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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 disagree 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? When 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 kinds of different 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 right racial mix is.

18 JUSTICE KENNEDY: So it'd have 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, a redistricting cases. Where

1 a court could look at see whether the racial motive was
2 a predominant factor as opposed to -- JUSTICE KENNEDY:
3 No, no. The school board says we want, right up front,
4 we want racial diversity in our new schools. Illicit
5 under the Fourteenth Amendment in your case?

6 MR. KORRELL: Your Honor, school districts
7 can do many, many things through race neutral means that
8 they could not do with race discrimination.

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

15 MR. KORRELL: Justice Ginsburg, our position
16 is that that is prohibited by the Constitution
17 absent past discrimination.

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

22 MR. KORRELL: Justice Scalia, our objection
23 to the Seattle program is that it is not a race neutral
24 means.

25 JUSTICE SCALIA: No, I understand. But I'm

1 trying to find what, you know, the outer limits of your
2 contentions are. It doesn't seem to me that your briefs
3 indicated that you would object to something like magnet
4 schools. The -- even if one of the purposes of those
5 schools is to try to cause more white students to go to
6 schools that are predominantly non-white. It's just
7 voluntary, I mean, but the object is to achieve a
8 greater racial mix.

9 MR. KORRELL: Your Honor, we object to
10 the -- if that's the sole goal of a school district
11 absent past discrimination, we object. But that kind of
12 hypothetical situation isn't even necessary for the
13 Court to reach.

14 JUSTICE SCALIA: I understand.

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

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

6 JUSTICE KENNEDY: That is true.

7 MR. KORRELL: And this Court has said
8 repeatedly that racial balancing is unconstitutional.

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

18 So why should the statements that have been
19 made in these entirely different contexts necessarily
20 decide this case?

21 MR. KORRELL: Justice Souter, we disagree
22 that the analysis in the Grutter and Gratz cases is
23 entirely different from the analysis in this case.

24 JUSTICE GINSBURG: But don't you agree that
25 those cases left someone out of the picture entirely

1 because we were talking about a selection of one person
2 or another? The word "sorting" has been used in this
3 context because everybody gets to go to school. Indeed,
4 they are required to go to school. So no one gets left
5 out of the system, and I think there have been Court of
6 Appeals judges who have noted. We have never had that
7 case before, not like the affirmative action cases.

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

20 JUSTICE SCALIA: Why do you agree that this
21 is not an affirmative action case? Is it not? Wherein
22 does it differ? I thought that the school district was
23 selecting some people because they wanted a certain
24 racial mix in the schools, and were taking the
25 affirmative action of giving a preference to students of

1 a certain race. Why isn't -- why doesn't that qualify
2 as affirmative action?

3 MR. KORRELL: If that's what affirmative
4 action is, Your Honor, then --

5 JUSTICE SCALIA: Well, I don't know what
6 else it is. What do you think it is that causes you to
7 seemingly accept the characterization that this is not
8 it?

9 MR. KORRELL: Your Honor, perhaps I
10 misspoke. I didn't mean to accept the characterization
11 that this case is not at all --

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

19 It is not a characteristic of this case, as
20 I understand it.

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

1 JUSTICE SCALIA: I thought there was a
2 criterion here, and that is, you can go to whatever
3 school you want. You are allowed to go to a certain
4 choice of school. The criterion was your choice.

5 MR. KORRELL: Justice Scalia, you're right.
6 And there's another criterion which I think is getting
7 to Justice --

8 JUSTICE SOUTER: Well, when you state
9 Justice Scalia is right, you are assuming, I think as
10 your brief assumed, that the definition of the benefit
11 to be received here is the active choice, not the
12 provision of an education.

13 Now the active choice may be of value. I do
14 not suggest that it is not. Clearly the school district
15 thinks it does or it wouldn't provide choice. But it is
16 not the entire benefit that is being provided, and the
17 principal benefit is the education, not the choice of
18 schools. Isn't that correct?

19 MR. KORRELL: Your Honor, they are both
20 benefits. I would point Your Honor back to this Court's
21 decision in Gratz, where the same analysis would apply.
22 And if Your Honor's analysis is correct, that would
23 mean, I think, that the Gratz case would have been
24 decided differently.

25 JUSTICE BREYER: But I think that the point

1 that Justice Souter is trying to make, as I understand
2 it, is of course there are similarities to Gratz, they
3 can choose, but there's a big difference. The
4 similarity in Grutter, or the difference in Grutter and
5 Gratz is that you had to prod a school that was supposed
6 to be better than others, that the members of that
7 school, the faculty and the administration tried to make
8 it better than others. It was an elite merit selection
9 academy. And if you put the black person in, the white
10 person can't get the benefit of that.

11 Here we have no merit selection system.
12 Merit is not an issue. The object of the people who run
13 this place is not to create a school better than others,
14 it is to equalize the schools. That's in principle and
15 in practice, if you look at the numbers, you see that
16 the six schools that were at the top, their position
17 would shift radically from year to year, preferences was
18 about equal among them. They have the same curriculum,
19 they have similar faculties, and I don't think anyone
20 can say either in theory or in practice, that one of
21 these schools happened to be like that prize of
22 University of Michigan, a merit selection system. That,
23 I think, was a major difference that he was getting at,
24 why is this not the same kind of thing? That was at
25 issue in Grutter and Gratz. Now what is your response

1 to that?

2 MR. KORRELL: Your Honor, we have several
3 responses. The first is that the premise of Your
4 Honor's question is that the schools are in essence
5 fungible for purposes of providing a high school
6 education. And I would direct Your Honor to the
7 District Court judge's decision, a footnote in the
8 decision in which she acknowledged that the schools were
9 not of equal quality, that they provided different
10 levels of education.

11 JUSTICE SCALIA: Of course they're not.
12 That's why some of them were oversubscribed. That's why
13 others were undersubscribed.

14 JUSTICE BREYER: I didn't say that they
15 were. What I said was that the object of the school
16 board and the administering authority was to make them
17 roughly equal. I said that in terms of curriculum and
18 faculty, they're about roughly equal. And in terms of
19 choice, what you see is a wide variation in choice by
20 those who want to go as to which is their preference
21 among six schools over a period of five years.

22 And that suggests a rough effort to create
23 the equality, not an effort as in Michigan, to run a
24 merit selection system.

25 MR. KORRELL: I agree with Your Honor that

1 there's not a merit selection system in --

2 JUSTICE BREYER: Fine. Now the question is,
3 why doesn't that fact that this is not a merit selection
4 system put a different kind of thing, a sorting system
5 or a system designed to maintain a degree of
6 integration, why doesn't that difference make a
7 difference?

8 MR. KORRELL: Your Honor, I think that the
9 fundamental command of the Equal Protection Clause is
10 that government treats as individuals, not as members of
11 a racial group. And that command I don't think is
12 suspended because of the nature of a school's admissions
13 process. That right is still possessed by the
14 individual students, and if a student is entitled to be
15 treated as an individual as opposed to a member of a
16 racial group at a university level, it's Parents'
17 position they are entitled to that same protection at
18 the high school level.

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

22 Do I understand correctly that none of the
23 parents who originally brought this lawsuit have
24 children who are now pre-ninth grade, but that
25 newcomers, people who recently joined, do have children

1 of pre-ninth grade age?

2 MR. KORRELL: Your Honor, that is mostly
3 correct. There is also a family that joined the parents
4 association back in 2000 that has a child in seventh
5 grade, that will be approaching high school by the time
6 this Court decides the case.

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

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

10 CHIEF JUSTICE ROBERTS: Not by individual
11 parents.

12 MR. KORRELL: That's correct.

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

16 MR. KORRELL: Your Honor, my understanding
17 of the Court's jurisprudence on associational standing
18 is as long as a member of the association has standing,
19 then the association has it. We submit that that has
20 been established by the complaint, the interrogatory
21 responses, and --

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

1 MR. KORRELL: I don't think that's right,
2 Your Honor. We cited to the Court the Pannell case, the
3 Associated General Contractors case, and Roe versus
4 Wade, all of which look at post-filing factors to --

5 JUSTICE GINSBURG: Yes, but the transaction
6 case situation is different.

7 MR. KORRELL: You're right, Your Honor, none
8 of those were class action cases. Pannell and
9 Associated General Contractors were association cases
10 much like this one. Roe, of course, was individual
11 plaintiffs.

12 JUSTICE STEVENS: I have a question. Does
13 the record tell us, the 300 people who have failed to
14 get into the schools they wanted, the racial composition
15 of that group?

16 MR. KORRELL: It does, Justice Stevens. The
17 record shows that 100, roughly 100 students who were
18 denied admission to their preferred schools were
19 non-white and roughly 200 who were denied admission were
20 white students.

21 If there are no further questions, Mr. Chief
22 Justice, I will reserve the balance of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 General Clement.

25 ORAL ARGUMENT OF PAUL D. CLEMENT

1 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
2 SUPPORTING THE PETITIONER

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

5 Respondents assert an interest in addressing
6 the most racially isolated schools in the district, yet
7 their plan does not address the two most racially
8 concentrated high schools in their district. They
9 likewise have certain interests in diversity, yet their
10 plan does not directly address diversity other than pure
11 racial diversity, and they do nothing to assemble the
12 kind of critical mass that was at issue in the Grutter
13 case.

14 In fact, if you look at the program and how
15 it operates in practice, the triggering critical mass
16 for the use of the racial tie breaker is when a
17 student -- when a school has less than 25 percent white
18 students or when it has less than 45 percent non-white
19 students. There is nothing in the record or in social
20 science that suggests that there's a radical difference
21 in the critical mass based on the race of the students.

22 Of course what explains that difference in
23 the triggering critical mass of white students versus
24 non-white students, the answer to that does not lie in
25 educational theory, the answer lies in the demographics

1 of the district. The district happens to have 25
2 percent more non-white students than white students, so
3 they trigger the race tie breaker at a different point
4 under those circumstances.

5 With all respect to respondents, the answer
6 to how this program works lies not in diversity but in
7 demographics. They are clearly working backwards from
8 the overall demographics of the school district rather
9 than working forward to any clearly articulated
10 pedagogical role.

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

15 GENERAL CLEMENT: Well, Mr. Chief Justice, I
16 think that those decisions are different primarily
17 because the resulting decision is not a racial
18 classification. And if you think about it, when you had
19 an overt racial classification, like you clearly do in
20 these cases, then you naturally ask the strict scrutiny
21 questions and look for a compelling interest. If
22 instead you start with a race-neutral government action
23 that doesn't classify people directly based on race,
24 then I suppose you could try to do some kind of
25 Arlington Heights-Washington Davis type analysis.

1 JUSTICE KENNEDY: Well, what would you do
2 with strategic site selection in order to create racial
3 diversity?

4 GENERAL CLEMENT: Well, Justice Kennedy, I
5 think --

6 JUSTICE KENNEDY: I mean, that's expressed
7 and principal purpose. You know the hypothetical.

8 GENERAL CLEMENT: Okay. And Justice
9 Kennedy, I will answer the hypo, but let me say it's
10 easy for purposes of the hypo to say the sole reason was
11 for race. In the real world, in fact I can't imagine
12 that a site decision won't be based at least in part on
13 concerns about the overall educational benefits. And I
14 think that's important. The reason I start with that
15 preface is because when you have mixed motives and a
16 variety of factors I think you'd be unlikely to strike
17 down that kind of motive.

18 JUSTICE KENNEDY: Are you suggesting there
19 was no consideration of overall educational benefits in
20 this plan?

21 GENERAL CLEMENT: No, Justice Stevens. I'm
22 saying you start at a different departure point when you
23 have an express racial classification. I think I'm
24 trying to answer Justice Kennedy's question about what
25 if you have a sort of a race-conscious goal at some

1 level and that's why you select a particular site or you
2 decide that you're going to invest in magnet schools and
3 want to put a magnet school in a particular school
4 district. My humble point is simply that in the real
5 world I think you're unlikely to have the pure racial
6 motive type objective. I would say that --

7 JUSTICE GINSBURG: Suppose it was faculty,
8 and the school district makes a deliberate effort to
9 have members of the white race and members of other
10 races represented in -- on the faculty of every school,
11 so you won't have one school with all white teachers, so
12 that you'll have a mix, and that's quite explicit.
13 That's their objective and they're using a racial
14 criterion criterion to get there.

15 Would that be impermissible, to have a mix
16 of teachers in all the schools?

17 GENERAL CLEMENT: Well, Justice Ginsburg, I
18 think if what they wanted to do is have an mix of
19 teachers that might be okay. If they're going to start
20 assigning teachers to particular schools and have sort
21 of racial quotas for the faculty at various schools, I
22 think that crosses a line.

23 JUSTICE GINSBURG: Well, what would be okay?
24 How would you get there other than having -- the point
25 I'm trying to make has been made by others. Let me read

1 from Judge Boudin's decision. He says: "The choice is
2 between openly using race as a criterion or concealing
3 it through some clumsy or proxy device."

4 If you want to have an integrated school and
5 you site the schools deliberately to achieve that
6 objective, it's very hard for me to see how you can have
7 a racial objective but a nonracial means to get there.

8 GENERAL CLEMENT: Well, with respect,
9 Justice Ginsburg, I think there's a fundamental
10 difference between how the same intent with two
11 programs, there's a fundamental difference if one of
12 them necessarily classifies people on the basis of their
13 skin color and the other does not.

14 JUSTICE SCALIA: General Clement, is there
15 anything unconstitutional about desiring a mingling of
16 the races and establishing policies which achieve that
17 result but which do not single out individuals and
18 disqualify them for certain things because of their
19 race? Is there anything wrong with a policy of wanting
20 to have racial mix?

21 GENERAL CLEMENT: Justice Scalia, we would
22 take the position that there's not and that there's a
23 fundamental difference between whether or not the policy
24 manages to avoid classifying people on the basis of
25 their race.

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

16 GENERAL CLEMENT: I think that's ultimately
17 the answer, Justice Kennedy, which is there's a
18 fundamental difference between classifying people and
19 having the real world effect. I mean, in this case
20 don't forget that there were 89 minority students that
21 wanted to attend Franklin High School. They could not
22 solely because of their race. At the same time, every
23 white student who applied to Franklin High School was
24 allowed in solely base would on their race.

25 JUSTICE KENNEDY: And what is the answer to

1 my strategic site selection hypothetical?

2 GENERAL CLEMENT: We would say that's fine.

3 We would say that that is permissible, for the school to
4 pursue that.

5 Just to get back, though, again, we say that
6 that avoiding racial isolation is -- I just want to make
7 the point, we say that racial isolation is an important
8 government interest. I think if you put this plan up
9 against that objective, it solely fails, because there
10 are two high schools that I think you would look at as
11 being racially isolated. They're Cleveland n Rainier
12 Beach, and this plan does nothing to directly address
13 those high schools.

14 JUSTICE SOUTER: My question is really Judge
15 Boudin's question. You are in effect saying that by
16 siting the school they can achieve exactly the objective
17 they are seeking here. It's a question of do the -- the
18 question comes down to whether they can do it candidly
19 or do it by clumsier. That is, it seems to me, an
20 unacceptable basis to draw a constitutional line.

21 GENERAL CLEMENT: With respect,
22 Justice Souter, first of all I think the kind of
23 interests we're talking about, avoiding racial isolation
24 and the like, do not lend themselves to absolutely
25 targeted, it has to be 15 percent, it has to be 50, it

1 has to be 25, it has to be 45. I would actually suggest
2 that the danger is in the opposite direction.

3 JUSTICE SOUTER: That isn't what they said
4 here. I mean, they were dealing with a zone within
5 which they operated, and it was only when the numbers
6 got to the outer limits that they said, okay, we're
7 going to use a racial criterion to prevent anything
8 more, any more extreme disparity.

9 GENERAL CLEMENT: Well, I mean, in the
10 second stage --

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

14 GENERAL CLEMENT: Well, I think in the
15 second case you'll see that, you know, the same logic
16 that leads to this leads itself to stricter bands. But
17 let me say, I would have thought the analysis would run
18 the exact opposite way, and I would think that if you
19 got to the point, which the Ninth Circuit did on page
20 58-A of its opinion, where it says, you know, with this
21 objective that we've allowed, the most narrowly tailored
22 way to get there is to expressly use race. I would have
23 thought that might have suggested there was something
24 wrong with the compelling interest, if that's the way --

25 JUSTICE BREYER: While you're talking about

1 the way, let me ask a practical question. 35 years ago
2 in Swann, this Court said that a school board,
3 particularly an elected one -- it didn't say that
4 -- "could well conclude that to prepare students to live
5 in a pluralistic society each school should have a
6 prescribed ratio of Negro to white students reflecting
7 the proportion of the district as a whole." Far more
8 radical than anything that's at issue here.

9 Then it adds: "To do this as an educational
10 policy is within the broad discretionary powers of
11 school authorities." That's what this Court said 35
12 years ago. Thousands of school districts across the
13 country, we're told, have relied on that statement in an
14 opinion to try to bring about a degree of integration.
15 You can answer this in the next case if you want. So
16 think about it.

17 CHIEF JUSTICE ROBERTS: You can answer in
18 this case, General.

19 (Laughter.)

20 JUSTICE BREYER: My question, of course, is
21 simply this. When you have thousands of school
22 districts relying on this to get a degree of integration
23 in the United States of America, what are you telling
24 this Court is going to happen when we start suddenly
25 making -- departing from the case? Do you want us to

1 overrule it? Why? Why practically?

2 CHIEF JUSTICE ROBERTS: General?

3 GENERAL CLEMENT: If I could answer the
4 question, I think that the fact that you point to the
5 specific language of Swann is helpful, because the Court
6 there in dictum -- I think everybody would agrees that
7 was dictum -- said that you could achieve a prescribed
8 ratio. And that's exactly where the logic of the other
9 side, of the Ninth Circuit, of Judge Boudin, with all
10 respect, that's where it takes you.

11 And I think anybody that relied on that
12 language in the wake of cases like Crosson, in the wake
13 of Freeman against Pitts, that said achieving a racial
14 balance for its own sake is not constitutional, and
15 Bakke and Grutter against Gratz, that all said that
16 racial balancing is verboten, I think those school
17 districts would have been misguided in relying on that
18 language. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, General.
20 Mr. Madden.

21 ORAL ARGUMENT OF MICHAEL F. MADDEN
22 ON BEHALF OF RESPONDENTS

23 MR. MADDEN: Mr. Chief Justice and may it
24 please the Court:

25 When Seattle was last before this Court you

1 struck down a State law that prevented bussing for
2 integration purposes because that law prevented the
3 school board from seeking to provide the educational
4 benefits of integrated schools. At that time you said
5 it was clear enough that all children benefit from
6 exposure to ethnic and racial diversity in the classroom
7 by preparing them for citizenship in our pluralistic
8 society and teaching them to live in harmony and mutual
9 respect.

10 JUSTICE SCALIA: Mr. Madden, that's
11 certainly an admirable goal. Could a local unit, a
12 municipality, or even a State have another goal? Let's
13 say what used to be great about the United States was
14 the presence of various ethnic groups. I mean, there
15 were the Pennsylvania Dutch, there were the Amish, there
16 were Little Italy's, there were Chinatowns, and these
17 things are beginning to disappear. And we think that we
18 should encourage the continuation of that diversity, as
19 the Federal Government has done with respect to American
20 Indian tribes.

21 And therefore, we're going to use public
22 funds for such things as street festivals, a Chinatown
23 street festival, an Italian street festival. We're
24 going to encourage those organizations that maintain
25 that separateness.

1 Is there anything unconstitutional about
2 that objective?

3 MR. MADDEN: Providing funding for street
4 festivals?

5 JUSTICE SCALIA: About the objective? I
6 mean, think we should foster separateness? Is there
7 anything wrong --

8 MR. MADDEN: I think that in the context
9 that you've described it that would be constitutionally
10 very problematic.

11 JUSTICE SCALIA: Fine -- it would be
12 problematic?

13 MR. MADDEN: Yes.

14 JUSTICE SCALIA: Why?

15 MR. MADDEN: Because I can conceive that
16 it's not -- unlike education, where the goal is to
17 educate the entire community and to help to prepare the
18 community, the students to live in that community, it's
19 not a traditional role of government --

20 JUSTICE KENNEDY: Well then, let me change
21 Justice --

22 JUSTICE SCALIA: Please let me finish the
23 line of questioning.

24 Assume with me that it is not an
25 unconstitutional objective, which I am sure it's not.

1 Could the -- could the government achieve that objective
2 by barring people from moving into Little Italy or
3 giving a preference to some people to buy real estate in
4 Little Italy if they are of Italian ancestry? Could it
5 do that? Absolutely not, right?

6 MR. MADDEN: I would agree with you.

7 JUSTICE SCALIA: So it would appear that
8 even if the objective is okay, you cannot achieve it by
9 any means whatever. And the mere fact that the
10 objective of achieving a diverse balanced society is
11 perfectly all right, although certainly not the only
12 objective in the world. The mere fact that it's okay
13 doesn't mean you can achieve it by any means whatever?

14 MR. MADDEN: I would submit that there's a
15 fundamental difference between the circumstances you've
16 described and a school system which takes all comers and
17 is tasked to educate them by preparing them to live in a
18 pluralistic society.

19 JUSTICE KENNEDY: Well, my slight
20 modification of Justice Scalia's hypothetical -- and it
21 proceeds on the same theory -- is suppose there's a huge
22 demand for housing. A developer has a plan to build 500
23 units. Can the city say, we'll grant you the permit on
24 the ground, on the condition that 30 percent of all the
25 houses go to minorities? That means people will live

1 together. Then we can have a school, a school that can
2 be diverse.

3 MR. MADDEN: I would say not, because
4 housing decisions are inherently private, unlike public
5 education. And there's no way to know how those
6 benefits are being distributed, if they're going to be
7 comparable. I would say no, it is not comparable to the
8 schools.

9 JUSTICE KENNEDY: Well, your system is the
10 one that gives a choice to the individuals.

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

13 CHIEF JUSTICE ROBERTS: Does that make a
14 difference? What if you adopted a plan that insisted on
15 a more or less rigid 60-40 ratio at every school and
16 assignments were made on that basis. It was not a
17 follow-on to a choice system.

18 MR. MADDEN: Well, I think --

19 CHIEF JUSTICE ROBERTS: Would that be
20 unconstitutional?

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

23 I think in each circumstance it depends on
24 the status of the school system.

25 CHIEF JUSTICE ROBERTS: The same -- the

1 facts are otherwise the same, except you conclude that
2 private choice contributes to further division rather
3 than integration and so the assignments are made on a
4 60-40 basis.

5 MR. MADDEN: I think that is roughly the
6 circumstance that existed in the first Seattle case,
7 Mr. Chief Justice. And additionally, I think that you
8 then have to move into the realm of what's
9 constitutionally permissible and can in a
10 constitutionally permissible use of race a school system
11 accommodate other values like choice and neighborhood
12 ties and family connections to the school system.

13 CHIEF JUSTICE ROBERTS: I still don't have
14 your answer.

15 Is strict assignment 60-40 without regard to
16 choice constitutional or not?

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

21 CHIEF JUSTICE ROBERTS: And how does this
22 not present narrow tailoring problems if -- if the --
23 when you get to the fact of choice, the sole criteria at
24 that level is the same as would be the case in a 60-40
25 assignment.

1 MR. MADDEN: Well, we have accommodated
2 choice to the extent there are seats available. And
3 then we go to family connections. And then we -- in
4 operation, admit everyone who lives close to the school.
5 And then as to those that live further away, we look to
6 see what's the school's racial demographic. Is it
7 significantly different than the community's? These
8 schools we have talked about have been the objects of
9 significantly more aggressive segregation efforts, and
10 the board wanted to preserve those.

11 CHIEF JUSTICE ROBERTS: One of the, one of
12 the factors our prior cases looked to was whether the
13 plan has a logical end point. What is the logical end
14 point in this plan?

15 MR. MADDEN: Well, the board actually at
16 every turn reflected in the record discussed whether it
17 was necessary to continue the use of race, whether to
18 narrow it, and eventually to end it. And I think it is
19 in the joint appendix at 408, the superintendent's
20 testimony of the, simultaneously the measures that the
21 board was implementing in terms of resource allocation,
22 implementation of new programs, because they realized
23 that by diversifying choice, they could hopefully
24 achieve some of these same ends, not as quickly, not as
25 efficiently, but that they could achieve them. That's

1 been indeed the entire trajectory of Seattle's
2 integration efforts since the first Seattle plan.

3 JUSTICE KENNEDY: But in Grutter we said, to
4 shorten it just a little bit, at page 329-330 of the
5 U.S. Reports, 539, "the law school's interest is not
6 simply to assure within its student body some specified
7 percentage of a particular group because of race ...
8 that would amount to outright racial balancing which is
9 patently unconstitutional." And that seems to be what
10 you have here.

11 MR. MADDEN: I think that the term racial
12 balancing has two significant meanings. One is a plan
13 that does not foster a compelling interest. And second,
14 a plan that is too rigid, a quota, for instance, that
15 might not pass narrow tailoring given the context.

16 In this case we're not after a rigid set of
17 numbers, and certainly not after a rigid set of numbers
18 for their own sake. The purpose was to have schools
19 that had become diverse through integration efforts not
20 stray too far from the community's demographic because
21 we're trying to prepare students to live in those
22 communities.

23 JUSTICE KENNEDY: The problem is that unlike
24 strategic siting, magnet schools, special resources,
25 special programs in some schools, you're characterizing

1 each student by reason of the color of his or her skin.

2 That is quite a different means. And it
3 seems to me that that should only be, if ever allowed,
4 allowed as a last resort.

5 MR. MADDEN: The board here was trying to
6 distribute, sort out seats that were available at these
7 popular schools; and so it devised a system whereby
8 every student had the opportunity to be assigned to at
9 least one of those popular schools; and as far as the
10 record shows in plaintiffs' briefing, there's no
11 material differences between those -- those popular
12 schools.

13 JUSTICE SCALIA: Do you have quotas for, for
14 racial hiring of your faculty in these schools?

15 MR. MADDEN: No.

16 JUSTICE SCALIA: Why not?

17 MR. MADDEN: I don't think the board has
18 ever found that necessary to, to achieve diversity in
19 the faculty.

20 JUSTICE BREYER: Justice Kennedy's question,
21 I think, was is this basically a kind of last resort?
22 Or how close to a has resort is it? What's the history
23 of this? I thought the history involved a lawsuit to
24 desegregate the schools, a much more rigid system of
25 racial -- abuse of race. Ultimately you come to this.

1 Now you stop this. And what happened after you stopped
2 it?

3 MR. MADDEN: What happened is that, that it
4 --

5 JUSTICE BREYER: Well, what is the history
6 basically? Am I right?

7 MR. MADDEN: The history is that the board
8 had both narrowed the use of the integration tie breaker
9 in '99 and 2000 and then continued it for the 2001
10 school year. We were -- in 2000-2001 school year, we
11 were enjoined in 2001 to use it in that year, which was
12 considerably disruptive. But the board was also, the
13 measures that it had implemented, implementing magnet
14 schools at Rainier Beach and Chief South high schools in
15 the South End, implementing it in --

16 JUSTICE BREYER: But that's not what I'm
17 thinking.

18 MR. MADDEN: I'm sorry.

19 JUSTICE BREYER: I mean I'm thinking that, I
20 thought as I read this, and you have to correct me
21 because you have a better knowledge, originally the
22 schools were highly segregated in fact. People brought
23 a lawsuit. Then to stop that Seattle engaged in a plan
24 that really bused people around on the basis of race.
25 That led to white flight. That was bad for the schools.

1 They then tried a voluntary choice plan. This is part
2 of that plan. Then when they abandon this plan, they
3 discover more segregation. Is that basically right or
4 not?

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

7 When this plan was suspended in, after the
8 Court of Appeals enjoined it, the board had, as I said,
9 experienced some considerable disruption in the
10 assignments because of the timing of the injunction.
11 But the board was also looking at the effect of the
12 race-neutral, if you will, program measures that it had
13 implemented.

14 Such that now, Ingram high school in the
15 north end of Seattle is much more popular. Nathan Hale
16 is no longer over-subscribed. There's less demand for
17 Ballard, but there have been --

18 JUSTICE ALITO: Do you think your, do you
19 think your schools as they are operated now are
20 segregated?

21 MR. MADDEN: We have some change of
22 conditions, but the basic conditions remain, the trends
23 has not been positive. For example, and I think that
24 the petitioner picked --

25 JUSTICE SCALIA: To say segregated,

1 segregated -- you refer to some of the schools as
2 segregated. And I, that's not what I understand by
3 segregated.

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

5 JUSTICE SCALIA: I mean, you know, if you
6 belong to a country club that, that -- that has 15
7 percent black members, I would not consider that a
8 segregated country club. So what you are complaining
9 about is, is not segregation in any, in any reasonable
10 sense of the word. You're complaining about a lack of
11 racial balance.

12 MR. MADDEN: We are not complaining about
13 segregation resulting from purposeful discrimination.
14 That's --

15 JUSTICE SCALIA: That's the only meaning of
16 segregation.

17 MR. MADDEN: I --

18 JUSTICE SCALIA: You're talking about racial
19 balance.

20 MR. MADDEN: Talking about schools that are
21 on the one end racially isolated. The Solicitor General
22 mentioned two of those. And talking on the other end
23 about preserving the diversity that we had achieved
24 through these years of effort in these north end
25 schools.

1 JUSTICE SCALIA: Well, I think you're also
2 --

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

6 MR. MADDEN: Yes.

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

13 MR. MADDEN: It, it may mean the board
14 confronted with the circumstances might well make that
15 decision independent of this litigation. But let me
16 answer the specific.

17 Let's take Franklin High School to begin
18 with. In, in 2000, that school was -- had 25 percent
19 white enrollment. In 2005, it had 10 percent white
20 enrollment. In the ninth grade, which is really the,
21 the level at which we see the effect of the segregation
22 tie breaker, in 2000, the white enrollment was 21
23 percent; it was 8 percent in 2005.

24 Go to Ballard High School on the other end.
25 Ballard was 56 percent white students in 2000; it's 62

1 percent in 2005. The ninth grade class has moved from
2 46 percent white students to 58 percent white students.
3 Keeping in mind that that school is now significantly
4 less popular than it was, I think those effects would
5 probably be, be more extreme.

6 But the plan -- I want to emphasize, the
7 plan was to try to disperse demand and to foster choices
8 that would result in diversity, not to compel it. We do
9 not --

10 JUSTICE ALITO: How do, how do you square
11 your objective of achieving racial balance with your
12 disinterest in the situation at Cleveland and Rainier
13 Beach? Those are the most unbalanced schools under your
14 definition, and yet those are not affected at all by
15 this plan. Why, why are you not concerned about that?

16 GENERAL CLEMENT: Well, they are affected by
17 the plan in this in this way, that in the past the
18 district had used mandatory measures, busing students
19 across town, to try to integrate those schools. And the
20 board decided after many years of effort that it would
21 no longer do that, but it was also of the firm
22 conviction that it would allow students who wanted the
23 opportunity to opt out of those schools to do so.

24 At the same time, it implemented magnet
25 schools at Rainier Beach, there's a new building under

1 construction at Cleveland. And so --

2 JUSTICE ALITO: Are the students who are
3 attending those schools getting the benefits of
4 attending a school that's racially balanced? And if
5 they're not, why are you not concerned about that, if
6 that's an important objective of your program?

7 MR. MADDEN: We, we are concerned about
8 improving the quality of education in all the schools.
9 We do not mandate that a student attend a school for
10 integration purposes as we once did.

11 JUSTICE SOUTER: Why?

12 MR. MADDEN: Because it, it's important to
13 the credibility and functionality of the school system
14 to have a system that is accepted by the public, by our
15 constituents. And so people like choice; they also like
16 neighborhood schools; they also like diverse schools.
17 And the board recognized when it set about to develop
18 this plan that accommodating all of those values would
19 require some trade-offs. And the board, familiar with
20 the local conditions, familiar with the history, did
21 just that in what I submit was a narrowly tailored and
22 appropriate way.

23 JUSTICE STEVENS: May I go back to the
24 Cleveland school that Justice Alito mentioned? An I
25 correct that there were 16 percent whites under the

1 plan? And I'm just wondering what happened to it during
2 the last couple of years?

3 MR. MADDEN: Cleveland is now about 8
4 percent.

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

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

9 JUSTICE GINSBURG: Mr. Madden, there was a
10 question raised about your categories, that is, you have
11 white and then everything else. And it was suggested
12 that if you are looking for diversity, what was -- the
13 schools that you just mentioned had a large percentage
14 of Asian-Americans, but they don't count.

15 What is your response to that?

16 MR. MADDEN: Well, the -- the problem that
17 the board was addressing was principally a, a problem of
18 the distribution of white and non-white students. The
19 -- as a generality, 75 percent of all non-white students
20 in the district lived in South Seattle. And that was
21 true for all the ethnic groups except Native Americans,
22 who are a very small --

23 JUSTICE ALITO: Why is that a problem?
24 Suppose you have a school in which 60 percent of the
25 students are either of Asian ancestry or Latino

1 ancestry, and 40 percent are white as you classify
2 people. And there are no African-American students at
3 all. You would consider that to be a racially balanced
4 school, would you not?

5 MR. MADDEN: I would say if that
6 circumstance occurred, that that would be something that
7 the board would have to pay attention to and consider.
8 But the fact of the matter is that --

9 CHIEF JUSTICE ROBERTS: Nothing under the
10 plan requires that, does it?

11 MR. MADDEN: No, because the numbers in
12 terms of the distribution of ethnic groups, separate
13 ethnic groups and the benefits or impacts of the plan
14 were spread proportionately --

15 JUSTICE ALITO: And what is the theory
16 behind that? Is, the theory is it that the white
17 students there or the Asian students or the Latino
18 students would not benefit from having African-American
19 classmates? It is enough if they have either Asian
20 classmates or Latino classmates or white classmates?
21 How do you -- how do square that with your, your
22 objective of providing benefits that flow from racial
23 balance?

24 MR. MADDEN: I may, I may have confused the
25 answer to the hypothetical with the, with rationale on

1 the ground, which was that we did not have that kind of
2 single minority ethnic group disparity existing in any
3 school. I was saying, however, that if that existed, I
4 think that would be something the board would have to be
5 mindful of. As a practical matter, because our
6 non-white ethnic neighborhoods in South Seattle are
7 themselves quite integrated, that the movement under
8 this plan did not produce disparities for or against any
9 particular ethnic group. And so I think in the end it
10 might have been more divisive to have individual
11 tiebreakers for the separate minority ethnic groups.

12 JUSTICE SCALIA: What criteria of race does
13 the school, just out of curiosity, does the school
14 district use? I mean, what if a particular child's
15 grandfather was white? Would he qualify as a white or
16 non-white.

17 MR. MADDEN: I would say -- well, the answer
18 is --

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

21 MR. MADDEN: The district has no criteria
22 itself. The district uses classifications that are
23 developed by the Federal Government but allows parents
24 to self identify children.

25 JUSTICE SCALIA: It allows parents to say

1 I'm white, no matter what?

2 MR. MADDEN: That allows the parents to self
3 identify, and the record in this case through the
4 testimony of petitioner's president is they were aware
5 of no abuse of that.

6 JUSTICE SCALIA: Seems like a big loophole.

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

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

12 MR. MADDEN: Oh, yes. Yes. They offer --
13 the popular schools to which everyone had access under
14 this plan who wanted access, I think it's -- there is no
15 dispute.

16 CHIEF JUSTICE ROBERTS: How is that
17 different from the separate but equal argument? In
18 other words, it doesn't matter that they're being
19 assigned on the basis of their race because they're
20 getting the same type of education.

21 MR. MADDEN: Well, because the schools are
22 not racially separate. The goal is to maintain the
23 diversity that existed within a broad range in order to
24 try to obtain the benefits that the educational research
25 show flow from an integrated education.

1 CHIEF JUSTICE ROBERTS: Even though in the
2 individual cases the students, including minority
3 students, and I gather 89 to 100 of the cases are being
4 denied admission on the basis of their race?

5 MR. MADDEN: They're not being denied
6 admission. They're being -- seats are being distributed
7 to them. This is not like --

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

10 MR. MADDEN: Yes. But this is not like
11 being denied admission to a state's flagship university.
12 I think for that proposition, I would cite Justice
13 Powell's opinion in the Bakke case where he was at some
14 pains to point out that a school integration plan is
15 wholly dissimilar to a selective university admissions
16 plan.

17 JUSTICE ALITO: If we look at the things
18 that Parents are concerned about when they're
19 considering where their children are going to high
20 school, we look at things like SAT scores, for example,
21 or performance on statewide tests, would we see that,
22 the oversubscribed schools and the undersubscribed
23 schools have similar test scores?

24 MR. MADDEN: It depends on what school
25 you're talking about, Justice Alito. In this case, I

1 think the most important point to start with is that
2 there was no contention that there was any material
3 difference in quality between the five popular high
4 schools.

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

7 MR. MADDEN: You would find a reasonable
8 basis to perceive a quality difference between those two
9 schools, but this plan didn't assign any students to
10 Cleveland.

11 I want to take a moment, if I can, to turn
12 to the issue of individualized consideration, because so
13 much emphasis has been placed on it in the earlier
14 discussion.

15 It seems to us, first of all, that this
16 Court in Grutter said that not all uses of race trigger
17 the same objections and that the Court must be mindful
18 of the context. This is not, as I've said, a selective
19 or merit-based system where we adjudge one student to be
20 better than the other. We do consider individual
21 factors before we get to race, starting with choice and
22 family connection, and how close you live to the school.

23 But ultimately, this is a distributive
24 system which, as Justice Powell -- as I noted, Justice
25 Powell said in the Bakke case, is quite wholly

1 dissimilar to a merit or selective-based system. What
2 it seems to us is being suggested by the United States
3 and by the petitioner is a system that would force an
4 individualized merit-based review on any kind of race
5 conscious program, specifically an assignment to public
6 schools.

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

10 CHIEF JUSTICE ROBERTS: But the reason that
11 our prior tests have focused on individual determination
12 is that the purpose of the Equal Protection Clause is to
13 ensure that people are treated as individuals rather
14 than based on the color of their skin. So saying that
15 this doesn't involve individualized determinations
16 simply highlights the fact that the decision to
17 distribute, as you put it, was based on skin color and
18 not any other factor.

19 MR. MADDEN: Mr. Chief Justice, in Grutter
20 you said specifically that individualized review was
21 required in the context of university admissions. In
22 this context, the kind of review, the specific kind of
23 review that I understand the United States to urge and
24 the petitioner to urge, serves no purpose, and it may
25 itself be stigmatizing in the context of public schools

1 where everyone gets a seat.

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

5 MR. MADDEN: Justice Ginsburg, that is
6 correct. I am saying, however, that this plan,
7 consistent with narrow tailoring, provided consideration
8 of individual circumstances, including an appeal on
9 hardship grounds for someone who felt that they had been
10 denied a school that they needed to be in.

11 JUSTICE KENNEDY: But the emphasis on the
12 fact that everybody gets into a school, it seems to me
13 is misplaced, but the question is whether or not you can
14 get into the school that you really prefer. And that in
15 some cases depends solely on skin color. You know, it's
16 like saying everybody can have a meal but only people
17 with separate skin can get the dessert.

18 MR. MADDEN: Well, like the Michigan cases,
19 sometimes student in the end of the day have an
20 assignment determined by race. Just like in the
21 university cases, at some point race will be a tipping
22 factor. It's different, though, when we put someone in
23 a basically comparable school.

24 CHIEF JUSTICE ROBERTS: Well, you're saying
25 every -- I mean, everyone got a seat in Brown as well;

1 but because they were assigned to those seats on the
2 basis of race, it violated equal protection. How is
3 your argument that there's no problem here because
4 everybody gets a seat distinguishable?

5 MR. MADDEN: Because segregation is harmful.
6 Integration, this Court has recognized in Swann, in the
7 first Seattle case, has benefits. The district was --

8 JUSTICE SCALIA: Well, it seems to me you're
9 saying you can't make an omelet without breaking eggs.
10 Can you think of any area of the law in which we say
11 whatever it takes, so long as there's a real need,
12 whatever it takes -- I mean, if we have a lot of crime
13 out there and the only way to get rid of it is to use
14 warrantless searches, you know, fudge on some of the
15 protections of the Bill of Rights, whatever it takes,
16 we've got to do it?

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

19 MR. MADDEN: There are many areas of the
20 law, certainly in the First Amendment and the Fourth
21 Amendment, that have considerable flexibility.

22 JUSTICE SCALIA: But what about the
23 Fourteenth? I thought that was one of the absolute
24 restrictions, that you cannot judge and classify people
25 on the basis of their race. You can pursue the

1 objectives that your school board is pursuing, but at
2 some point you come against an absolute, and aren't you
3 just denying that?

4 MR. MADDEN: I think that in Grutter and
5 Gratz, this Court rejected the absolute and instead
6 described discretely, which we feel we need, and which
7 is why we are not urging an absolute position. We say
8 that we indeed comply with the requirements of narrow
9 tailoring, and that the plan therefore should be upheld.

10 JUSTICE GINSBURG: And the question of
11 integration, whether there was any use of a racial
12 criterion, whether integration, using racial integration
13 is the same as segregation, it seems to me is pretty far
14 from the kind of headlines that attended the Brown
15 decision. They were, at last, white and black children
16 together on the same school bench. That seems to be
17 worlds apart from saying we'll separate them.

18 MR. MADDEN: We certainly agree,
19 Justice Ginsburg. We'd go one step further and note
20 that in Brown, this Court said that the effects of
21 segregated schools are worse.

22 CHIEF JUSTICE ROBERTS: There's no effort
23 here on the part of the school to separate students on
24 the basis of race. It's an assignment on the basis of
25 race, correct?

1 MR. MADDEN: And it is in effect to bring
2 students together in a mix that is not too far from
3 their community.

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

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

7 Mr. Korrell, you have four minutes
8 remaining.

9 REBUTTAL ARGUMENT OF HARRY J.F. KORRELL

10 ON BEHALF OF PETITIONER

11 MR. KORRELL: Thank you, Mr. Chief Justice.

12 There were some questions of my friend Mr. Madden about
13 the record and the statistics about enrollment, and I'd
14 like to draw the Court's attention, particularly
15 Justice Breyer and Justice Stevens' questions about what
16 the schools look like now.

17 If the Court looks at pages 6 and 7 of our
18 reply brief, we provided the enrollment data. The
19 information on page 7 comes from the school district
20 website that provides enrollment data at the individual
21 schools. In 2005 and 2006, enrollment at the
22 oversubscribed schools is now 54 percent non-white,
23 which is greater than it was under the district's --

24 JUSTICE BREYER: This is the -- as I gather,
25 the plan where race is used, has to do only with the

1 ninth grade. And therefore, what you would like to note
2 is when you look at the ninth grade after they stopped
3 using any racial criteria at all, what happened to those
4 ninth grade classes. Did they become more heavily
5 separated or did they retain their diversity? Are the
6 numbers that you are about to read us, which I have in
7 front of me, going to do that? Tell us that? I think
8 they're about the whole school.

9 MR. KORRELL: They are, Your Honor, but
10 they're about the whole school after four years of
11 operating without the race preference. So each of the
12 four years they're represented in the aggregate shows
13 the effect that I think Your Honor was asking about.

14 So, the record in this case shows the
15 Seattle schools are richly diverse. It's very important
16 in our view that the Court not lose site of that. We've
17 talked about integration and segregation, but I urge the
18 Court to take a look at the data the petitioners submit
19 regarding the actual enrollment in those schools.

20 A couple of other record citations I'd like
21 to bring to the Court's attention. Justice Kennedy, I
22 think, asked about considering race at a last resort.
23 It's simply not the case that the school district looked
24 at race as a last resort. And I would draw the Court's
25 attention to the superintendent's testimony at joint

1 appendix 224 and 25, where he said in essence, the
2 reason we didn't consider race neutral plans is because
3 we were interested in racial diversity.

4 JUSTICE BREYER: The numbers I have here,
5 Franklin went from 25 percent white to 12.7 percent.
6 Roosevelt, which was basically a white school, jumped up
7 from about 51 to 59. Ballard jumped up from about 56 to
8 62. Then Garfield went down some, more mixed. But
9 those were the worst ones; am I right on that?

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

13 JUSTICE BREYER: Okay.

14 MR. KORRELL: The numbers I was trying to
15 bring to the Court's attention were the difference
16 between the enrollment under the race-based plan and the
17 enrollment in 2005 and 2006, which shows significant and
18 continued racial diversity in Seattle's high schools.

19 Counsel suggested also that there is no
20 material difference among the five oversubscribed
21 schools. And I would draw the Court's attention to the
22 testimony of the board president at joint appendix 261
23 to 274, where she discusses in detail the programmatic
24 differences. It is true that those five schools were
25 oversubscribed and they were popular, but they all

1 provide unique programs, some of which as we indicated
2 in our briefs, required children to meet certain
3 prerequisites to be able to attend.

4 JUSTICE GINSBURG: Was the board
5 simultaneously trying to introduce similar programs or
6 attractive programs in the undersubscribed schools?

7 MR. KORRELL: Your Honor, I'm perhaps not
8 the best person to answer that. I believe the board has
9 been trying to introduce programs at all of its schools
10 that would make each school unique, and I think that
11 includes the undersubscribed schools as well.

12 Justice Breyer asked a question about the --
13 about the process of this litigation, and my
14 understanding is there was never a lawsuit against
15 Seattle to compel desegregation, that they were always
16 following a plan.

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

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

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