9:19 15:4 34:22</p> <p>plan 8:7 17:16 17:18 20:4 23:19,22 30:8 30:25 32:24,25 33:13,24 34:1 36:10,13,14,14 36:17,19 39:18 39:19 40:2,4 41:5,12,18 42:22,25 43:20 45:2 46:2,4,22 48:19 50:23 52:15 54:7</p> <p>plans 53:18</p> <p>plan's 38:17</p>	<p>please 3:10 17:13 27:10 29:8</p> <p>pluralistic 25:16 27:18 30:4</p> <p>point 4:18,20 8:16 10:23 11:15 12:3,8 18:12 20:7,13 21:9 23:17 25:4 26:15 32:24,25 46:2 46:14 49:9 50:16</p> <p>policies 22:1</p> <p>policy 22:4,8 25:21 44:23</p> <p>popular 3:12 34:19,21,23 37:2 39:16 45:1 46:16 54:16</p> <p>position 4:13 5:9 5:16,17 6:18 12:24 14:25 22:7 50:21</p> <p>positive 37:10</p> <p>posits 5:24</p> <p>possessed 14:22</p> <p>post-filing 16:12</p> <p>Powell 47:12,13</p> <p>Powell's 46:1</p> <p>powers 25:21</p> <p>practical 25:12 43:17</p> <p>practically 26:12</p> <p>practice 12:23 13:3 17:24</p> <p>precise 41:19</p> <p>predominant 6:2</p> <p>predominantly 7:9</p> <p>preface 19:24</p> <p>prefer 49:2</p> <p>preferable 9:23</p>	<p>preference 10:5 14:3 29:14 53:1</p> <p>preferences 12:25</p> <p>preferred 9:20 17:2</p> <p>premise 13:11</p> <p>prepare 25:15 29:3 34:8</p> <p>preparing 27:18 30:3</p> <p>prerequisites 54:19</p> <p>prescribed 25:17 26:18</p> <p>presence 27:25</p> <p>present 32:8</p> <p>presents 32:6</p> <p>preserve 32:21</p> <p>preserving 38:10</p> <p>president 44:17 54:13</p> <p>pretty 51:3</p> <p>prevent 24:18</p> <p>prevented 27:12 27:13</p> <p>pre-ninth 15:7,9</p> <p>primarily 18:25</p> <p>principal 11:25 19:16</p> <p>principally 42:4</p> <p>principle 3:20 12:22</p> <p>prior 32:23 47:24</p> <p>private 30:15 31:13</p> <p>prize 12:13 13:4</p> <p>probably 39:17</p> <p>problem 34:10 42:3,4,10 49:16</p> <p>problematic 28:21,23</p> <p>problems 32:6,8</p>	<p>proceeds 30:7</p> <p>process 14:21 55:4</p> <p>produce 43:20</p> <p>produced 9:22</p> <p>program 7:1 17:23 18:15 36:24 40:18 47:18</p> <p>programmatic 54:14</p> <p>programs 21:21 33:8 34:12 54:17,21,22,25</p> <p>prohibited 6:19</p> <p>proportion 25:18</p> <p>proportionately 43:1</p> <p>proposition 45:25</p> <p>protection 3:17 3:20 14:17 15:1 47:25 49:15</p> <p>protections 50:4</p> <p>provide 11:23 27:14 54:17</p> <p>provided 9:21 11:24 13:17 48:20 52:8</p> <p>provides 52:10</p> <p>providing 13:13 28:14 43:9</p> <p>provision 11:19</p> <p>proxy 21:13</p> <p>public 28:7 30:15 41:1 47:19 48:13</p> <p>pure 17:19 20:15</p> <p>purpose 19:16 22:25 34:5 47:21,25 48:12</p> <p>purposeful 37:25</p> <p>purposes 4:14</p>
--	---	---	---	---

7:7 13:13 15:22 19:19 27:13 40:22 pursue 23:14 50:15 pursuing 50:16 put 12:17 14:12 20:12 22:14,16 23:18 48:5 49:10	18:23 19:8,20 20:19 21:12 22:4,10,23 23:7,9 25:7 31:21 33:3,19 35:12 36:11 43:25 45:7,17 47:4,9,18 49:8 49:9,15 50:14 51:2,14,15 52:15 53:1,13 53:15,18 races 4:24 20:20 22:1 race-based 54:7 race-conscious 7:23 20:9 race-neutral 19:6 22:18 36:24 racial 3:11,19 4:2 5:4,10,17 6:1,5,15,16 7:11 8:5,6,11 8:18 10:4 14:19,24 16:24 17:20,25 19:1 19:3,11 20:7 20:15,23 21:6 21:17 22:5,24 23:16,17 24:8 24:17 26:24 27:2,17 32:17 33:20,23 35:1 35:12 37:23 38:5 39:23 43:9 51:1 52:18 53:19 54:9 racially 6:24 17:15,16 23:21 38:8 40:16 42:15 45:10 radical 18:4 25:19 radically 12:25 Rainier 23:22	36:1 39:24 40:12 raised 41:22 range 45:11 ratio 25:17 26:19 31:1 rational 43:13 reach 4:17 7:16 read 21:11 36:7 52:21 reading 54:2 real 19:20 20:14 23:4 29:14 50:1 realize 11:7 realized 33:8 really 23:24 36:11 39:7 49:2 realm 31:19 reason 5:3 19:20 19:23 34:13 47:23 53:18 reasonable 37:22 46:21 REBUTTAL 2:12 51:24 received 11:19 recognized 41:4 49:19 record 16:22 17:1 18:3 33:2 34:22 44:16,21 52:3 53:4,11 redistricting 5:25 reducing 22:13 22:17 refer 37:13 reflected 33:2 reflecting 25:17 regard 32:1 regarding 53:9 reiterated 3:21 rejected 50:19 relevant 10:22 relied 25:24	26:22 relying 26:8 27:3 remain 37:9 remaining 51:23 remarks 8:14 remedial 4:1 remember 41:19 repeatedly 8:10 8:13 reply 52:8 Reports 33:16 represented 20:20 53:2 request 11:4 require 41:6 required 9:7 48:9 54:18 requirements 50:22 requires 42:22 research 45:12 reserve 16:20 17:6 residential 5:7 resort 34:16 35:8,9 53:13 53:15 resource 33:7 resources 34:11 respect 18:14 21:18 24:6 26:21 27:20 28:5 Respondent 1:23 2:11 respondents 17:14 18:14 27:8 response 11:4 13:8 42:2 responses 13:11 16:4 restrictions 50:7 50:13 result 5:11 22:2	39:20 resulting 5:10 19:1 37:25 retain 52:20 review 47:17 48:8,10,11 richly 53:5 rid 50:2 right 5:17,24 6:5 11:3,13,17 14:21 16:9,16 22:25 29:16,22 35:18 36:15,18 41:20 53:25 Rights 50:4 rigid 31:1 34:1,3 34:4 35:11 ROBERTS 3:3 15:15,18 17:7 18:20 26:3,13 27:5 30:24 31:5,11,24 32:7,22 42:21 44:22 45:4,14 45:21 47:23 49:12 51:12,20 55:7 Roe 16:11,19 role 29:5 Roosevelt 53:22 rough 14:5 24:23 roughly 13:25 14:1 17:1,3 31:16 rule 47:20 run 12:20 14:6 25:2 runs 15:3
Q				
qualify 10:6 44:3 quality 13:17 40:20 44:24 46:16,21 question 3:22,25 6:13 7:21,25 10:19 13:12 14:10 16:22 18:21 20:8 22:19 23:24,25 24:2,3 25:12 26:6,15 35:7 41:22 49:1 50:25 55:3 questioning 29:9 questions 16:6 17:5 19:5 52:2 52:5 quick 16:21 quickly 33:10 quite 20:22 34:14 43:19 47:13 quota 34:1 quotas 21:6 34:25				
R				
R 3:1 race 3:15 4:3,13 4:14,20,23,23 6:9,10,12 7:1 7:25 8:5 10:6 11:6 18:5,12				
				S
				S 2:1 3:1 sake 26:25 34:5 SAT 46:8 saying 20:6 23:25 43:15 48:2,15,17,19

<p>49:4,12,23 51:7 says 6:5 21:11 25:5 Scalia 6:21,25 7:3,17 9:25 10:11 11:8,13 11:17 13:19 21:24 22:6 27:21 28:16,22 28:25 29:8,18 34:25 35:3 37:12,17 38:2 38:5 43:25 44:7,13,19 49:22 50:11 Scalia's 30:6 school 1:7 3:5 3:12,22 4:1,4 4:22,25 5:13 5:14 6:4,6,8 7:13 9:6,7,17 9:18,20 10:2 11:3,10,11,22 12:13,15,21 13:13,23 15:1 15:13 18:1,17 20:12,13,18,20 20:21 21:14,15 22:12 23:6,8 23:13 24:1,22 25:13,16,22,23 26:7 27:2,14 30:2,12,12 31:1,10,21,23 32:15 35:22,22 37:1 39:4,5,11 39:15 40:16,21 40:25 41:11 42:11,16 43:15 44:1,1 45:22 46:2,7,12 47:10 48:13,23 48:25 49:2,11 50:15 51:6,13 52:9,23,25 53:14,22 55:1</p>	<p>schools 1:4 3:5 3:12,14 5:3,11 6:17,22 7:7,8,9 9:20,20 10:4 11:6 12:1,22 12:24 13:4,12 13:17 14:4 16:23 17:2,15 17:17 18:22 20:12 21:1,5,6 23:20,23 27:15 30:19 32:19 34:5,11,12,19 34:21,24 35:1 35:11 36:1,1,9 36:12 37:6,13 38:7,12 39:25 40:6,10,12,15 40:20 41:3,3 41:25 44:23 45:1,9 46:10 46:10,17,22 47:19 51:11 52:6,11,12 53:5,10 54:9 54:12,15,22,25 55:2 school's 14:21 32:17 33:16 science 18:4 scores 10:23 46:8,11 scrutiny 19:5 50:20 searches 50:3 seat 48:14 49:13 49:17 seats 30:23 32:13 34:18 45:19 49:14 Seattle 1:7,17,22 3:5,12 5:23 7:1 27:11 31:17 33:13 36:10 37:2 42:7 43:19 49:20 53:5 55:5</p>	<p>Seattle's 33:12 54:9 second 24:20,25 33:25 see 6:1 12:23 14:2 21:16 24:25 32:17 39:8 46:9 51:19 seeking 24:2 27:14 seemingly 10:13 segregated 36:9 37:7,12,13,14 37:15,20 51:11 segregation 5:7 5:12 36:15 37:21,25 38:3 49:18 51:3 53:7 select 20:10 selecting 10:3 selection 4:21 8:18 9:4 10:17 12:17,19 13:5 14:7,9,11 19:11 22:15 23:11 selective 46:3 47:6,14 self 44:12,15 sense 37:16,22 48:16 separate 42:24 43:23 45:5,10 49:5 51:7,13 separated 52:20 separateness 28:11,17 serves 48:12 set 22:21,22 34:3,4 41:4 seventh 15:12 shift 12:25 shorten 33:15 shown 10:22 shows 17:1</p>	<p>34:22 45:13 53:2,4 54:8 side 26:20 sight 53:6 significant 33:24 54:8 significantly 32:18,20 39:15 similar 5:25 13:2 46:11 54:21 similarity 12:10 12:12 Similarly 9:18 simply 3:18 20:13 26:7 33:17 48:4 53:14 simultaneously 33:6 54:21 single 22:2 43:14 site 4:21,23,24 5:1 19:11,21 20:11 21:15 22:15 23:11 24:22 sites 4:22 5:19 siting 24:1 34:11 situation 7:15 16:15 39:24 six 12:24 14:4 skin 21:23 34:13 38:24 48:2,5 49:3,5 slight 30:5 small 42:9 social 18:3 society 25:16 27:19 29:21 30:4 sole 6:2 7:13 19:20 32:9 solely 3:15 23:7 23:9 49:3 Solicitor 1:19 4:7,11,12 7:22</p>	<p>38:8 sorely 23:19 sorry 31:8 36:5 sort 20:9 21:5 34:18 sorting 9:5 14:12 sounds 41:20 Souter 8:12,24 10:18 11:7,16 12:9 23:24 24:7,13,21 38:13 40:23 Souter's 11:15 South 36:1,2 42:7 43:18 special 34:11,12 specific 4:14 26:16 39:3 48:10 specifically 47:18 48:8 specified 33:18 spread 43:1 square 38:20 39:22 43:8 stage 24:20 standing 15:4,22 15:25 16:2,13 start 19:6,24 20:6 21:4 26:10 46:14 starting 47:9 state 22:21 27:12,23 stated 8:15 statement 25:24 statements 8:21 States 1:1,14 17:10 26:9 27:24 47:16 48:11 statewide 46:9 State's 45:24 statistics 52:3 status 31:10 step 51:9</p>
---	--	---	---	---

<p>Stevens 16:21 16:25 20:2,5 41:10,17 52:5 stigmatizing 47:22 48:13 stop 36:10 stopped 35:13 35:14 52:17 strategic 19:11 22:15 23:11 34:11 stray 34:7 street 28:8,9,9 28:14 strict 19:4 32:1 50:20 stricter 25:1 strictly 32:4 strike 20:1 strikes 3:16 struck 27:12 student 14:22 18:1 23:8 33:17 34:13,20 40:21 47:7 students 7:8 10:5 14:22 17:1,4 18:2,3,5 18:7,8,11,11 23:5 25:15,17 29:4 34:8 38:23 39:12,14 39:14 40:5,9 40:14 42:5,6 42:12,14 43:3 43:4,4 45:15 45:16 46:23 49:7 51:13,17 submit 16:2 29:25 41:8 53:9 submitted 4:8 55:8,10 substantially 38:21 suddenly 26:10 suggest 3:23</p>	<p>11:22 24:12 suggested 25:8 41:23 47:15 54:10 suggesting 20:3 suggests 14:5 18:4 superintenden... 33:5 53:16 supporting 1:21 2:7 17:11 suppose 19:8 20:17 30:7 42:11 supposed 12:14 Supreme 1:1,14 sure 11:2 29:11 suspended 14:20 36:19 Swann 25:13 26:16 49:19 system 6:22,24 9:8 12:19 13:5 14:7,9,12,12 14:13 30:2,20 31:3,10,21,23 32:4 34:19 35:11 40:25 41:1 47:7,12 47:14,16</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 tailored 25:6 41:8 tailoring 32:6,8 34:2 48:20 50:23 take 4:12 5:18 22:7 39:4 46:24 53:8 takes 26:21 30:2 49:25 50:1,5 talked 32:19 53:7 talking 9:4 24:8 25:11 38:5,7,9</p>	<p>46:13 targeted 24:10 teachers 20:21 21:1,4,5 teaching 27:19 tell 16:22 38:16 38:22 52:22 telling 26:9 term 33:23 terms 13:25 14:1 22:21,22 33:7 42:24 48:16 test 10:23 46:11 testimony 33:6 44:17 53:16 54:13 tests 46:9 47:24 Thank 17:7 27:4 27:5 51:19,20 52:1 55:7 theory 13:3 18:9 30:7 43:2,3 thing 13:7 14:12 things 6:9 10:23 22:3 28:3,8 46:5,8 think 5:2 6:13 7:15 9:8 10:12 11:14,17 12:6 12:8 13:2,6 14:16,20 16:9 18:25 19:2,14 19:23,25 20:8 20:14 21:3,7 21:19 23:1,18 23:20 24:7,24 25:3 26:2,15 26:17,22 27:2 28:3,17,19 31:4,9,16,18 32:4,5 33:4,23 35:4,8 37:5,6 37:10 38:13 39:16 43:16,21 45:2,25 46:14 46:20 47:21</p>	<p>49:24 50:18 52:22 53:3,13 54:1 55:1 thinking 36:4,6 thinks 11:23 thought 10:2 11:8,9 25:2,8 35:10 36:7 48:17 50:12 thousands 25:23 26:7 three 4:22,24 5:19 tie 17:25 18:12 35:20 39:9 tiebreakers 43:23 ties 31:23 time 15:3,13 17:6 23:7 27:15 40:11 51:19 timing 36:22 tipping 49:9 today 3:4 told 25:24 top 12:24 town 40:5 trade-offs 41:6 traditional 29:5 trajectory 33:12 treat 3:18 treated 14:23 48:1 treatment 48:16 treats 14:18 trend 37:9 tribes 28:6 tried 12:15 trigger 18:12 47:4 triggering 17:24 18:7 true 8:9 42:8 54:15 try 6:23 7:8 19:8 25:25 36:13</p>	<p>39:19 40:6 45:12 trying 7:4 12:9 20:8 21:10 34:8,17 54:5 54:21,25 turn 33:2 46:24 turns 5:3 two 4:23 17:16 21:20 23:20 33:24 38:9 46:22 type 19:9 20:15 45:8</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 23:1 35:12 47:11 unacceptable 24:5 unbalanced 39:25 unconstitutio... 8:7,11 21:25 28:12 29:11 31:6 33:21 understand 7:3 7:17 11:1 12:9 15:5 37:14 48:11 understanding 15:24 55:4 undersubscri... 13:21 46:10 54:22 55:2 undoubtedly 9:16 unique 54:17 55:1 unit 27:22 United 1:1,14 17:10 26:9 27:24 47:15 48:11 units 30:9 university 9:16 13:5 14:24</p>
--	---	--	---	--

<p>45:24 46:3 48:9 49:9 unquestioned 22:13,17 upheld 50:24 urge 48:11,12 53:8 urging 50:21 use 4:3,20 6:15 7:25 17:25 24:17 25:7 28:7 31:21 33:3 35:12,20 35:23 44:2 50:3 51:1 uses 44:10 47:4 U.S 33:16</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:6 value 11:21 values 31:22 41:5 variation 14:2 variety 19:25 various 21:6 27:25 verboten 27:2 versus 3:5 16:11 18:7 view 53:6 violated 49:15 voluntarily 6:23 voluntary 7:10 36:13</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wade 16:12 wake 26:23,23 want 6:5,5,16 8:2 11:10 14:3 15:3 20:12 21:14 26:1,11 32:3 39:18 46:24 wanted 9:18,19 9:24 10:3 16:24 21:3</p>	<p>23:6,16 32:21 40:9 45:2 wanting 22:4 wants 5:7,8,8 warrantless 50:3 Wash 1:17,22 Washington 1:10,20 way 25:3,7,9 30:16 40:4 41:9 50:2 ways 25:12 website 52:10 went 53:21,24 we'll 3:3 24:22 30:9 51:7 we're 7:20 24:8 24:17 25:24 28:7,9 34:3,8 we've 8:14 25:6 50:5 53:7 white 3:13 7:8 12:18 17:4 18:1,7,11 20:19,21 23:8 25:17 36:12 39:6,6,9,12,14 39:14 41:12,23 42:5,13 43:3,7 44:3,3,14 51:5 53:21,22 whites 41:18 white/non-white 4:2 wholly 46:3 47:13 wide 14:2 wondering 41:13 word 9:5 37:22 words 45:6 working 18:16 18:18 works 18:15 25:10 world 19:20</p>	<p>20:14 23:4 29:23 worlds 51:6 worse 51:11 worst 53:25 wouldn't 11:23 write 7:20 writing 7:20 wrong 22:4 25:9 28:18</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,9</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 12:25,25 35:22,22,23 years 14:4 25:12 25:23 38:11 40:7 41:14 52:25 53:2</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zone 24:15</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>05-908 1:6 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 1:8 3:5 10 39:6 10:01 1:15 3:2 100 17:1,1 45:16 11:02 55:9 12.7 53:21 15 24:10 37:18 16 41:12 17 2:8</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>20 18:10 200 17:3 2000 15:12 35:21 39:5,9 39:12 41:20 54:3,3 2000-2001 35:22 2001 35:21,23</p>	<p>2005 39:6,10,13 52:11 2005-2006 54:8 2006 1:11 52:11 21 39:9 224 53:17 25 18:1 24:11 39:5 53:17,21 261 54:13 27 2:11 274 54:14</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 5:1 30 30:10 300 3:13 16:23 329-330 33:15 35 25:12,22</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 1:11 40 42:13 40-60 24:23 408 33:5 45 18:2 24:11 46 39:14</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 24:10 500 30:8 51 2:14 53:23 539 33:16 54 52:12 56 39:12 53:23 58 39:14 58a 25:5 59 53:23</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 52:7 60 42:11 60-40 31:1,15 32:1,10 62 39:12 53:24</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 22:11 52:7,9 75 42:6</p>	<hr/> <p style="text-align: center;">8</p> <hr/> <p>8 39:10 41:15 89 23:5 45:16</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>99 35:21 54:3</p>
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