GRATING RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS IN THE CAULDRON OF *PARENTS INVOLVED V. SEATTLE SCHOOL DISTRICT*

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The authors would like to thank Elizabeth Kruman, Mary J. Weindorf and the editors of *The Wayne Law Review* for their dedicated, meticulous and conscientious review and help with this article.

I. INTRODUCTION

School districts today remain racially segregated partly due to vestiges of past discrimination and an expanded resegregation of our public schools. While the resegregation today remains mostly *de facto*, it still presents great dangers to race relations in our country if, from their impressionable years, students are not exposed to the benefits of diversity as part of an overall educational experience.[1] As Chief Justice

1. In this Article, the term "race" has the same meaning as "ethnicity."

Warren noted in *Brown v. Board of Education*,[2] "[s]eparate educational facilities are *inherently* unequal."[3] Consequently, various school districts across the country have voluntarily adopted race-conscious plans in order to ensure a diverse educational experience for students. As revealed in our examination of *Parents Involved in Community Schools v. Seattle School District No. 1*[4] and seven pre-*Parents Involved* cases,[5] these voluntary plans have come under increasing attack. This has spurred great fears of legal repercussions in school administrators, leading them to abandon efforts to implement race-conscious plans or to dismantle those already in place. The media is not helping calm those fears either, and the misperception lingers that race-conscious plans are unconstitutional. If we are to diminish or reverse the growing trend of resegregation and ensure our students are educated in diverse schools, we must educate administrators and policymakers about the continued viability of race-conscious plans in schools. Our article is one step forward in that direction.

The first section of this paper presents the facts of the *Parents Involved* case. The second section examines the U.S. Supreme Court's opinion.[6] The third section presents the plurality opinion.[7] The fourth section discusses the opinion of Justice Kennedy—the swing vote in *Parents Involved*. The fifth section sets forth the opinion of the four dissenting justices.[8] Our examination of the Court opinion, the plurality opinion, the dissenting opinion, and Justice Kennedy's opinion reveals

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2. 347 U.S. 483 (1954).

3. *Id.* at 495 (emphasis added).

4. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 704 (2007).

5. The seven cases are *Brewer v. West Irondequoit Central School District* (*Brewer II*), 212 F.3d 738 (2d Cir. 2000); *Comfort ex rel. Neumyer v. Lynn School Committee*, 100 F. Supp.2d 57 (D. Mass. 2000); *Eisenberg v. Montgomery County Public Schools* (*Eisenberg II*), 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Ho ex rel. Ho v. San Franscisco Unified School District*, 147 F.3d 854 (9th Cir. 1998); *Hunter ex rel. Brandt v. Regents of the University of California*, 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 121 U.S. 186 (2000); *Tuttle v. Arlington County School Board* (*Tuttle II*), 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000); *Wessmann v. Gittens* (*Wessmann II*), 160 F.3d 790 (1st Cir. 1998). For more on these cases, see Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349 (2003).

6. The following justices supported the majority opinion: Chief Justice Roberts, Justice Alito, Justice Thomas, Justice Kennedy and Justice Scalia. *See Parents Involved*, 551 U.S. at 708.

7. The justices in the plurality were Chief Justice Roberts, Justice Scalia, Justice Thomas and Justice Alito. *See id.*

8. The dissenting justices were Justice Stevens, Justice Breyer, Justice Souter and Justice Ginsburg. *See id.*

that the use of race-conscious student assignment plans in public schools is not per se unconstitutional. The sixth section describes the race-conscious plans in seven lower court cases predating the Supreme Court's *Parents Involved* decision. The description of each plan is followed by an analysis of the plan's continued viability after *Parents Involved.* The final section suggests some principles for school districts to follow to ensure constitutional viability of race-conscious student assignment plans.

II. THE FACTS IN PARENTS INVOLVED

The *Parents Involved* case involved two lower court cases consolidated for review of voluntary race-conscious student assignment plans.[9] In one of the cases,[10] Seattle School District No. 1 instituted a series of tiebreakers for determining student assignment to oversubscribed high schools.[11] One of the tiebreakers involved using the applicant's race as well as a school's racial demographics to determine the student's school assignment.[12] The district classified as racially imbalanced schools in which racial demographics varied from the district's overall racial demographics by more than 10 percent.[13] Roughly 41 percent of the district's student population was white and 59 percent nonwhite.[14] The race-conscious student assignment plan classified students using two categories: white versus nonwhite racial groups.[15] The Seattle School District had no history of running segregated schools and was never under a desegregation decree.[16]

Parents of students denied assignment and those who may be denied assignment to the schools of their choice due to the racial tiebreaker challenged its constitutionality under the Equal Protection Clause.[17] The federal district court for the Western District of Washington granted the

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9. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 709-10 (2007).

10. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved I*), 137 F. Supp.2d 1224 (W.D. Wash. 2001).

11. *Id.* at 1225-27

12. *Id.* at 1226.

13. *Id.*, n.2; *see also Parents Involved*, 551 U.S. at 712 ("If an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls 'integration positive,' and the district employs a tiebreaker that selects for assignment students whose race will serve to bring the school into balance.") (internal quotation marks omitted).

14. *Parents Involved I*, 137 F. Supp.2d at 1226; *Parents Involved*, 551 U.S. at 712.

15. *Parents Involved,* 551 U.S. at 723.

16. *Id.* at 712.

17. *Parents Involved I*, 137 F. Supp.2d at 1226.

school district's summary judgment motion, ruling that the racial tiebreaker satisfied the strict scrutiny standard of review.[18] A Ninth Circuit panel reversed.[19] The court held that the school district's interests in preventing racial isolation and achieving racial diversity were compelling interests; however, the district's racial tiebreaker plan was not narrowly tailored to the compelling interests.[20] Rehearing the case en banc, the Ninth Circuit overruled the panel, finding the racial tiebreaker narrowly tailored.[21]

The other case in the Supreme Court *Parents Involved* case was *McFarland v. Jefferson County Public Schools*.[22] In that case, Crystal Meredith challenged, as violative of the Equal Protection Clause, a race-conscious plan implemented by the Jefferson Public Schools.[23] Jefferson County Public Schools had created a voluntary race-conscious assignment plan to increase the black student population of its nonmagnet elementary schools to within the 15 to 50 percent range of the school population.[24] Pursuant to their race-conscious plan, the school district denied the transfer of Crystal's son, Joshua McDonald, to a school near his house because of concerns that the transfer would lead to racial imbalance.[25]

The plan classified students using two categories: black versus other racial groups.[26] Black students constituted about 34 percent of the district's students, and the majority of the other 66 percent were white.[27] The Jefferson County Public Schools had a history of operating segregated public schools.[28] As a result, the district was under a desegregation decree from 1975[29] to 2000 when it was adjudicated to

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18. *Id.* at 1240.

19. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved III*), 377 F.3d 949, 988 (9th Cir. 2004).

20. *Id.*

21. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved IV*), 426 F.3d 1162, 1193 (9th Cir. 2005) (en banc).

22. McFarland v. Jefferson Cnty. Pub. Schs. (*McFarland I*), 330 F. Supp.2d 834 (W.D. Ky. 2004).

23. *Id.* at 836, 838 n.3; *Parents Involved,* 551 U.S. at 717-18.

24. *McFarland I*, 330 F. Supp.2d at 842 ("[T]he 2001 Plan requires each school to seek a Black student enrollment of at least 15% and no more than 50%. This reflects a broad range equally above and below Black student enrollment systemwide.").

25. *Id.* at 838 n.3.

26. *Id.* at 840 n.6; *Parents Involved*, 551 U.S. at 723.

27. *Parents Involved,* 551 U.S. at 716; *McFarland I*, 330 F. Supp.2d at 840.

28. Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson Cnty., 489 F.2d 925 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918 (1974), *reinstated with modifications*, 510 F.2d 1358 (6th Cir. 1974).

29. Hampton v. Jefferson Cnty. Bd. of Educ. (*Hampton I*), 72 F. Supp.2d 753, 754 (W.D. Ky. 1999) (discussing desegregation legal actions in Jefferson County).

have attained unitary status.[30] Desiring to continue the progress under the desegregation decree, in 2001, the school district voluntarily implemented the challenged race-conscious assignment plan.[31] The plan assigned students based on availability of space at each school and the district's racial guidelines.[32] Students were denied admission to schools of their choice if racial imbalance would occur from assignment to the school.[33] The federal district court recognized a compelling interest in racial diversity for the district's plan and found the plan narrowly tailored to the compelling interest.[34] Adopting the district court's reasoning without a written opinion, the Sixth Circuit affirmed.[35] The U.S. Supreme Court granted certiorari to review both cases.[36]

III. THE SUPREME COURT OPINION AND THE RACE-CONSCIOUS ASSIGNMENT PLANS

In both cases, the issue for the Supreme Court's consideration was whether racial classifications can be constitutionally used in assigning students to schools if the school has been adjudicated unitary or has no history of "operating legally segregated schools."[37] In his opinion for the Court, Chief Justice Roberts applied the strict scrutiny standard of review for racial classifications.[38] This standard of review demands that racial classifications used in distributing government burdens or benefits be "narrowly tailored to . . . a compelling government interest."[39] The following presents the compelling interest and narrow-tailoring analysis of the Court.

A. Compelling Interest

The Court opinion identified two compelling interests in its precedents for schools seeking to use racial classifications: (1)

30. Hampton v. Jefferson Cnty. Bd. of Educ. (*Hampton II*), 102 F. Supp.2d 358, 360 (W.D. Ky. 2000).

31. *McFarland I*, 330 F. Supp.2d at 841-48.

32. *Parents Involved*, 551 U.S. at 716.

33. *Id.* at 717.

34. *Id.* at 717-18.

35. McFarland ex rel. McFarland v. Jefferson Cnty. Pub. Schs. (*McFarland II*), 416 F.3d 513, 514 (6th Cir. 2005).

36. *Parents Involved*, 551 U.S. at 715, 718.

37. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 711 (2007).

38. *Id.* at 720.

39. *Id.* at 720 (internal quotation marks omitted).

"remedying the effects of past intentional discrimination;"[40] and (2) diversity at the higher education level,[41] if the diversity is "not focused on race alone but encompass[es] all factors that may contribute to student body diversity."[42] Without explicitly recognizing other compelling interests, the Court suggested the possibility of recognizing others in the future.[43]

The Court determined that the Seattle School District and the Jefferson County Public Schools had no compelling interest in remedying effects of past intentional discrimination.[44] It reasoned that because the Seattle School District had neither been segregated by law nor under a court-ordered desegregation decree, there could be no *remedial* reason for the plan.[45] As for Jefferson County Public Schools, its plan had no remedial reason because dissolution of its desegregation decree in 2000 included adjudication that the district had eradicated vestiges of past intentional discrimination.[46] Therefore, if vestiges had been eliminated, there was no past intentional discrimination to remedy.[47]

The majority opinion suggested the possibility of a compelling interest in student body diversity in the context of K-12 education—if the diversity goes beyond race.[48] In other words, the use of racial classifications for diversity could be a compelling interest if the classification is part of a "broader effort to achieve exposure to widely diverse people, cultures, ideas, and viewpoints,"[49] and not merely race-centric.[50] The Court took issue with the fact that in the assignment plans

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40. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 720-21 (2007) (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

41. *Id.* at 722 (citing Grutter v. Bollinger, 539 U.S. 306, 328 (2003)). Justice Kennedy, the fifth vote in the Court decision, however, suggested that diversity could be a compelling interest in K-12 education. *See id.* at 790-91.

42. *Id.* at 722 (internal citations omitted).

43. *See id.* at 720 ("Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling.").

44. *Id.* at 720-21.

45. *Id.* at 720.

46. *Parents Involved,* 551 U.S. at 721 ("Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.").

47. *Id.*

48. *Id.* at 722-24.

49. *Id.* at 723 (internal citations omitted).

50. *Id.* at 722-24.

for Seattle and Jefferson County, "race, for some students, [was] determinative standing alone."[51]

The Court further objected to the plans because they made race "decisive by itself. It [was] not simply one factor weighed with others in reaching a decision . . . ."[52] The Court determined that even in the use of racial diversity, both school districts' plans used "only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/'other' terms in Jefferson County."[53] The Court observed, however, that "[w]e are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals."[54]

B. Narrow Tailoring

As noted earlier, even racial classifications with compelling interests must be narrowly tailored.[55] The Court found both plans in the case wanting on the narrowly tailored analysis, reasoning that the "minimal effect these classifications have on student assignments . . . suggest[ed] that other means would be effective."[56] The Seattle School District's racial tiebreaker, for instance, only moved "a small number of students between schools."[57] The Court observed that "[e]ighty-four students were assigned to schools that they did not list as a choice, but twenty-nine of those students would have been assigned to their respective school without the racial tiebreaker, and three were able to attend one of the oversubscribed schools due to waitlist and capacity adjustments."[58]

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51. *Id.* at 723.

52. *Parents Involved*, 551 U.S. at 723.

53. *Id.*

54. *Id.* at 723-24 (citing Metro Broad., Inc. v. FCC, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting)). *See also id.* at 724 (internal quotation marks, brackets, and citations omitted):

> The Seattle 'Board Statement Reaffirming Diversity Rationale' speaks of the inherent educational value in [p]roviding students the opportunity to attend schools with diverse student enrollment. But under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is broadly diverse.

55. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 720 (2007).

56. *Id.* at 733.

57. *Id.*

58. *Id.*

Furthermore, "[i]n over one-third of the assignments affected by the racial tiebreaker, then, the use of race in the end made no difference, and the district could identify only fifty-two students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned."[59]

In the case of Jefferson County Public Schools, the Court concluded that the racial tiebreaker had "minimal impact in this process, because they mostly influence[d] student assignment in subtle and indirect ways."[60] For instance, "[e]lementary school students [were] assigned to their first- or second-choice school 95 percent of the time . . . ."[61] The Court noted the district's acknowledgement that "the racial guidelines account[ed] for only 3 percent of assignments."[62] In so ruling, the Court explained that it was not indicating that "*greater* use of race would be preferable";[63] rather, "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications."[64]

In evaluating the plans, the Court declared that narrow tailoring requires "serious, good-faith consideration of workable race-neutral alternatives."[65] In other words, to survive narrow-tailoring analysis, school districts must "show that they considered methods other than explicit racial classifications to achieve their stated goals."[66] The Court found that in the Seattle School District, "several alternative assignment plans-many of which would not have used express racial classifications-were rejected with little or no consideration."[67] As for Jefferson County Public Schools, the Court concluded that it "failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications."[68]

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59. *Id.* at 733-34.
60. *Id.* (internal quotes omitted).
61. *Parents Involved*, 551 U.S. at 734.
62. *Id.*
63. *Id.* (emphasis in original).
64. *Id.*
65. *Id.* at 735 (quoting *Grutter*, 539 U.S. at 339).
66. *Id.*
67. *Parents Involved*, 551 U.S. at 735.
68. *Id.*

IV. THE PLURALITY OPINION AND THE RACE-CONSCIOUS ASSIGNMENT PLANS

A. Compelling Interest

At heart, a plurality of the Court limited the compelling interest in diversity to higher education.[69] If a majority of the Court follows suit, race-conscious assignment plans at the elementary and secondary school levels could not have a compelling interest in diversity.[70] The plurality emphasized that "remedying past *societal* discrimination"[71] is not a compelling interest.[72]

In addition to the two interests discussed above, the school districts asserted others as compelling interests justifying their race-conscious plans.[73] A plurality of the Court examined those other interests and found them non-compelling.[74] For example, the Seattle School District asserted compelling interests in lowering "racial concentration in schools"[75] and in ensuring that nonwhite students' access to the best schools is not hindered by "racially concentrated housing patterns."[76] Echoing these same interests, Jefferson County Public Schools asserted a compelling interest in "educating its students in a racially integrated environment."[77]

Both school districts contended that "educational and broader socialization benefits flow from a racially diverse learning

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69. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*). 551 U.S. 701, 724-25 (2007) (internal quotation marks and citations omitted).

> In upholding the admissions plan in *Grutter,* though, this Court relied upon considerations unique to institutions of higher education, noting that in light of the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. The Court explained that context matters in applying strict scrutiny, and repeatedly noted that it was addressing the use of race in the context of higher education. The Court in *Grutter* expressly articulated key limitations on its holding-defining a specific type of broad-based diversity and noting the unique context of higher education-but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter.*

Id. at 724-25.

70. *Id.* at 722-24.

71. *Id.* at 731 (emphasis added).

72. *Id.*

73. *Id.* at 725.

74. *Id.* at 725-29.

75. *Parents Involved,* 551 U.S. at 725.

76. *Id.* at 725

77. *Id.* (internal quotation marks omitted).

environment";[78] and that because the form of diversity sought was racial diversity, "it [made] sense to promote that interest directly by relying on race alone."[79] According to the plurality, however, these interests represent the same thing: racial balancing, racial proportionality, racial integration and avoidance of racial isolation.[80] The plurality ruled that "[i]n design and operation, the [Seattle and Jefferson County] plans [were] directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."[81] The plurality concluded that "[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society."[82] This, the plurality reasoned, would be "contrary to our repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[83]

B. Narrow Tailoring

Moreover, the plurality ruled that the districts' plans were not narrowly tailored to their asserted socialization and educational racial diversity benefits.[84] Specifically, the plurality found the plans objectionable because they were "tied to each district's specific *racial demographics*, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[85] For instance, the Seattle School District's plan precisely desired "white enrollment of between 31 and 51 percent (within 10 percent of the district white average of 41 percent), and nonwhite enrollment of

78. *Id.* at 725.

79. *Id.* at 725-26.

80. *Id.* at 726-27. *See also id.* at 732 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' While the school districts use various verbal formulations to describe the interest they seek to promote-racial diversity, avoidance of racial isolation, racial integration-they offer no definition of the interest that suggests it differs from racial balance").

81. *Parents Involved*, 551 U.S. at 726.

82. *Id.* at 730.

83. *Id.* (citing Miller v. Johnson, 515 U.S. 900, 911 (1995), quoting *Metro Broadcasting*, 497 U.S., at 602 (O'Connor, J., dissenting)).

84. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 726-27 (2007).

85. *Id.* at 726 (emphasis added).

between 49 and 69 percent (within 10 percent of the district minority average of 59 percent)."[86]

The Jefferson County Public Schools' plan was designed to ensure "black enrollment of no less than 15 or more than 50 percent, a range designed to be equally above and below Black student enrollment systemwide."[87] This was "based on the objective of achieving at all schools . . . an African-American enrollment equivalent to the average district-wide African-American enrollment of 34 percent."[88] The plurality observed that "in the words of Seattle's Manager of Enrollment Planning, Technical Support, and Demographics, [the plans were tailored] to the goal established by the school board of attaining a level of diversity within the schools that approximates the district's overall demographics."[89] In other words, "the *racial demographics* in each district—whatever they happen to be—drive the required diversity numbers."[90] Essentially, any assignment plan tied specifically to racial demographics rather than to a pedagogical concept of diversity for educational benefits would have a difficult time surviving the narrow-tailoring analysis of a plurality of the Court.[91]

Additionally, the Court found the plans in the case failed the narrow-tailoring analysis because of the absence of evidence in the record showing that the "level of racial diversity necessary to achieve the asserted educational benefits *happen[ed] to coincide* with the racial demographics of the respective school districts-or rather the white/nonwhite or black/'other' balance of the districts, since that [was] the only diversity addressed by the plans."[92]

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86. *Id.* (internal quotation marks omitted).

87. *Id.* at 726 (internal quotation marks and citations omitted).

88. *Id.* (internal quotation marks omitted).

89. *Id.* at 727 (internal quotation marks and citations omitted).

90. *Parents Involved*, 551 U.S. at 726-27 (emphasis added) (internal quotation marks and citations omitted).

91. *Id.* at 726-27; *see also id.* 729-30 ("We have many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake'" (quoting Freeman v. J.A. Croson Co., 488 U.S. 469, 507 (1989))).

92. *Id.* at 727. *See also id.* at 727-28 (internal quotation marks and citations omitted):

> Jefferson County's expert referred to the importance of having at least 20 percent minority group representation for the group to be visible enough to make a difference, and noted that small isolated minority groups in a school are not likely to have a strong effect on the overall school. The Jefferson County plan, however, is based on a goal of replicating at each school an African-American enrollment equivalent to the average district-wide African-American enrollment. Joshua McDonald's requested transfer was denied because his race was listed as 'other' rather than black, and allowing the transfer would have had an adverse effect on the racial guideline compliance of Young Elementary,

The plurality opinion characterized each plan as an "extreme measure of relying on race in assignments" even to attain the districts' asserted interests.[93] The plurality reasoned that in the Seattle School District, for instance, with or without the racial tiebreaker, the racial demographics were essentially diverse.[94] In particular, the plurality stated that "[w]hen the actual racial breakdown is considered, enrolling students without regard to their race yields a substantially diverse student body under any definition of diversity."[95] For example, "the racial tiebreaker was applied [at a school in the Seattle School District] because nonwhite enrollment exceeded 69 percent, and resulted in an incoming ninth-grade class in 2000-2001 that was 30.3 percent Asian-American, 21.9 percent African-American, 6.8 percent Latino, 0.5 percent Native-American, and 40.5 percent Caucasian."[96] In contrast, "[w]ithout the racial tiebreaker, the class would have been 39.6 percent Asian-American, 30.2 percent African-American, 8.3 percent Latino, 1.1 percent Native-American, and 20.8 percent Caucasian."[97]

The plurality also found the plans deficient under its narrow-tailoring analysis because they lacked a logical stopping point.[98] The plurality observed that under the plans, "[a]s the districts' demographics shift, so too will their definition of racial diversity," effectively ensuring that the plans would stay in effect indefinitely.[99] The plurality reiterated Justice O'Connor's declaration for the Court granting a 25-year license, beginning in 2003, for limited constitutional use of race-conscious plans for student assignments as an affirmation that all race-conscious plans require a logical stopping point.[100]

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the school he sought to leave. At the time, however, Young Elementary was 46.8 percent black. The transfer might have had an adverse effect on the effort to approach district-wide racial proportionality at Young, but it had nothing to do with preventing either the black or 'other' group from becoming 'small' or 'isolated' at Young.

93. *Id.* at 728.

94. *Id.*

95. *Id.*

96. *Parents Involved*, 551 U.S. at 728.

97. *Id.*

98. *Id.* at 731 (quoting *Croson*, 488 U.S. at 498).

99. *Id.* at 731.

100. *Id.*; *see Grutter,* 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today"); *see also id.* at 376 (Thomas, J., concurring in part and dissenting in part).

V. JUSTICE KENNEDY'S OPINION AND THE RACE-CONSCIOUS ASSIGNMENT PLANS

In this section, we examine Justice Kennedy's concurring opinion because he was the swing vote in the decision, and his vote will be pivotal in any future Supreme Court decision on race-conscious student assignment plans.

A. Compelling Interest

Justice Kennedy agreed with the plurality that racial balancing is not a compelling interest in itself.[101] However, he disagreed with the plurality about diversity as a compelling interest at the elementary and secondary education level: "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[102] He ruled that both school districts had compelling interests in using the race-conscious plans to achieve diversity.[103] He also emphasized that the strict- scrutiny standard of review must govern all Equal Protection Clause cases involving racial classifications for the distribution of burdens or benefits.[104] For Justice Kennedy, a compelling interest in diversity will exist if a race-conscious plan focused on diversity only makes race "one aspect" of the diversity plan.[105]

B. Narrow Tailoring

The core of Justice Kennedy's opinion was his narrow-tailoring analysis. He took exception to the Jefferson County Public Schools plan because the "how and when"[106] of its racial classifications were defined "only in terms so broad and imprecise that they cannot withstand strict

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101. Parents Involved, in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*). 551 U.S. at 701, 783-87 (2007).

102. *Id.* at 783.

103. *Id.*

104. *Id.* at 783-84.

105. *Id.* at 788 ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."); *see also id.* 797-98. This is clearly different from the plurality opinion, which limits the compelling interest in student body diversity to higher education. *Id.* at 724-25. Justice Kennedy also recognizes a compelling interest in avoiding racial isolation. *Id.* at 797.

106. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 784-85 (2007).

scrutiny."[107] He noted that "ambiguities become all the more problematic in light of the contradictions and confusions that result."[108] For example, he pointed out that while Jefferson County Public Schools claimed that its race-conscious plan was not applicable to kindergartens, it was applied to the student in the case for his kindergarten enrollment.[109] Yet, the school district "fail[ed] to explain the discrepancy. Resort to the record, including the parties' Stipulation of Facts, further confuse[d] the matter."[110] Additionally, he observed that the district's plan failed to clearly identify: who made student assignment decisions;[111] the oversight provided for the plan;[112] "the precise circumstances in which an assignment decision will or will not be made on the basis of race";[113] and "how it [was] determined which of two similarly situated children will be subjected to a given race-based decision."[114] He declared that "[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State."[115]

Justice Kennedy found that relative to Jefferson County Public Schools, the Seattle School District was clearer "in describing the methods and criteria used to determine assignment decisions on the basis of individual racial classifications."[116] He opined, however, that "[t]he district, nevertheless . . . failed to make an adequate showing in at least one respect. It . . . failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as 'white,' it . . . employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions."[117]

Additionally, Justice Kennedy observed that the Seattle School District failed to "explain how, in the context of its diverse student population, a blunt distinction between 'white' and 'non-white'"[118] promotes its interests in: (1) curtailing the harm from racial isolation;[119] (2) the educational benefits of diversity;[120] and (3) ensuring that non-white students are not hindered from the "equitable access to the most

107. *Id.* at 785.
108. *Id.*
109. *Id.* at 784.
110. *Id.*
111. *Id.* at 785.
112. *Parents Involved*, 551 U.S. at 785.
113. *Id.*
114. *Id.*
115. *Id.* at 786
116. *Id.* at 786.
117. *Id.*
118. *Parents Involved*, 551 U.S. at 787.
119. *Id.* at 786.
120. *Id.*

popular over-subscribed schools"[121] due to "racially segregated housing patterns."[122] Pointing out the inconsistencies in the district's plan, Justice Kennedy stated that under the plan, "a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not."[123] He characterized the Seattle School District plan as "ill fit"[124] for its asserted interests and concluded that "[f]ar from being narrowly tailored to its purposes, [the Seattle plan] threatens to defeat its own ends, and the school district has provided no convincing explanation for its design."[125]

Justice Kennedy indicated that school districts could use race-conscious student assignment plans if race is not determinative in assigning students.[126] In other words, to survive Justice Kennedy's narrow tailoring muster, school district plans must address diversity "in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[127] At heart, Justice Kennedy does not disapprove of all typing by race, only *individual* typing by race.[128] *Individual* typing includes, for instance, the "assignment of *individual* students by race,"[129] with race being the dispositive factor or the only factor.[130] Justice Kennedy objects to this because of the impact of the typing on the *individual* student at a personalized level.[131] Justice Kennedy would uphold a plan that has "a more nuanced, individual evaluation of school needs and student characteristics that might include race as *a* component."[132] Under such a plan, "the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools."[133] Justice Kennedy made it clear that schools should feel free to

121. *Id.* at 786-87 (quoting Brief for Respondents at 19, *Parents Involved*, 551 U.S. 701 (No. 05-908)).

122. *Id.* at 786 (quoting Brief for Respondents at 19, *Parents Involved*, 551 U.S. 701 (No. 05-908)).

123. *Id.* at 787.

124. *Parents Involved*, 551 U.S. at 787.

125. *Id.*

126. *Id.* at 788-89.

127. *Id.* at 706.

128. *Id.* at 706-07.

129. *Id.* at 789 (emphasis added).

130. *Parents Involved*, 551 U.S. at 788-90.

131. *Id.* at 788-89.

132. *Id.* at 790 (emphasis added).

133. *Id.*

use "facially race-neutral means" to achieve the compelling interest in diversity.[134] He likewise revealed that "tracking enrollments, performance, and other statistics by race"[135] would be constitutionally appropriate.[136] He explained that "[t]hese mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race."[137] Finally, he pointed out that he would not subject such use of race to strict scrutiny.[138]

VI. THE DISSENTING OPINION AND THE RACE-CONSCIOUS ASSIGNMENT PLANS

The dissenting opinion reveals that four dissenting justices would permit school districts to use race-conscious plans and scrutinize such measures under a standard less stringent than traditional strict scrutiny.[139] These justices distinguish between inclusive or beneficial race-conscious plans from plans that seek to exclude people based on race.[140] According to the justices, traditional strict scrutiny, which is "strict in theory but fatal in fact," applies to exclusionary uses of racial classifications; however, race-conscious plans that are beneficial or seek to include people in a benefit on the basis of race should be subject to a form of strict scrutiny that is not "strict in theory but fatal in fact."[141] The dissenting justices approved of the Jefferson County and Seattle School District race-conscious plans because they were inclusionary plans.[142] Consequently, they concluded that the plans were constitutional.[143]

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134. *Id.*

135. *Id.* at 789.

136. *Parents Involved*, 551 U.S. at 789.

137. *Id.*

138. *Id.*

139. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 730-33 (2007).

140. *Id.* at 829-30 (internal quotes and citations omitted):

> [A] well-established legal view of the Fourteenth Amendment. That view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion . . . . There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together . . . . Although the Constitution almost always forbids the former, it is significantly more lenient in respect to the latter.

141. *Id.* at 832-33 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).

142. *Id.* at 804-63.

143. *Id.* at 802, 805-06, 837-57.

A. Compelling Interest

In his opinion for the dissenting justices, Justice Breyer reasoned that "[a] longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it."[144] The Justices are willing to allow school districts to experiment with various strategies and "gravitate toward those that prove most successful or seem to them best to suit their individual needs."[145]

The dissenting justices stated that they would approve a compelling interest in racial integration, racial diversity, racial balancing or avoidance of racial isolation for school districts' race-conscious plans.[146] According to the justices, these terms are interchangeable and refer to "the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience."[147] However, to be upheld as compelling, the interest should have "three essential elements":[148] (i) remedial;[149] (ii) educational;[150] and (iii) democratic.[151]

The remedial element represents "an interest in continuing to combat the *remnants* of segregation caused in whole or in part by these [legal or administrative] school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes."[152] This remedial element "has its roots in preventing what gradually may become the *de facto* resegregation of America's public schools."[153] Since the remedial element encompasses remnants of segregation as well as *de facto* segregation, it indicates that the justices would approve race-conscious plans focused on addressing the effects of *de facto* segregation and the remnants of segregation.[154]

144. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 701, 823 (2007).

145. *Id.* at 822 (quoting Comfort v. Lynn Sch. Comm., 418 F.3d 1, 28 (1st Cir. 2005) (Boudin, C.J., concurring) (citing United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J. concurring)).

146. *Id.* at 838.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Parents Involved*, 551 U.S. at 839.

151. *Id.* at 840.

152. *Id.* at 838 (emphasis added).

153. *Id.*

154. *Id.* at 839-43.

The remedial element is not an interest in eliminating the remnants of "general *societal* discrimination, but of primary and secondary school segregation."[155] The Justices also indicated that remedial interests do not "vanish the day after a federal court declares that a district is unitary."[156]

The second element is the educational element, which represents the "interest in overcoming the adverse educational effects produced by and associated with highly segregated schools."[157] In other words, the justices would uphold race-conscious plans targeted to overcome adverse educational consequences of highly segregated schools.[158]

The third element—the democratic element—represents the "interest in producing an educational environment that reflects the pluralistic society in which our children will live."[159] In other words, the dissenting justices would uphold district race-conscious plans seeking to ensure that schools in the district are reflective of American pluralistic society.[160] This element was also described as "an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation."[161] The Justices found the Jefferson County and Seattle School District plans had these three essential elements, leading them to conclude that the school districts had compelling interests in implementing the plans.[162]

B. Narrow Tailoring

The dissenting opinion found the Jefferson County and Seattle School District plans narrowly tailored to a compelling interest.[163] A composite of different factors led the justices to conclude that the districts' plans should pass narrowly tailoring analysis.[164] The first factor required the race-conscious plans to only "set the outer bounds of *broad* ranges."[165] The justices explained that "the broad ranges are less like a

155. *Id.* at 843 (emphasis added) (internal quotation marks and citations omitted).
156. *Parents Involved,* 551 U.S. at 844 (internal quotation marks omitted).
157. *Id.* at 839.
158. *Id.*
159. *Id.* at 840 (internal quotation marks omitted).
160. *Id.*
161. *Id.*
162. *Parents Involved,* 551 U.S. at 838-45.
163. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 846-55 (2007).
164. *Id.* at 846.
165. *Id.*

quota and more like ... useful starting points."[166] In other words, race must "constitute but one part of plans that depend primarily upon other, nonracial elements."[167] Unlike the plurality and Justice Kennedy, the dissenting justices indicated that the district race-conscious plans in this case were simply "one part of plans that depend primarily upon other, nonracial elements."[168] According to the Justices, the primary element in the race-conscious assignment plans in both districts was student *choice*, not race.[169] The Justices explained that:

> [i]n Seattle, for example, in more than 80% of all cases, that choice alone determines which high schools Seattle's ninth graders will attend. After ninth grade, students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria). *Choice,* therefore, is the 'predominant factor' in these plans. *Race* is not.[170]

The second factor states that "broad-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored . . . ."[171] Consequently, if race-conscious plans use broad-range limits, they might survive the dissenting justices' "narrow tailoring" review.[172] The Justices concluded that the broad-range limits in the districts' plans were less burdensome, as they ensured that race was "a factor only in a fraction of students' non-merit-based assignments—not in large numbers of students' merit-based applications."[173]

The third factor examines "the manner in which the school boards developed" the race-conscious plans to determine whether the "plan embodies the results of local experience and community consultation."[174] The plan is examined to determine if it was "the product of a process that has sought to enhance student choice, while diminishing the need for mandatory busing."[175] Further, under the third factor, the plan is analyzed to determine if its "use of race-conscious elements is *diminished* compared to the use of race in preceding integration

166. *Id.* at 847 (internal quotation marks omitted).
167. *Id.* at 846.
168. *Id.*
169. *Parents Involved,* 551 U.S. at 846.
170. *Id.*
171. *Id.* at 847.
172. *Id.* at 847-48.
173. *Id.* at 847.
174. *Id.* at 848.
175. *Parents Involved,* 551 U.S. at 848.

plans."[176] The justices concluded that both race-conscious plans in the case passed this third-factor analysis.[177]

Under the fourth factor, Justice Breyer suggested that the justices are more likely to find a plan narrowly tailored if there is a "lack of reasonably evident alternatives."[178] However, he cautioned that demonstration of a lack of reasonable alternatives does not require "proof that there is no hypothetical *other* plan that could work as well . . . ."[179]

VII. THE CASE OF SEVEN: RACE-CONSCIOUS ADMISSIONS

A. Brewer v. West Irondequoit Central School District[180]

1. The West Irondequoit Central School District Plan

Jessica L. Haak, a white student, was denied transfer to Iroquois Elementary School, a suburban school with predominantly white students in the West Irondequoit Central School District, from the high-minority district in which she resided—Rochester City School District (Rochester District)—because of a race-conscious interdistrict transfer program.[181] This state-funded program, challenged in this case, was the result of a voluntary agreement between six districts in Monroe County, N.Y., to decrease "racial isolation within their boundaries . . . ."[182] The goals set out in the program's mission statement were: "Reducing Minority Group Isolation; Encouraging Intercultural Learning; Promoting Academic Excellence; [and] Fostering Responsible Civic Leadership."[183]

The program was established "to reduce the percentage of minority students in predominately minority city schools, and to increase the percentage of minority students in predominately white suburban schools."[184] State regulations governing the program defined racial

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176. *Id.*

177. *Id.*

178. *Id.* at 855. Recall, this was the fourth factor the dissenting justices considered in their narrow-tailoring analysis.

179. *Parents Involved*, 551 U.S. at 850.

180. *Brewer v. West Irondequoit Central School District* (*Brewer II*), 212 F.3d 738 (2d Cir. 2000).

181. *Id.* at 741.

182. *Id.* The program was operated pursuant to New York state law. *See* N.Y. EDUC. LAW § 3602(36) (McKinney 1995). *See also* N.Y. COMP. CODES R. & REGS. tit. 8, § 175.24 (1999)).

183. *Brewer II*, 212 F.3d at 742.

184. *Id.* (citing Brewer v. W. Irondequoit Cent. Sch. Dist. (*Brewer I*), 32 F. Supp.2d 619, 621 (W.D.N.Y. 1999)).

isolation as a situation in which "a school or school district enrollment consists of a predominant number or percentage of students of a particular racial/ethnic group."[185] Participating districts "must demonstrate each year that implementation of the [p]rogram will reduce racial isolation by transferring minority pupils, nonminority pupils or both on a voluntary basis between participating urban and suburban districts."[186] The state regulations defined minority student as "a pupil who is of Black or Hispanic origin or is a member of another racial minority group that historically has been the subject of discrimination..."[187]

Under the program, only minority students could transfer from Rochester District schools to suburban schools, while only nonminority students could transfer to Rochester District schools from suburban schools.[188] In pertinent part, the districts described their program as follows: "once the [student] applicant is met in person by a Program Administrator, a question may be raised as to the student's race as a result of the student's name, manner of speech and phrasing, and personal appearance of the child as observed during an interview or orientation meeting."[189] During the 1998-99 school year, about 580 minority students got to attend suburban schools as a result of the program.[190] That same year, no nonminority student, except Jessica, was allowed to transfer to a suburban school district.[191]

Jessica was initially accepted into the program as a transfer even after the assistant principal of Iroquois Elementary School saw, *in person*, that she was white.[192] However, her transfer was ultimately denied on the basis of race "after another administrator [at Iroquois Elementary] became concerned that [Jessica] Haak was not a minority pupil when she saw Haak in person and [later] verified her race as Caucasian/White in the Rochester District records . . . ."[193] Notwithstanding the program, the Rochester District remained heavily minority, and indeed, the "concentration of minority students"

185. *Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 8, § 175.24(a)(2) (1999)).

186. *Id.* (internal quotation marks omitted) (citing N.Y. COMP. CODES R. & REGS. tit. 8, § 175.24(c)(1) (1999)).

187. *Id.* at 742 (citing N.Y. COMP. CODES R. & REGS. tit. 8, § 175.24(a)(1) (1999)). The court noted that the participating districts included American Indians and Asians within the group of minorities. *See Id.* at 743, n.6.

188. *Id.* at 741.

189. *Brewer II*, 212 F.3d at 742-43 (internal quotation marks omitted).

190. *Id.* at 743.

191. *Id.*

192. *Id.*

193. *Id.* at 741.

increased.[194] Jessica's parents sued the West Irondequoit Central School District, the program, and various school officials claiming a violation of her rights under the Equal Protection Clause.[195] The district court issued a mandatory preliminary injunction[196] against the defendants and ordered them to allow Jessica to transfer.[197] The defendants appealed, seeking reversal of the injunction[198] and presented various interests as compelling reasons for the program: (1) preparation of students for "adult society, in which they will encounter and interact with people from many different backgrounds";[199] (2) "mak[ing] students more tolerant and understanding of others throughout their lives";[200] (3) "eliminating *de facto* segregation."[201]

In reviewing the mandatory preliminary injunction, the circuit court concluded that there was insufficient basis in the record before it to rule on whether there was *de facto* segregation in the participating districts.[202] The court remanded on this issue, finding "a substantial question as to the existence of *de facto* segregation in the participating school districts in Monroe County, such that the defendants should be given an

194. *Id.* at 741.

195. *Brewer I*, 32 F.Supp.2d at 632-33.

196. *See Brewer II*, 212 F.3d at 743-44, for the standard governing preliminary injunctions.

> In most cases, a party seeking a preliminary injunction must demonstrate (1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its favor. In some cases, a significantly higher standard applies. The moving party must make a "clear" or "substantial" showing of a likelihood of success in two instances: where (1) the injunction sought is mandatory, *i.e.*, "will alter, rather than maintain, the status quo"; or (2) the injunction sought "will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits.

Brewer II, 212 F.3d at 743-44 (internal citations omitted) (citing Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir.1996)). Recall, this case involved a mandatory preliminary injunction. *See Brewer II*, 212 F.3d at 744. *Cf.* Comfort ex rel. Neumyer v. Lynn Sch. Comm., 100 F. Supp.2d 57, 60-61 (2000) (ruling that the test for preliminary injunctions "is a four part one: The Court must find: (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction").

197. *Brewer I*, 32 F. Supp.2d at 634.

198. *Brewer II*, 212 F.3d at 743.

199. *Id.* at 745.

200. *Id.*

201. *Id.* (emphasis in original).

202. *Id.*

opportunity during a full trial on the merits to address this factual issue . . . ."[203] The court also found that the plaintiffs had failed to show a clear likelihood that they would succeed on the merits.[204]

The court observed that there was "much disagreement among the circuit courts"[205] as to whether the only compelling interest for race-conscious classifications was the remedy of past discrimination.[206] Additionally, the court emphasized that the Second Circuit had never ruled out diversity, or other non-remedial interests, as compelling interests in education.[207] The court stated that, based on its precedent and the lack of palpable Supreme Court precedent on compelling interests in education beyond remedial interests, it could not conclude "that reduction of racial isolation to ameliorate what may be *de facto* segregation in the voluntarily participating public schools [was] not a compelling state interest . . . ."[208] Relying on the circuit's precedents, the court then ruled that the reduction of *de facto* segregation constituted a compelling interest.[209]

In so ruling, the circuit court narrowed the question to ask "whether the [p]rogram [was] narrowly tailored to achieve its primary goal of reducing racial isolation resulting from *de facto* segregation." [210] The court found that the plaintiffs failed to meet the greater standard required of them in preliminary injunction.[211] Thus, there were insufficient grounds, given the record before the court, to conclude that the program was not narrowly tailored.[212] The court declared that "[i]f reducing racial isolation is—standing alone—a constitutionally permissible goal, as we have held it is . . . , then there is no more effective means of achieving that goal than to base decisions on *race*."[213] Consequently, the court

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203. *Id.* at 746.

204. *Brewer II*, 212 F.3d at 746-47.

205. *Id.* at 747.

206. *Id.*

207. *Id.* at 749.

208. *Id.* at 752.

209. *Id.* at 749-52 (citing Parent Ass'n of Andrew Jackson High Sch. v. Ambach (*Andrew Jackson I*), 598 F.2d 705 (2d Cir. 1979) and Parent Ass'n of Andrew Jackson High Sch. v. Ambach (*Andrew Jackson II*), 738 F.2d 574, 577, 579 (2d Cir. 1984)). *See Brewer II*, 212 F.3d at 752 ("a compelling interest *can* be found in a program that has as its object the reduction of racial isolation and what appears to be *de facto* segregation").

210. *Brewer II*, 212 F.3d at 752.

211. *Id.*

212. *Id.*

213. *Id.* (emphasis added).

vacated the injunction and order allowing Jessica to transfer;[214] the case was remanded for a trial consistent with the Second Circuit opinion.[215]

2. *Parents Involved Analysis*

a. *Compelling Interest*

The dissenters in *Parents Involved* would likely deem the West Irondequoit Central School District's interest in decreasing racial isolation compelling. Recall, in *Parents Involved*, the dissenting justices stated that avoidance of racial isolation constituted a compelling interest.[216] The Irondequoit plan would satisfy the three elements these Justices require for a compelling interest as long as the district could support them with evidence.[217] The district's interest in eradicating *de facto* segregation[218] would satisfy the remedial element, which "has its roots in preventing what gradually may become the *de facto* resegregation of America's public schools."[219] The district would need to further explain the plan's goal of academic excellence,[220] in order to tie it to the "interest in overcoming the adverse educational effects produced by and associated with highly segregated schools"[221]—the educational element recognized by the *Parents Involved* dissenting justices.[222] The democratic element, representing the "interest in producing an educational element that reflects the pluralistic society in which our children will live"[223] would be satisfied by: (1) the district's intercultural learning goal;[224] (2) the district's interest in "preparing students to function in adult society, in which they will encounter and interact with people from many different backgrounds";[225] (3) the district's interest in

214. *Id.* at 753.
215. *Id.*
216. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 838 (2007).
217. Recall, the circuit court remanded, stating that there was "a substantial question as to the existence of *de facto* segregation in the participating school districts in Monroe County." *Brewer II*, 212 F.3d at 746.
218. *Id.* at 752.
219. *Parents Involved*, 551 U.S. at 838.
220. *Id.* at 742.
221. *Parents Involved*, 551 U.S. at 839.
222. *Id.*
223. *Id.* at 840 (internal quotation marks omitted).
224. *Brewer II*, 212 F.3d at 742.
225. *Id.* at 745.

"mak[ing] students more tolerant and understanding of others throughout their lives";[226] and (4) the district's goal in fostering civic leadership.[227]

A plurality of the Supreme Court would find the district's interest non-compelling, as those justices ruled that avoidance of racial isolation, and promotion of educational and socialization benefits through racially diverse educational environments are synonymous with racial balancing.[228] These interests, the plurality ruled, were "illegitimate."[229] This plurality also seemed more inclined to limit a compelling interest in diversity to higher education.[230] Justice Kennedy—the swing vote—also declared that racial balancing is not a compelling interest,[231] and was only willing to recognize diversity as a compelling interest if race is only "one aspect" of the race-conscious plan.[232] The district's race-conscious plan, "designed to reduce the percentage of minority students in predominately minority city schools, and to increase the percentage of minority students in predominately white suburban schools,"[233] could present problems for the district with the plurality and Justice Kennedy.

b. Narrow Tailoring

It is unclear if the district plan would survive the dissenting justices' narrow-tailoring analysis. The plan would have to use broad percentage ranges, presented as a "useful starting point" [234] for achieving racial diversity–something not currently evident. Further, the district would have to show that the core of the race-conscious plan was student choice, rather than race.[235] This would present a problem, as race seemed to be at the core of the West Irondequoit Central School District plan. Jessica's case typifies this, because even though she was initially accepted,[236] she was ultimately denied the transfer solely because of her race when an "administrator became concerned that [Jessica] Haak was not a minority pupil when she saw Haak in person and verified her race as

226. *Id.*
227. *Id.* at 742.
228. *Parents Involved*, 551 U.S. at 725-27.
229. *Id.* at 726.
230. *Id.* at 724-25.
231. *Id.* at 783-87.
232. *Id.* at 788.
233. *Brewer II*, 212 F.3d at 742 (citing *Brewer I*, 32 F.Supp.2d at 621).
234. *Parents Involved*, 551 U.S. at 847. Recall, this was the first factor considered in the dissenting justices' narrow-tailoring analysis.
235. *Id.*
236. Additionally, Jessica was the only nonminority student granted a transfer to a suburban district. *Brewer II*, 212 F.3d at 742-43.

Caucasian/White in the Rochester District records."[237] The racial focal point of the plan was also evident in its description: "once the [student] applicant is met in person by a [p]rogram [a]dministrator, a question may be raised as to the student's race as a result of the student's name, manner of speech and phrasing, and personal appearance of the child as observed during an interview or orientation meeting."[238]

The district also failed to show that its race-conscious plan constituted a "less burdensome"[239] plan with "broad-range limits on voluntary school choice plans . . . ."[240] Indeed, the facts discussed immediately above show that the West Irondequoit Central School District plan was not designed with "broad-range limits on voluntary school choice plans . . . ."[241] The dissenting justices found the plans in the *Parents Involved* case less cumbersome, because race was "a factor only in a fraction of students' non-merit-based assignments-not in large numbers of students' merit-based applications."[242] On the other hand, it is evident that the West Irondequoit Central School District plan was more cumbersome. While 580 minority students were granted transfers to suburban schools the year in which Jessica applied, Jessica was the only Caucasian/White student granted a transfer; nevertheless, even Jessica was eventually denied transfer.[243] Therefore, race was a factor in more than "a fraction of students' non-merit-based assignments."[244]

Further, the record does not show that the district would pass the dissenting justices' narrow-tailoring analysis because the district did not prove that its plan "embodie[d] the results of local experience and community consultation . . . the product of a process that has sought to enhance student choice." [245] Additionally, the record did not appear to include district examination of any "reasonably evident alternatives."[246]

For the precise factual reasons discussed above, the West Irondequoit Central School District plan would fail Justice Kennedy's narrow-tailoring analysis. Justice Kennedy would object to a plan which

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237. *Id.* at 743.

238. *Id.* at 742-43 (internal quotation marks omitted).

239. *Parents Involved*, 551 U.S. at 847.

240. *Id.* Recall, this was the second factor the dissenting justices considered in their narrow-tailoring analysis.

241. *Id.*

242. *Id.*

243. *Brewer II*, 212 F.3d at 743.

244. *Parents Involved*, 551 U.S. at 847.

245. *Id.* at 848. Recall, this was the third factor the dissenting justices considered in their narrow-tailoring analysis.

246. *Id.* at 855. Recall, this was the fourth factor the dissenting justices considered in their narrow-tailoring analysis.

defines the "how and when"[247] of its racial classifications "in terms so broad and imprecise that they cannot withstand strict scrutiny."[248] While the West Irondequoit Central School District plan described the when and how of its racial classifications,[249] its "broad and imprecise" nature was evident in the description: "once the [student] applicant is met in person by a [p]rogram [a]dministrator, a question may be raised as to the student's race as a result of the student's name, manner of speech and phrasing, and personal appearance of the child as observed during an interview or orientation meeting."[250] The "broad and imprecise" nature of the plan is likewise evident in its implementation with respect to Jessica, who was first accepted for transfer after the assistant principal of Iroquois Elementary School saw, in person, that she was white.[251] Yet, she was later denied transfer when "another administrator became concerned that [Jessica] Haak was not a minority pupil when she saw Haak in person and verified her race as Caucasian/White in the Rochester District records."[252]

These facts likewise reveal that the Irondequoit plan would fail Justice Kennedy's narrow-tailoring analysis for failing to clearly identify who made student assignment decisions,[253] the oversight provided for the plan,[254] "the *precise* circumstances in which an assignment decision will or will not be made on the basis of race";[255] as well as "how it [was] determined which of two similarly situated children will be subjected to a given race-based decision."[256] The plan, and its application to Jessica, revealed its engagement in "individual typing by race."[257] To pass Justice Kennedy's analysis, however, the plan must address diversity "in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[258] Further, the plan must include "a more nuanced, individual evaluation of school needs and student characteristics that might include race as *a* component."[259]

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247. *Id.* at 784-85.
248. *Id.* at 706.
249. *See generally Brewer II*, 212 F.3d at 742, and *Brewer I*, 32 F. Supp.2d 619.
250. *Brewer II*, 212 F.3d at 742-43 (internal quotation marks omitted).
251. *Id.* at 743.
252. *Id.*
253. *Parents Involved*, 551 U.S. at 785.
254. *Id.*
255. *Id.* (emphasis added).
256. *Id.* (emphasis added).
257. *Id.* at 788-89.
258. *Id.*
259. *Parents Involved*, 551 U.S. at 790 (emphasis added).

The *Parents Involved* majority would find the plan not narrowly tailored because of its minimal impact in achieving its goals.[260] For example, the record revealed that the Rochester District—one of the participating districts in the plan and Jessica's district of residence—continued to be a heavily-minority district.[261] In fact, the "concentration of minority students" actually increased after the plan was implemented.[262] To pass narrow tailoring muster with the majority, a party must present evidence showing "serious [and] good faith consideration of workable race-neutral alternatives" [263] prior to adoption of the plan.[264] Since the plan was "designed to reduce the percentage of minority students in predominately minority city schools, and to increase the percentage of minority students in predominately white suburban schools,"[265] it was "tied to each district's specific *racial demographics*, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[266] Consequently, a plurality of the *Parents Involved* Court would object to it.[267] Finally, while the plan required participating districts to "demonstrate *each year* that implementation of the [p]rogram will reduce racial isolation by transferring minority pupils, nonminority pupils or both on a voluntary basis between participating urban and suburban districts,"[268] it failed to specify a logical stopping point as a plurality of the Court would demand.[269]

B. Comfort Ex Rel. Neumyer v. Lynn School Committee[270]

1. The Lynn School District Plan

The Lynn School District in Massachusetts implemented a race-conscious plan titled "A Voluntary Plan for School Improvement and the

260. *See id.* at 733-34.
261. *Brewer II*, 212 F.3d at 741.
262. *Id.* at 743.
263. *Parents Involved*, 551 U.S. at 735 (quoting *Grutter*, 539 U.S. at 339).
264. *Id.* at 735.
265. *Brewer II*, 212 F.3d at 742 (citing *Brewer I*, 32 F. Supp.2d 619, 621 (W.D.N.Y. 1999)).
266. *Parents Involved*, 551 U.S. at 726 (emphasis added).
267. *See id.*
268. *Brewer II*, 212 F.3d at 742 (emphasis added) (internal quotation marks omitted) (citing N.Y. COMP. CODES R. & REGS. tit. 8, § 175.24(c)(1) (1999)).
269. *Parents Involved*, 551 U.S. at 731 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989)).
270. 100 F. Supp.2d 57 (D. Mass. 2000).

Elimination of Racial Isolation."[271] Under the Lynn plan, students could attend their neighborhood schools, however, if any student sought to transfer out of his neighborhood school, the district considered race in determining whether to approve the transfer.[272] The district could deny approval of the transfer if it would increase "racial isolation or racial imbalance."[273] Racial isolation was defined as "too low a minority percentage," while racial imbalance was defined as "too high a minority percentage" in the sending or receiving schools involved in a particular transfer.[274] There was no restriction on transfers between racially balanced schools.[275] Racial balance was defined as "the condition in which a particular elementary school's white-minority ratio is within 15 percent of the white-minority ratio of the students in the school system, and in the case of a middle or high school, when the ratio is within 10 percent of the white-minority ratio of the students in the school system."[276] While its high schools were racially balanced, none of the district's elementary schools were racially balanced, and only two of its five middle schools were racially balanced.[277]

Under the Lynn plan, for example, a white student would be denied transfer out of Harrington Elementary School (80-percent minority) because it would increase the school's racial imbalance.[278] Likewise, a minority student would be denied transfer out of Lynn Wood Elementary School (81-percent white) because it would increase the school's racial isolation.[279] Thus, "a white student attending any elementary school would always be eligible to transfer to the Harrington elementary school because it would decrease racial imbalance, and a minority student would always be eligible to transfer to the Lynn Wood elementary school because it would decrease racial isolation."[280] Once the district assigns a student to a non-neighborhood school, it automatically reassigns the student to that same school for the next school year.[281] If the school became oversubscribed, however, the Lynn Plan required the district to weigh the student's race in deciding whether to reassign the student to

271. *Id.* at 59.
272. *Id.*
273. *Id.*
274. *Id.* at 61.
275. *Id.*
276. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 61.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 62.

yet another.[282] These rules on student transfers only served as "the starting point" for the plan.[283] In other words, they only determined "initial eligibility for transfer, but [were] not necessarily determinative of the outcome of the request."[284] For instance, parents could appeal denial of transfer requests and exceptions for hardship were granted in certain situations.[285] Efforts were also made to discuss alternatives with parents whose children were denied transfer requests.[286]

The plaintiffs, parents of students in the school district, sued the state, the City of Lynn, the school districts and various school officials, challenging the constitutionality of the Lynn Plan under the Equal Protection Clause.[287] They sought a preliminary injunction against implementation of the plan.[288] The federal district court for the District of Massachusetts denied the motion for preliminary injunction because the plaintiffs failed to show a clear likelihood of success on the merits and a threat of irreparable harm from a denial of the injunction.[289] In examining the constitutionality of the plan, the court declared: "it cannot be said—as the plaintiffs do—that *any* government consideration of race in devising school assignment policies is unconstitutional."[290] Instead, without further clarification, the court ruled that the constitutionality of race-conscious student assignment plans must depend on: (1) the plan's actual operation;[291] (2) "the context in which it is administered";[292] and (3) the plan's purposes.[293] The court indicated that it would not accept "generalities emanating from the subjective judgments of local officials to dictate whether a particular percentage of a particular racial or ethnic group is sufficient or insufficient" in attaining the school district's asserted compelling interests.[294] The Lynn School District asserted as

282. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 62.
283. *Id.* at 61.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* at 59-60. They also challenged the constitutionality of a state statute that provided additional funds to the district for its implementation of the plan. *Id.* at 59.
288. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 59-60. They also sought to enjoin the state law granting the additional aid to the district for implementation of the plan. *Id.* The court refused to grant the injunction, stating the Lynn Plan was not a "product" of the statute. *See id.* at 62 (noting that the challenged statute did not "mandate, encourage, or reward the school district for the implementation of the Lynn Plan").
289. *Id.* at 59-60, 63-69.
290. *Id.* at 60.
291. *Id.*
292. *Id.*
293. *Id.* at 60.
294. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 66. (quoting Wessman v. Gittens, 160 F.3d 790, 800 (1st Cir. 1998)).

compelling interests (1) diversity;[295] and (2) "the educational benefits of preparing students to live in a pluralistic society."[296]

2. Parents Involved Analysis

a. Compelling Interest

The Lynn School District argued that its plan was designed to eliminate racial isolation.[297] In fact, this interest—asserted as compelling—was evident in the title of the plan: "A Voluntary Plan for School Improvement and the Elimination of Racial Isolation."[298] Student assignments under the plan were based on their impact on racial imbalance or racial isolation.[299] The district also asserted diversity[300] and "the educational benefits of preparing students to live in a pluralistic society"[301] as compelling interests.[302]

The dissenting justices in *Parents Involved* characterized the interest in racial diversity, racial balancing, and avoidance of racial isolation as one and the same.[303] These Justices would uphold this interest as compelling if the Lynn School District could demonstrate the interest has an educational element, a remedial element, and a democratic element.[304] The educational element requires the district to show that its interest in diversity or avoidance of racial isolation represents an "interest in overcoming the adverse educational effects produced by and associated with highly segregated schools."[305] To prove the educational element, the district would have to show that the plan was being implemented at highly segregated schools.[306] It is evident from the record that the Lynn School District could satisfy this requirement. For example, Harrington Elementary School was 80-percent minority whereas Lynn Wood Elementary School was 81-percent white.[307] Further, none of its

295. *Id.* at 64-65.
296. *Id.* at 66.
297. *See generally, id.*
298. *Id.* at 59.
299. *Id.*
300. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 64-65.
301. *Id.* at 66.
302. *See id.* at 64-66.
303. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. at 701, 838. (2007).
304. *Id.*
305. *Id.* at 839.
306. *Id.*
307. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 61.

elementary schools were racially balanced,[308] and of its five middle schools, only two were racially balanced.[309] The district then needs to show that there are "adverse educational effects produced by and associated with [the] highly segregated schools."[310]

The remedial interest represents an interest in combating remnants of segregation or preventing *de facto* resegregation of schools.[311] Here, the Lynn School District would have to develop the record to demonstrate that there are remnants of segregation in the district or that its plan is designed to prevent *de facto* resegregation of its schools.[312] The democratic element represents an "interest in producing an educational element that reflects the pluralistic society in which our children will live."[313] The district's asserted compelling interest in "the educational benefits of preparing students to live in a pluralistic society"[314] suggests it might be able to satisfy the democratic element.[315]

The district's asserted compelling interests would not be approved as such by a plurality of the Court, who made it clear that the avoidance of racial isolation and the promotion of educational benefits through racially diverse elementary or secondary schools were "illegitimate" interests.[316] These justices would also likely limit diversity as a compelling interest in the higher education context.[317] Justice Kennedy would agree that racial balancing is not a compelling interest.[318] However, to gain his vote on diversity as a compelling interest, the district must modify its race-conscious plan to make race only "one aspect" of the overall plan.[319] As it stands, the plan's core focus on racial imbalance—"too high a minority percentage" [320]—and racial isolation—"too low a minority percentage"[321]—could present problems for the district with Justice Kennedy.[322]

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308. *Id.*
309. *Id.*
310. *Parents Involved*, 551 U.S. at 839.
311. *Id.* at 838.
312. *See id.*
313. *Id.* at 840 (internal quotation marks omitted).
314. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 66.
315. As with every other case discussed here, the district has to prove the compelling interest, not merely assert it. *See generally Parents Involved*, 551 U.S. 701, 703.
316. *Id.* at 726.
317. *Id.* at 724-25.
318. *Id.* at 783-87.
319. *Id.* at 788.
320. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 61.
321. *Id.*
322. *See Parents Involved*, 551 U.S. 783-87.

b. Narrow Tailoring

One of the narrow tailoring requirements of the dissenting justices in *Parents Involved* is that a constitutionally viable plan must use broad ranges, which serve as a "useful starting point" [323] for achieving racial diversity.[324] One cannot conclusively say whether the district's range would be adequately "broad" for the dissenting justices. The district's plan defined racial balance as

the condition in which a particular elementary school's white-minority ratio is within 15 percent of the white-minority ratio of the students in the school system, and in the case of a middle or high school, when the ratio is within 10 percent of the white-minority ratio of the students in the school system.[325]

While the 15 percent or 10 percent may or may not be considered "broad" by the *Parents Involved* dissenting justices, the district should prudentially further broaden the range. The district presented its student transfer standards as "the starting point"[326] for the plan, and this could help gain the votes of the dissenting justices. The district would need to develop its race-conscious plan so that race is "but one part of plans that depend primarily upon other, nonracial elements."[327] To satisfy the dissenting justices, the district should ensure that the primary element in its race-conscious assignment plan is student *choice* not race, [328] something not readily evident in the plan presented in *Comfort ex rel. Neumyer*.[329]

Further, for the dissenting justices, narrow tailoring requires that the race-conscious plan be a "less burdensome"[330] plan with "broad-range limits on voluntary school choice plans . . . ."[331] With the incertitude of the broad-range requirement, the challenge for the district could be in showing that its plan is "less burdensome."[332] The justices described a "less burdensome" plan as one in which race constitutes "a factor only in a fraction of students' non-merit-based assignments-not in large numbers

323. *Id.* at 846. Recall, this was the first factor considered in the dissenting justices' narrow-tailoring analysis.

324. *Id.*

325. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 61.

326. *See id.*

327. *Parents Involved*, 551 U.S. at 846.

328. *Id.*

329. *See generally, Comfort ex rel. Neumyer*, 100 F. Supp.2d 57.

330. *Parents Involved*, 551 U.S. at 847.

331. *Id.* Recall, this was the second factor the dissenting justices considered in their narrow-tailoring analysis.

332. *Id.*

of students' merit-based applications."[333] As revealed in *Comfort ex rel. Neumyer*, since none of the district's elementary schools were racially balanced, and with only two of five middle schools racially balanced, the district's plan was probably significantly cumbersome compared to the number of students it affected.[334] Additionally, for the dissenting justices' votes, the district should rework its plan so that it "embodies the results of local experience and community consultation [and the plan is] the product of a process that has sought to enhance student choice . . . ."[335] Finally, the district needs to present evidence that it considered "reasonably evident alternatives"[336] before adopting its race-conscious plan.

As for Justice Kennedy's narrow-tailoring analysis, the district would need to develop the record to clearly define the "how and when"[337] of its racial classifications.[338] It must not be "in terms so broad and imprecise,"[339] for as Justice Kennedy emphasized, "[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State."[340] The plan should clearly state: who made student assignment decisions;[341] the oversight provided for the plan;[342] "the precise circumstances in which an assignment decision will or will not be made on the basis of race";[343] and "how it [was] determined which of two similarly situated children will be subjected to a given race-based decision."[344] As the facts above reveal,[345] the Lynn School District plan involved "individual typing by race."[346] For example, for any student seeking a transfer out of a neighborhood school, the student's race relative to the racial makeup of the sending and receiving schools played the key role.[347] To pass Justice Kennedy's analysis, however, the plan must address diversity "in a general way and

333. *Id.*
334. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 61.
335. *Parents Involved*, 551 U.S. at 848. Recall, this was the third factor the dissenting justices considered in their narrow-tailoring analysis.
336. *Id.* at 855. Recall, this was the fourth factor the dissenting justices considered in their narrow-tailoring analysis.
337. *Id.* at 784-85.
338. *Id.*
339. *Id.* at 706.
340. *Id.* at 786.
341. *Parents Involved*, 551 U.S. at 785.
342. *Id.*
343. *Id.*
344. *Id.*
345. *See also Comfort ex rel. Neumyer*, 100 F. Supp.2d at 61.
346. *Parents Involved*, 551 U.S. at 788-89.
347. *Comfort ex rel. Neumyer*, 100 F. Supp.2d at 59.

without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[348] The plan must include "a more nuanced, individual evaluation of school needs and student characteristics that might include race as *a* component."[349]

To garner the support of the *Parents Involved* majority, the Lynn School District must show that its plan had more than a minimal effect in achievement of its goals.[350] Furthermore, the district would be required to provide evidence that it seriously considered, in good faith, "workable race-neutral alternatives"[351] before implementing the race-conscious plan.[352] A plurality of the Court would require that the district's racial classifications be linked to a "pedagogic concept of the level of diversity needed to obtain the asserted educational benefits"[353] rather than to racial demographics.[354] This plurality would object to the district's plan here because "the racial demographics . . . whatever they happen[ed] to be [drove] the required diversity numbers."[355] Finally, the Lynn School District plan would fail the plurality's narrow-tailoring analysis due to the absence of a logical stopping point for the use of racial classifications in the plan.[356] For as the demographics of the schools in the Lynn School "shift, so too will their definition of racial diversity,"[357] effectively continuing the plan *in perpetuum.*

C. Eisenberg v. Montgomery County Public Schools[358]

1. The Montgomery County Public School Plan

In this case, Montgomery County Public Schools, in Maryland, denied Jacob Eisenberg's request to transfer from Glen Haven Elementary, his neighborhood school, to Rosemary Hills Elementary School's math and science magnet program because of a race-conscious assignment plan.[359] Even though the district was never under a court desegregation decree, the district voluntarily implemented a plan to

348. *Parents Involved*, 551 U.S. at 788-89.
349. *Id.* at 790 (emphasis added).
350. *See id.* at 733-34.
351. *Id.* at 735 (quoting *Grutter*, 539 U.S. at 339).
352. *Id.* at 735.
353. *Id.* at 726 (emphasis added).
354. *Parents Involved*, 551 U.S. at 726.
Parents Involved, 551 U.S. at 726.
355. *Id.* at 726-27 (internal quotation marks omitted).
356. *Id.* at 731 (quoting *J.A. Croson*, 488 U.S. at 498 (1989)).
357. *Id.*
358. *Eisenberg II*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000).
359. *Id.* at 125.

eliminate segregation at its schools.[360] The district created magnet schools as part of the plan to attract a diverse student population.[361] Under the plan, the district considered a student's diversity profile in determining whether to grant his/her transfer request.[362] The district identified students as white, African American, Hispanic or Asian.[363] The district compared the percentage of students of each race in a school to the countywide percentage for each race.[364] The plan further involved a review of whether, over the preceding three years, the percentage of each race in the school decreased or increased.[365] The district then used this information to assign a diversity category to each racial group within each school.[366] Racial groups that had a higher percentage at a particular school than the countywide percentage were assigned to categories 1 and 2.[367] Specifically, the district assigned to category 1, "racial groups, the percentage of which [was] higher than the countywide percentage for that group and [which had] increased over time rather than moved closer to the countywide percentage."[368] If a student's racial group had been designated a category 1 at his requested school, the student's transfer request to that school was denied[369] because the represented percentage of the student's racial group at the school was already higher than the relative countrywide percentage of the same racial group.[370] The district assigned to category 2 "racial/ethnic populations which, although higher than the countywide percentage, [had] tended to decline over time."[371] The district granted some transfer requests for this group.[372]

Categories 3 and 4 were designated for racial groups that had a lower percentage at a school than the countywide percentage for the group.[373] Specifically, the district assigned racial groups whose percentages had declined over time to category 3, while those whose percentages had increased over time were assigned to category 4.[374] To illustrate, "if a particular school ha[d] had a declining white enrollment over the

360. *Id.*
361. *Id.*
362. *Id.* at 126.
363. *Id.*
364. *Eisenberg II*, 197 F.3d at 126.
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Eisenberg II*, 197 F.3d at 126.
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.* at 127.

preceding three year period and [was] substantially below the average [c]ounty-wide enrollment of white students,"[375] it would be a category 3, and white students could be restricted from transferring from that school "because they would contribute to that school becoming racially isolated."[376] The district assessed and adjusted each school's diversity profile annually.[377]

The following table shows the categories assigned to racial groups at Jacob's assigned neighborhood school and his requested school at the time of his transfer request.[378]

School	African American	Asian	Hispanic	White
Glen Haven (Jacob's assigned neighborhood school)	1		1	3
Rosemary Hills (Jacob's requested school)		3		

On the transfer application, Jacob identified his race as "White, not of Hispanic origin."[379] At the time of his request, relative to the countywide white population of 53.4 percent, Glen Haven had a 24.1-percent white student body.[380] In addition, between the 1994-95 school year and the 1997-98 school year, the white student population at Glen

375. *Id.* (internal quotation marks omitted).
376. *Eisenberg II*, 197 F.3d at 127.
377. *Id.*
378. *Id.* at 127, n.9.
379. *Id.* at 125.
380. *Id.* at 127.

Haven decreased from 38.9 percent to 24.1 percent.[381] Consequently, the district denied Jacob's request.[382] The only reason the district gave was the "'impact on diversity', that is to say because Jacob was white."[383] Jacob's parents sued the district and various school officials, seeking damages as well as injunctive and declaratory relief to allow Jacob to transfer.[384] The federal district court for the District of Maryland denied injunctive relief.[385] The district court found the school district's interests in diversity and avoidance of a segregated student enrollment by racial isolation compelling[386] and also found the district's plan to be narrowly tailored.[387] The Fourth Circuit reversed and remanded with instructions.[388]

As the circuit court commenced its analysis, it punctuated the presumption against use of racial classifications.[389] Further, the court observed that it had emphasized in its precedents "the constitutional premise that race is an impermissible arbiter of human fortunes, even when using race as a reparational device or as a remedial measure for past discrimination."[390] The court concluded that there was "*nothing in the record to overcome this presumption.*"[391] It pointed out that the Montgomery County Public Schools plan was not a remedial race-conscious plan because the district had never been under a court desegregation decree, and no court had found the district "not unitary."[392] Instead, the court characterized the plan as voluntary.[393]

The court ruled that the district's asserted compelling interests—(1) diversity and (2) avoidance of a segregated student enrollment by racial isolation—were one and the same.[394] Specifically, the court cited *Brewer I*, describing the "avoidance of racial isolation [as] a negatively-phrased

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381. *Id.* (citing Eisenberg v. Montgomery Cnty. Pub. Sch. (*Eisenberg I*), 19 F. Supp.2d 449, 451 (D. Md. 1998), *rev'd*, 197 F.3d 123 (4th Cir. 1999)).

382. *Eisenberg II*, 197 F.3d at 127.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id. See also Eisenberg I*, 19 F. Supp.2d at 453-54.

387. *Eisenberg II*, 197 F.3d at 128. *See also Eisenberg I*, 19 F. Supp.2d at 458.

388. *Eisenberg II*, 197 F.3d at 134.

389. *Id.* at 128-29.

390. *Id.* at 128 (internal quotation marks omitted) (citing Podberesky v. Kirwan, 38 F.3d 147, 152 (4th Cir. 1994), and Md. Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993)).

391. *Eisenberg II*, 197 F.3d at 129, 133 (emphasis in original).

392. *Id.* at 129-30.

393. *Id.* at 129.

394. *Id.* at 130 (internal quotation marks omitted) (citing Brewer v. W. Irondequoit Cent. Sch. Dist. (*Brewer I*), 32 F. Supp.2d at 619, 627 (W.D.N.Y. 1999)).

expression for attaining the opposite of racial isolation which is racial diversity."[395] The court refused to decide whether racial diversity constituted a compelling interest, simply noting that "diversity *may* be a compelling governmental interest."[396] Indeed, the court emphatically noted that "[n]o inference may here be taken that we are of opinion that racial diversity is a compelling governmental interest."[397]

Under its narrow-tailoring analysis, the court characterized the district plan as "mere racial balancing in a pure form."[398] It objected to the plan because it was tied to racial demographics at the affected schools and countywide.[399] The court observed that while "the transfer policy [did] not necessarily apply 'hard and fast quotas,' its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity [was] racial balancing."[400] The court found this "nonremedial racial balancing" violative of the constitution[401] because "racial balancing was not a narrowly tailored remedy."[402] It declared that "[i]f racial imbalance occurs in some of the Montgomery County schools because students like Jacob, for example, are permitted to transfer to magnet schools to get a better education, any racial or ethnic imbalance is a product of "private choices [and] it does not have constitutional implications."[403] The court ruled that the annual review and adjustments made to the plan—based on demographics—did not make the plan narrowly tailored.[404] It also ruled that the plan's personal hardship

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395. *Id.*

396. *Id.* (emphasis added). The court stated that "diversity *may* be a compelling governmental interest" so it could proceed to rule on the case based on narrow-tailoring analysis, avoiding a compelling interest decision. *See id.* at 131.

397. *Eisenberg II*, 197 F.3d at 130; *see also id.* at 134.

398. *Id.* at 131.

399. *Id.*

400. *Id.* at 131 n.20 (citing Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981)).

401. *Id.* at 132.

402. *Id.* at 133.

403. *Eisenberg II*, 197 F.3d at 132 (citing Freeman v. Pitts, 503 U.S. 467, 495 (1992)).

404. *Id.* at 132.

> The fact that the "[c]ounty engages in periodic review . . . [and the] diversity profile for each school is reviewed and adjusted" each year to avoid the facilitation and the creation of a racially isolated environment does not make the policy narrowly tailored. Instead, it manifests Montgomery County's attempt to regulate transfer spots to achieve the racial balance or makeup that most closely reflects the percentage of the various races in the county's public school population. Periodic review does not make the transfer policy more narrow.

Id. (internal citation omitted).

exception for race-conscious student assignment did not narrowly tailor the plan.[405]

2. Parents Involved Analysis

a. Compelling Interest

In *Eisenberg II*, the Fourth Circuit found that the Montgomery County Public Schools' race-conscious plan was voluntary rather than remedial because the district had neither been under court desegregation decree, nor found "not unitary."[406] The *Parents Involved* majority ruled that if a school district had never been segregated by law or under court-ordered desegregation decree, it could not constitutionally use race as a remedial measure.[407] However, in *Eisenberg I*, the district also asserted compelling interests in diversity and avoidance of a segregated student enrollment by racial isolation.[408]

The plurality of the Court would deem these two interests non-compelling and view them as synonymous with racial balancing,[409] an "illegitimate" interest.[410] Additionally, the plurality would likely restrict a compelling interest in diversity to higher education.[411] While Justice Kennedy would also consider racial balancing a non-compelling interest,[412] the Montgomery County Public Schools would have a more favorable case with him for diversity as a compelling interest if race is merely "one aspect" of the race-conscious plan.[413] However, the plan presented in *Eisenberg* did not meet this criterion.[414] For example, as part of the plan, the district used each student's racial diversity profile for determining student assignments.[415] The plan was also heavily dependent on racial demographics.[416] Specifically, the district compared the percentage of students of each race in a school to the countywide percentage for each race.[417] Based on this information, the district then

405. *Id.* at 132-33.
406. *Id.* at 123, 129-30.
407. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 720-21 (2007).
408. *Eisenberg I*, 19 F. Supp.2d at 453-54.
409. *Parents Involved*, 551 U.S. at 725-27.
410. *Id.* at 726.
411. *Id.* at 724-25.
412. *Id.* at 783-87.88.
413. *Id.* at 788.
414. *See Eisenberg II*, 197 F.3d at 126.
415. *Id.*
416. *Id.*
417. *Id.*

assigned each racial group at each school a diversity category.[418] Furthermore, the district's only proffered reason for denying Jacob's transfer request was the "'impact on diversity,' that is to say because Jacob was white."[419]

The dissenting justices in *Parents Involved* would likely find the Montgomery County Public Schools' interests in diversity and avoidance of racial isolation compelling.[420] In fact, the Justices specifically stated that these interests constituted compelling interests.[421] They described these interests, which they viewed as synonymous, as a constitutional "interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience."[422] However, the district must develop the record on the essential elements of the interest. For example, the district would need to provide evidence that its diversity interest had an educational element–the "interest in overcoming the adverse educational effects produced by and associated with highly segregated schools."[423] Here, the district needs to show that its schools were highly segregated and that there were adverse educational effects resulting from the segregation.[424]

Even with the Fourth Circuit in *Eisenberg II* finding that the district had never been segregated by law or under a desegregation decree, the district is not hopeless.[425] The diversity categories used by the Montgomery County Public Schools provide evidence of the highly segregated nature of its schools.[426] For instance, category 1 was for "racial groups, the percentage of which [was] higher than the countywide percentage for that group and [which had] increased over time rather than moved closer to the countywide percentage."[427] Category 2 was for "racial/ethnic populations which, although higher than the countywide percentage, [had] tended to decline over time."[428]

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418. *Id.*

419. *Id.* at 127.

420. *Parents Involved*, 551 U.S. at 838.

421. *Eisenberg I*, 19 F. Supp.2d at 453-54; *see also Parents Involved*, 551 U.S. at 838 (discussing the dissenting justices' views of these interests).

422. *See Parents Involved*, 551 U.S. at 838.

423. *Id.* at 839.

424. *Id.* at 834-40.

425. *See id.* at 823-34 (discussing the dissenting justices' views that race-conscious measures may be used even without history of *de jure* segregation).

426. *Eisenberg II*, 197 F.3d at 126-27.

427. *Id.* at 126.

428. *Id.*

Table 1 above also highlights the highly segregated nature of the district's schools.

As for the remedial element, the district must show that it was not merely addressing general societal discrimination.[429] Rather, its interest must be "an interest in continuing to combat the *remnants* of segregation caused in whole or in part by ... [legal or administrative] school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes."[430] For the democratic element, the district must develop the record to show that it had an "interest in producing an educational element that reflects the pluralistic society in which our children will live."[431]

b. Narrow Tailoring

To satisfy the narrow-tailoring analysis of the *Parents Involved* majority, the Montgomery County Public School District needs to develop the record to show that its race-conscious plan had more than a minimal impact on student assignments and diversity.[432] Further, the district must show that it seriously considered, in good faith, "workable race-neutral alternatives."[433] The plurality of the Court would strike down the plan for failing this narrow-tailoring analysis because it was based on the district's "specific *racial demographics*,"[434] as opposed to a "pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[435] The diversity categories used reflect the fact that under the plan, the diversity numbers were driven by racial demographics;[436] the plurality would find this objectionable.[437] The plurality would also find that the plan was not narrowly tailored because it failed to specify a "logical stopping point."[438]

In order to clear the narrow-tailoring analysis hurdle with Justice Kennedy, the district must clearly identify "[1] the *precise* circumstances in which an assignment decision will or will not be made on the basis of

429. *Parents Involved*, 551 U.S. at 843.
430. *Id.* at 838 (emphasis added).
431. *Id.* at 840 (internal quotation marks omitted).
432. *Id.* at 733-34.
433. *Id.* at 735 (quoting *Grutter*, 539 U.S. at 339).
434. *Id.* at 726 (emphasis added).
435. *Parents Involved*, 551 U.S. at 726.
436. *Eisenberg II*, 197 F.3d at 126.
437. *Parents Involved*, 551 U.S. at 726-27.
438. *Id.* at 731 (quoting *J.A. Croson*, 488 U.S. at 498.

race,"[439] "[2] how it [was] determined which of two similarly situated children [would] be subjected to a given race-based decision,"[440] (3) who made student assignment decisions,[441] and (4) the who oversaw the plan.[442] In essence, the district must precisely identify the "how and when" [443] of its use of racial classifications;[444] "broad and imprecise descriptions"[445] will not suffice.[446] Further, in *Eisenberg*, the district only used four racial groups: White, Hispanic, African American and Asian.[447] The district might be required to justify choosing these particular racial groups to the exclusion of others and how the choice of these particular racial groups promoted its interests in diversity.[448]

The district's plan would fail Justice Kennedy's narrow-tailoring analysis because it was based on individual typing by race.[449] *Individual* typing refers to the "assignment of *individual* students by race," [450] where race is the dispositive factor or the only factor.[451] In the *Eisenberg* case, the Fourth Circuit noted that the only reason the district gave for denying Jacob's transfer request was the "'impact on diversity,' that is to say because Jacob was white."[452] Justice Kennedy would clearly find this unacceptable.[453] Instead, he will want the district to show that its plan dealt with diversity "in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[454] The district must also keep in mind that a narrowly tailored plan in Justice Kennedy's view requires "a more nuanced, individual evaluation of school needs and student characteristics that might include race as *a* component."[455] To gain his approval, the district must develop its race-conscious plan such that "the criteria relevant to student

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439. *Id.* at 785 (emphasis added).
440. *Id.* (emphasis added).
441. *Id.*
442. *Id.*
443. *Parents Involved*, 551 U.S. at 784-85.
444. *Id.*
445. *Id.* at 784-85.
446. *Id.*
447. *Eisenberg II*, 197 F.3d at 126.
448. *Parents Involved*, 551 U.S. at 786-87.
449. *See id.* at 788-90 (discussing Justice Kennedy's views on individual typing by race).
450. *Id.* at 788-90 (emphasis added).
451. *Id.*
452. *Eisenberg II*, 197 F.3d at 127.
453. *See Parents Involved*, 551 U.S. at 788-90. (discussing Justice Kennedy's views on individual typing by race).
454. *Id.* at 788-89.
455. *Id.* at 790 (emphasis added).

placement would differ based on the age of the students, the needs of the parents and the role of the schools."[456]

To pass narrow-tailoring analysis with the dissenting justices, the district must frame its plan as one based on broad ranges which are "useful starting points" rather than quotas.[457] This was not clearly evident in *Eisenberg*. In the district's explicit use of the racial diversity profiles for individual students, the racial diversity categories for racial groups and the explicitly-stated racial grounds for denying Jacob's transfer.[458] The district should also be prepared to show that its race-conscious plan was primarily driven by student choice-of-school assignment, rather than race.[459] Secondly, the district must show that its race-conscious plan was a "less burdensome"[460] plan with "broad-range limits on voluntary school choice plans."[461] It is evident that the plan was burdensome, for example, because students whose racial groups had been designated category 1 at the requested school were usually denied transfer to that school.[462]

Some students were also denied transfers under the other categories.[463] For instance, the Fourth Circuit observed that, under category 3, "if a particular school ha[d] had a declining white enrollment over the preceding three year period and [was] substantially below the average [c]ounty-wide enrollment of white students,"[464] white students could be restricted from transferring from that school "because they would contribute to that school becoming racially isolated."[465] However, under this "less burdensome" factor, all that the dissenting justices require is that the district shows that race was "a factor only in a fraction of students' non-merit-based assignments-not in large numbers of students' merit-based applications."[466] Additionally, the district must develop the record to demonstrate that its plan "embodies the results of local experience and community consultation [and was] the product of a

456. *Id.*

457. *Id.* at 846-47. Recall, this was the first factor considered in the dissenting justices' narrow-tailoring analysis.

458. *Eisenberg II*, 197 F.3d at 126-27.

459. *Parents Involved*, 551 U.S. at 846.

460. *Id.* at 847.

461. *Id.* Recall, this was the second factor the dissenting justices considered in their narrow-tailoring analysis.

462. *Eisenberg II*, 197 F.3d at 126.

463. *Id.* at 126-27.

464. *Id.* at 127 (internal quotation marks omitted).

465. *Id.*

466. *Parents Involved*, 551 U.S. at 847.

process that has sought to enhance student choice" [467] and was adopted following consideration of "reasonably evident alternatives."[468]

D. Ho v. San Francisco Unified School District[469]

1. The San Francisco Unified School District Plan

In this case, parents and next friends of three students of Chinese descent–Brian Ho, Hilary Chen, and Patrick Wong–sued the San Francisco Unified School District and various state and local defendants, claiming that the district's race-conscious student assignment plan violated the Equal Protection Clause.[470] The plaintiffs based their challenge of the plan—part of a court-approved consent desegregation decree—on paragraph 13 of the decree, which provided in pertinent part:

> No school shall have fewer than four racial/ethnic groups represented in its student body. (b) No racial/ethnic group shall constitute more than 45% of the student enrollment at any regular school, nor more than 40% at *any* alternative school. In the event the percentage of any racial/ethnic group at any alternative school exceeds 40% after September 1983, the S.F.U.S.D. [San Francisco Unified School District] shall apply the provisions of subparagraph (c) to the entering class at such school. (c) Beginning with the 1983-84 school year, the S.F.U.S.D. shall monitor the entering classes of all regular schools in which a single racial/ethnic group comprises more than 45% of the student enrollment, to assure that students in that racial/ethnic group will not comprise more than 40% of the entering class at any such school.[471]

The district's superintendent averred in an affidavit that he never authorized or personally made race-conscious student assignments.[472] He conceded, however, that race was a factor in evaluating whether the district's schools fell within the guidelines of paragraph 13.[473] He also

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467. *Id.* at 848. Recall, this was the third factor the dissenting justices considered in their narrow-tailoring analysis.

468. *Id.* at 855. Recall, this was the fourth factor the dissenting justices considered in their narrow-tailoring analysis.

469. 147 F.3d 854 (9th Cir. 1998).

470. *Id.* at 856.

471. *Id.* at 856-57.

472. *Id.* at 857.

473. *Id.*

acknowledged that "sometimes a student [was] not permitted to enroll if the school [was] overcrowded or outside the guideline."[474] The superintendent stated that, while the district had not eliminated all vestiges of past discrimination,[475] he remained optimistic that, with implementation of the race-conscious plan, the district would attain unitary status.[476] Moreover, he observed that "[t]he level of confidence in public education by African-American, Latino, and persons of poverty [in the district] remain[ed] minimal."[477]

The program director for the district's Education Placement Center averred the following under oath:

> At some point, because of Paragraph 13 of the Consent Decree, it may become necessary to determine whether the race of the student is the same race as the student group which is the highest percentage in the entire school. We do not treat Paragraph 13 as a quota system. Race becomes a consideration only when placement of the student in the school will exceed 45% in the regular school or 40% in the alternative school. . . . If it is determined that the race of the student in a particular school is

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474. *Id.*

475. The school board president agreed in an affidavit, stating:

> I am aware that all vestiges of the segregatory acts alleged by the San Francisco NAACP have not yet been eliminated 'root and branch' or 'to the greatest extent possible.' . . . I know that there are presently many schools in which the goals set forth in paragraph 13 . . . of the Consent Decree have not yet been achieved. . . . We have not yet reached the level of achievement that would permit us to validly claim that the victims of prior segregatory acts are convinced that we have fully complied with the terms of the Consent Decree and that all vestiges of segregation have been removed.

Ho, 147 F.3d at 858. He also noted:

> Among the desegregation obligations referenced in the Consent Decree, which require our continued and focused attention are: (a) The over-representation of African-American males in Special Education; (b) Too many schools exceed Paragraph 13 guidelines; (c) Too many African-American and Latino students are in the bottom quantile in standardized achievement tests; (d) The grade point averages for African-American and Latino children are disproportionately low; and (e) The number of expulsions and suspensions of African-Americans, particularly males, is disproportionately high.

Id.

476. *Id.* at 857.

477. *Id.*

> 45% or more, the parent/guardian is told about the desegregation court order and another school is sought.[478]

In his affidavit, the school district's attorney stated that if the guidelines were eliminated, "racial isolation and resegregation will swiftly occur."[479]

The information sheet provided to new students and those seeking school transfers required parents to designate the race of their children.[480] Further, the sheet indicated that the district gave priority to African American and Hispanic students over similarly situated students in student assignment decisions, even in cases where the racial cap in the consent decree did not so require.[481] The form provided with the sheet included a section called "Racial/Ethnic Identification: *CHECK ONLY ONE.*"[482] Students could select only one of the thirteen racial/ethnic groups listed in the form.[483] The groups were: White, Chinese, American Indian, African American, Filipino, Japanese, Hispanic/Latino, Korean, Arabic, Southeast Asia (Vietnam, Laos, Cambodia, Thailand, etc.), Middle Easterner (Iran, Turkey, etc.), Samoan, and Other Non-White.[484]

The court certified the plaintiffs as class action representatives for all San Francisco resident school-age children of Chinese descent qualified to attend its public schools.[485] The plaintiffs requested declaratory judgment and injunctive relief prohibiting the defendants from using quotas and race-conscious classifications.[486] The federal district court for the Northern District of California denied the defendants' motion to dismiss[487] and the plaintiffs' summary judgment motion.[488] The court failed to determine whether vestiges of past discrimination existed in the district or whether there was segregation in the district at the time of the case.[489] Likewise, the court failed to address the plaintiffs' contention that the race-conscious plan in paragraph 13 was unconstitutional racial

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478. *Id.* at 857. The Ninth Circuit characterized the phrase "another school is sought" used by the director as a "delicate passive being employed to gloss over the compulsion exercised by the School District to force the seeking of another school." *Id.* at 861.

479. *Id.* at 859.

480. *Id.* at 858.

481. *Ho*, 147 F.3d at 858.

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.* at 857.

486. *Id.* at 856.

487. *Ho*, 147 F.3d at 857.

488. *Id.* at 859-60.

489. *Id.*

balancing.[490] The plaintiffs appealed.[491] The Ninth Circuit Court of Appeals ruled that it lacked jurisdiction over the appeal.[492]

Despite arguments by the defendants to the contrary, the circuit court concluded that the district was using quotas and racial classifications in student assignments.[493] The court also stated that "[t]he use of race by government is, in general, highly disfavored by the law."[494] The court reasoned that race had been a frequent means of "oppressing, persecuting, or discriminating against a group of persons on the basis of alleged color or some other accidental physical attribute."[495] Likewise, the court reasoned that "[i]n the name of that science [the pseudo-science of race] the Anglo-Saxon race was glorified, and immigration to America diluting the Anglo-Saxon heritage was viewed with alarm."[496] Moreover, "[i]n the name of that science the 'yellow peril' of immigration from Asia was decried—a tradition of the hateful rhetoric of color continued in by California officialdom as late as the 1920 report for Governor Stephens entitled *California and the Oriental.*"[497] The court pointed out, however, that science had revealed the truth that "races are not, and never were, groups clearly defined biologically."[498] The court found objectionable any government practice requiring "racial self-designation" and compelling "governmental sanctions for failure to do so and add[ing] further sanctions as the consequence of doing so."[499]

The Ninth Circuit observed that, in California and particularly San Francisco, people of Chinese descent had faced "a very large iceberg of Sinophobic legal measures and spirited resistance."[500] It noted the "even longer and more painful history"[501] of the struggle for students of Chinese descent seeking admission into San Francisco's public schools,

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490. *Id.* at 860.

491. *Id.*

492. *Id.* at 860-61.

493. *Ho*, 147 F.3d at 861-62.

494. *Id.* at 862.

495. *Id.*

496. *Id.* at 863 (internal quotation marks omitted).

497. *Id.* (citing CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY 283 (1994) and IAN F. HANEY LOPEZ, WHITE BY LAW 27-33 (1996)).

498. *Id.* at 863 (internal quotation marks omitted) (citing William W. Howells, *The Meaning of Race* in THE BIOLOGICAL AND SOCIAL MEANING OF RACE 16 (Richard H. Osborne ed. 1971) and Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 13 (1994)).

499. *Ho*, 147 F.3d at 863.

500. *Id.* (citing MCCLAIN, *supra* note 497, at 3).

501. *Id.* (citing MCCLAIN, *supra* note 497, at 133-44).

as only whites could attend California schools until at least the 1870's.[502] Moreover, state law confining students of "Mongolian or Chinese descent"[503] to segregated schools was only repealed in 1947.[504] The court concluded that "such a history of official bias in the public school system of San Francisco"[505] made it "specially hazardous to adopt racial classifications and racial caps that bear most heavily upon the class of plaintiff schoolchildren."[506]

The Ninth Circuit found the district's race-conscious plan insufferable because it identified people as members of a racial group, rather than as individuals.[507] The court pointed out, however, that constitutional rights are personal, not group-based.[508] It ruled that racial classifications would be constitutional if used for the limited purpose of remedying past discrimination.[509] Indeed, it characterized the use of race for remedial purposes as a "temporary expedient ... to compensate individual persons themselves injured by the malevolent use of race."[510]

The Ninth Circuit dismissed the appeal;[511] it instructed the district court to determine whether paragraph 13 was still justified by vestiges of past discrimination and whether the paragraph was essential to eliminating vestiges, if any existed.[512] The instructions also tasked the school district with showing that paragraph 13's quotas and racial classifications remained narrowly tailored to the remedial compelling interest of eradicating vestiges of past discrimination.[513]

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502. *Id.*

503. *Id.* at 864 (citing MCCLAIN, *supra* note 497, at 142).

504. *Id.*

505. *Ho*, 147 F.3d at 864.

506. *Id.*

507. *See id.* ("Race identifies groups. The legal rights of Americans are personal. Our rights belong to each of us as individual persons. Our rights are not conferred upon us as members of any group or as a corollary of any racial identification.").

508. *See id.* ("It is as a person that each of us has these rights that are so majestically secured. The rights created by the Fourteenth Amendment are guaranteed to the individual. The rights established are personal rights.") (internal quotation marks omitted) (citing Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).

509. *Id.* at 864.

510. *Id.* ("This employment of race may be compared to the building of a back fire as a means of containing a conflagration. Skillfully done, carefully controlled, the back fire will work to extinguish the greater blaze and not function to increase the devastation. The comparison suggests how tight a hand must be kept on race lest, employing it to remedy racial evil, it slip out of control and inflict fresh harm.").

511. *Ho*, 147 F.3d at 865.

512. *Id.*

513. *Id.*

2. Parents Involved Analysis

a. Compelling Interest

The majority of the *Parents Involved* Court would require the district to justify its asserted remedial interest in paragraph 13's race-conscious plan by showing that there was past intentional discrimination and that vestiges of that discrimination remained.[514] The school district should be able to show this. For example, the school board president stated:

> I am aware that all vestiges of the segregatory acts alleged by the San Francisco NAACP have not yet been eliminated 'root and branch' or 'to the greatest extent possible.' . . . I know that there are presently many schools in which the goals set forth in paragraph 13 . . . of the Consent Decree have not yet been achieved. . . . We have not yet reached the level of achievement that would permit us to validly claim that the victims of prior segregatory acts are convinced that we have fully complied with the terms of the Consent Decree and that all vestiges of segregation have been removed.[515]

Further, the superintendent testified that while the district had not eliminated all vestiges of past discrimination, he remained optimistic that, with implementation of the race-conscious plan, the district would attain unitary status.[516] However, the *Parents Involved* Court pointed out that this remedial interest would cease with attainment of unitary status.[517]

If the district were to posit racial diversity as a compelling interest, a majority of the *Parents Involved* Court would likely deny diversity as a compelling interest at the elementary and secondary school levels.[518] It appears the San Francisco Unified School District in *Ho* did just that, with the school district's attorney stating that if the guidelines of paragraph 13 were eliminated, "*racial isolation* and resegregation will swiftly occur."[519] According to the *Parents Involved* plurality, however, these interests are "illegitimate."[520] The plurality would also object to an

514. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 720-21 (2007).

515. *Ho*, 147 F.3d at 858.

516. *Id.* at 857.

517. *Parents Involved*, 551 U.S. at 720-21.

518. *See id.* at 722-25 (discussing *Grutter*, 539 U.S. at 328.

519. *Ho*, 147 F.3d at 859 (emphasis added).

520. *Parents Involved*, 551 U.S. at 726.

interest in racial diversity because such an interest treats citizens as "simply components of a racial . . . class,"[521] rather than as individuals.[522] This is evident in paragraph 13's mention of the term "racial/ethnic group" at least five times, emphasizing the group over the individual.[523] Paragraph 13 stated:

> No school shall have fewer than four racial/ethnic groups represented in its student body. (b) No racial/ethnic group shall constitute more than 45% of the student enrollment at any regular school, nor more than 40% at *any* alternative school. In the event the percentage of any racial/ethnic group at any alternative school exceeds 40% after September 1983, the S.F.U.S.D.[San Francisco Unified School District] shall apply the provisions of subparagraph (c) to the entering class at such school. (c) Beginning with the 1983-84 school year, the S.F.U.S.D. shall monitor the entering classes of all regular schools in which a single racial/ethnic group comprises more than 45% of the student enrollment, to assure that students in that racial/ethnic group will not comprise more than 40% of the entering class at any such school.[524]

It is also evident from paragraph 13 that Justice Kennedy would not find the district's interests in avoiding racial isolation and resegregation compelling.[525] The district would need to convince Justice Kennedy that race is only "one aspect" of the race-conscious plan.[526] Paragraph 13 does not appear to use race as merely an aspect of the plan. With respect to the remedial use of racial classifications, Justice Kennedy is in line with the Court.[527]

The dissenting justices would likely uphold the district's remedial interest and diversity interests as compelling.[528] Unlike the Court majority, the dissenting justices declared that remedial interests do not "vanish the day after a federal court declares that a district is unitary."[529]

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521. *Id.* at 794 (internal quotation marks omitted) (citing Miller v. Johnson, 515 U.S. 900, 911 (1995)).

522. *Id.*

523. *Ho*, 147 F.3d at 856-57.

524. *Id.*

525. *Parents Involved*, 551 U.S. at 783-87.

526. *Id.* at 788.

527. *See id.* at 720-21. Justice Kennedy joined that part of the *Parents Involved* decision to make it a majority opinion.

528. *See id.* at 804-63.

529. *Id.* at 844 (internal quotation marks omitted).

The district should be able to satisfy the dissenting justices' remedial, educational, and democratic elements for a compelling diversity interest.[530] For example, the testimony of the board president and the superintendent provide some evidence that the district has satisfied the remedial element by describing their interest in combating remnants of segregation and preventing *de facto* resegregation.[531] The district might need to develop the record further to show that it satisfies the educational element—the "interest in overcoming the adverse educational effects produced by and associated with highly segregated schools."[532] The superintendent's testimony that "[t]he level of confidence in public education by African-American, Latino, and persons of poverty [in the district] remain[ed] minimal"[533] would likely aid in this respect. As for the democratic element, the district should demonstrate that it has an "interest in producing an educational environment that reflects the pluralistic society in which our children will live."[534]

2. *Narrow Tailoring*

With respect to its goal of diversity, paragraph 13 would likely fail the narrow-tailoring analysis of the *Parents Involved* Court majority because, as with the Seattle and Jefferson County plans, in the San Francisco Unified School District plan, "race, for some students, [was] determinative standing alone."[535] As noted above, the district superintendent testified to this effect.[536] To satisfy the *Parents Involved* majority, the district would also need to show that its plan had more than a minimal impact on attainment of its goal.[537] Additionally, the district must present evidence demonstrating its good faith and serious evaluation of "workable race-neutral alternatives"[538] prior to implementation of the plan.[539]

The district's plan would fail the narrow-tailoring analysis of the plurality of the Court because it was tied to the "district's specific *racial demographics*, rather than to any pedagogic concept of the level of

530. *Id.* at 838.
531. *See Ho*, 147 F.3d at 857-58.
532. *Parents Involved*, 551 U.S. at 839.
533. *Ho*, 147 F.3d at 857.
534. *Parents Involved*, 551 U.S. at 840 (internal quotation marks omitted).
535. *Id.* at 723.
536. *See Ho*, 147 F.3d at 857.
537. *See Parents Involved*, 551 U.S. at 733-34.
538. *Id.* at 735 (quoting *Grutter*, 539 U.S. at 339).
539. *Parents Involved*, 551 U.S. at 735.

diversity needed to obtain the asserted educational benefits."[540] This is evident in the very language of paragraph 13. It is likewise evident in the testimony of the Education Placement Center's Program Director:

> At some point, because of Paragraph 13 of the Consent Decree, it may become necessary to determine whether the race of the student is the same race as the student group which is the highest percentage in the entire school ... Race becomes a consideration only when placement of the student in the school will exceed 45% in the regular school or 40% in the alternative school.... If it is determined that the race of the student in a particular school is 45% or more, the parent/guardian is told about the desegregation court order and another school is sought.[541]

Indeed, the Ninth Circuit in *Ho* characterized the director's use of the phrase "another school is sought" as a "delicate passive being employed to gloss over the *compulsion* exercised by the School District to *force* the seeking of another school."[542] Furthermore, the district's plan would not pass the plurality's narrow-tailoring muster because it had "no logical stopping point,"[543] as the "definition of racial diversity"[544] would shift as the racial demographics of the district shift.[545]

In preparing a viable case to withstand Justice Kennedy's narrow tailoring scrutiny, the district must clarify the "how and when"[546] of its use of racial classifications.[547] In other words, the district's plan must describe: "[1] the precise circumstances in which an assignment decision will or will not be made on the basis of race,"[548] "[2] how it [was] determined which of two similarly situated children will be subjected to a given race-based decision,"[549] [3] who made student assignment decisions,[550] and [4] the oversight provided for in the plan.[551] The fact that the district student information sheet listed 13 racial groups,[552] as

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540. *Id.* at 726 (emphasis added).
541. *Ho*, 147 F.3d at 857.
542. *Id.* at 861 (emphasis added).
543. *Parents Involved*, 551 U.S. at 731 (quoting *J.A. Croson*, 488 U.S. at 498).
544. *Id.* at 731.
545. *Id.*; *see generally Ho*, 147 F.3d 854.
546. *Parents Involved*, 551 U.S. at 784-85.
547. *Id.*
548. *Id.*
549. *Id.*
550. *Id.* at 785.
551. *Id.*
552. *See Ho*, 147 F.3d at 858 (listing the groups as White, Chinese, American Indian, African American, Filipino; Japanese, Hispanic/Latino, Korean, Arabic, Southeast Asia

opposed to the binary white/nonwhite classes used by the Seattle School District, or the black/"other" classification used by Jefferson County Public Schools,[553] might make the plan more amenable to Justice Kennedy.[554] On the other hand, this same information sheet indicated that the district gave Hispanic and African American students priority over students of other races.[555] If Justice Kennedy views the classes used as "crude racial categories"[556] of Hispanic and African American/"other," this could present narrow tailoring problems for the district.[557] Either way, the district must show how these classifications promote its compelling interests in diversity, once recognized as such.[558]

Justice Kennedy might object to the district's plan for diversity because it seems to individually type each student by his/her race.[559] The superintendent and Placement Center director's testimonies seem to confirm individual typing.[560] Likewise, evidence of individual typing by race could be found in the "Pre-Registration/Optional Enrollment Request information sheet['s]" requirement of racial self-designation and its revelation that the district gave Hispanic and African American students priority over students of other races.[561] Besides, the Ninth Circuit already has concluded that the district engaged in individual typing by race.[562] Justice Kennedy would require the district to find a way of ensuring that its plan addresses diversity "in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[563]

For Justice Kennedy's analysis, the district should seek to create a plan that has "a more nuanced, individual evaluation of school needs and student characteristics that might include race as *a* component."[564] Under such a plan, "the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of

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(Vietnam, Laos, Cambodia, Thailand, etc.), Middle Easterner (Iran, Turkey, etc.), Samoan, and Other Non-White).

553. *Parents Involved*, 551 U.S. at 723.

554. *Id.* at 786-87 (Kennedy, J., referring to such classifications as "crude racial categories").

555. *Ho*, 147 F.3d at 858.

556. *Parents Involved*, 551 U.S. at 786.

557. *Id.* at 786-87.

558. *Id.*

559. *Id.* at 788-89.

560. *See Ho*, 147 F.3d at 857.

561. *Id.* at 858.

562. *See id.* at 864-65 (holding that issues of fact existed for trial as to the constitutionality of the racial classifications employed by the school district).

563. *Parents Involved*, 551 U.S. at 788-89.

564. *Id.* at 790 (emphasis added).

the schools."[565] The record reveals that the San Francisco School District required parents or guardians of students to identify their children's races on an information sheet.[566] While Justice Kennedy would permit districts to keep track of "enrollments, performance, and other statistics by race,"[567] if the plan moved beyond that into individual typing by race, he would object to it.[568] In fact, he might object to the practice here because, as the Ninth Circuit concluded, sanctions attended the failure to comply with the "racial self-designation" requirement.[569]

To satisfy the narrow-tailoring analysis for its diversity interest, the San Francisco Unified School District would need to show the *Parents Involved* dissenting justices that it used broad ranges.[570] It must then show that "the broad ranges [were] less like a quota and more like . . . useful starting points."[571] In other words, race-conscious plans must "constitute but one part of plans that depend primarily upon other, nonracial elements."[572] However, in *Ho*, the dissenting justices concluded that paragraph 13 constituted a quota.[573] Therefore, the district might need to rework paragraph 13 to ensure that it not only embraces broad ranges, but also that those ranges constitute "useful starting points" for its diversity interest.[574] The district must ensure that student assignments are primarily driven by student choice rather than race.[575] As the language of paragraph 13 and the program director's testimony show, the district plan was not "one part of plans that depend[ed] primarily upon other, nonracial elements," [576] as required by the *Parents Involved* dissenting opinion.[577]

With respect to the burdensome nature of the plan,[578] the district might have to show that the broad range it selects is "less burdensome"[579] because race is "a factor only in a fraction of students'

565. *Id.*
566. *Ho*, 147 F.3d at 858.
567. *Parents Involved*, 551 U.S. at 789.
568. *Id.* at 788-90.
569. *See Ho*, 147 F.3d at 863.
570. *Parents Involved*, 551 U.S. at 846. Recall, this was the first factor considered in the dissenting justices' narrow-tailoring analysis.
571. *Id.* at 846-47 (internal quotation marks omitted).
572. *Id.* at 846.
573. *See Ho*, 147 F.3d at 861-62.
574. *Parents Involved*, 551 U.S. at 846-47.
575. *Id.* at 846.
576. *Id.*
577. *See id.* at 846-47.
578. *Id.* at 847. Recall, this was the second factor the dissenting justices considered in their narrow-tailoring analysis.
579. *Id.*

non-merit-based assignments—not in large numbers of students' merit-based applications."[580] In this case, the district might be required to establish that the plan is not too burdensome on the other 11 racial groups (besides African American and Hispanics listed on the information sheet as priorities), particularly, the other 10 *minority* groups passed over for Hispanics and African Americans.[581] In redesigning its plan, the district should ensure that its plan "embodies the results of local experience and community consultation[,] . . . the product of a process that has sought to enhance student choice . . . ." [582] Finally, the district must consider "reasonably evident alternatives"[583] before implementing the plan.

E. Hunter Ex Rel. Brandt v. Regents of the University Of California[584]

1. The University Of California Laboratory Elementary School Plan

The University of California Los Angeles (UCLA) Graduate School of Education and Information Studies (Graduate School) established a research laboratory elementary school—Corinne A. Seeds University Elementary School (UES)—to address the "needs of a dramatically changing public school population."[585] UES researched issues involving social development and education of urban children with a goal of developing teaching innovations to address these issues.[586] UES disseminated its research findings throughout the state.[587] Various UES and UCLA officials met annually to determine necessary student body characteristics for the school's research and training mission.[588] To attain the desired characteristics, the school factored in family income, gender and race in admissions decisions.[589] Keeley, a white student, sought to

580. *Parents Involved*, 551 U.S. at 847.

581. *See Ho*, 147 F.3d at 858 (listing the 13 racial groups included on the information sheet).

582. *Parents Involved*, 551 U.S. at 848. Recall, this was the third factor the dissenting justices considered in their narrow-tailoring analysis.

583. *Id.* at 855. Recall, this was the fourth factor the dissenting justices considered in their narrow-tailoring analysis.

584. 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 121 U.S. 186 (2000).

585. *Id.* at 1062.

586. *Id.*

587. *Id.*; *see also id.* at 1064.

588. *Id.* at 1062.

589. *Id.* The school informed parents that these factors were used. *Id.* Other factors considered in determining suitability of the applicant for research included: "dominant language, permanence of residence, and parents' willingness to comply with UES's mandatory involvement requirement." *Id.*

enroll after her sister graduated from UES.[590] She was denied admission pursuant to the race-conscious plan.[591] Her mother sued the university regents and the dean of the graduate school, challenging the constitutionality of the plan under the Equal Protection Clause.[592]

The federal district court for the Central District of California ruled that the state had a compelling interest in "operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools."[593] The court also found the race-conscious admissions plan narrowly tailored to the compelling interest.[594] The Ninth Circuit affirmed.[595]

The Ninth Circuit agreed with the district court that "the operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools"[596] constituted a compelling interest.[597] The court reasoned that UES was designed to address the myriad "challenges posed by California's increasingly diverse population [which] intensify the state's interest in improving urban public schools."[598] For its compelling interest ruling, the court relied on the expert testimony of Dr. Mitchell, among others, who stated that "[t]he dynamic interplay of . . . research, dissemination, professional development, and the training of an ever-expanding cadre of researchers dedicated to find[ing] the answers to the perplexing problems facing urban schools . . . [made] UES a unique and powerful instrument in meeting the State's fundamental obligations to the children of its cities."[599]

The court explained that its approval of the state's proffered non-remedial interest as compelling was based on the substance of UES's research mission,[600] not its designation as a laboratory school.[601] Besides,

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590. *Hunter ex rel. Brandt*, 190 F.3d at 1063. Keeley's sister had been admitted even with the race-conscious admissions plan in operation. *See id.*

591. *Id.*

592. *Id.*

593. *Id.*

594. *Id.*

595. *Id.* at 1063, 1067.

596. *Hunter ex rel. Brandt*, 190 F.3d at 1063.

597. *Id.* The court took judicial note of the parties' agreement that the admissions plan was not designed to remedy past discrimination. *Id.* at 1063, n.3.

598. *See generally id.* at 1064 ("UES is dedicated to providing more useful and more accurate information to educators facing these challenges.").

599. *Id.*; *see also id.* (concluding, "[g]iven this record, the district court concluded, and we agree, that the defendants' interest in operating a research-oriented elementary school is compelling.") (internal quotation marks omitted).

600. *See id.* at 1064-65 (concluding that "research is fundamental to the UES's charter").

the court observed, UES's research mission impacted the "day-to day experience of its students and require[d] more resources than those available to most, if not all, other elementary schools."[602] The court further reasoned that the elementary school's cadre of faculty with doctoral degrees evidenced the school's uniqueness as a research laboratory school.[603]

With respect to narrow tailoring, the court relied on various scholarly expert testimonies from the trial, including one testifying that: "[t]here is a simple rule about being a researcher . . . . If you're trying to find a sample that has some [particular] distribution of race, you use race as the variable to make that. You don't use an approximation or some variable of it."[604] Another expert testified that "[b]ecause of the small sample size, it [was] highly unlikely that such a small group, if selected without some explicit consideration of race/ethnicity, would be representative of Los Angeles' or the State's urban school population."[605]

In finding the UES plan narrowly tailored, the Ninth Circuit also relied on the district court's conclusion that UES had developed various innovative educational strategies.[606] Likewise, it cited the district court's conclusion that "it would not be possible, nor would it be reasonable, to require the defendants to attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications."[607] The Ninth Circuit dismissed the suggestion that the state had more narrowly tailored alternatives to the race-conscious plan, such as the establishment of laboratory situations in all the state's schools or the creation of laboratory schools at sites beyond UES.[608] The court observed that, even if those alternatives had been

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601. *Id.* at 1065. Further, the court pointed out it did not rely on UES's characterization of its mission as "educational research" in finding a compelling interest. *See id.* ("Nor does UES's *stated mission* of 'educational research' justify its admissions process. A mere statement from a governmental entity that it is committed to research, without more, would not be sufficient to establish a compelling interest.").

602. *Hunter ex rel. Brandt*, 190 F.3d at 1065.

603. *Id.* ("In addition, twenty-one graduate, doctoral, and post-doctoral students, three medical students, thirty-two nursing students, and seventy-five undergraduate student teachers were involved with the elementary school, observing, working with students, and conducting research.").

604. *Id.* at 1066.

605. *Id.* Still, another expert testified that "even if the applicant pool in the aggregate [was] sufficiently diverse, an entirely random selection would not yield a population that balances ethnicity with other factors, such as age, gender and family income." *Id.*

606. *Id.*

607. *Id.*

608. *Hunter ex rel. Brandt*, 190 F.3d at 1066-67.

implemented, UES admissions would still require the race-conscious plan in order to accomplish UES's research mission.[609]

As an expert testified, "[w]e cannot have a subject sample that does not have meaningful distribution of ethnicity and still meets the scientific standards that we are held to. . . . Otherwise, you can't do research there."[610] Further, in concluding that the plan was narrowly tailored, the court ruled that "courts should defer to researchers' decisions about what they need for their research."[611] The court held that UES's race-conscious plan was "narrowly tailored to achieve the necessary laboratory environment to produce research results which can be used to improve the education of California's ethnically diverse urban public school population."[612]

2. Parents Involved Analysis

a. Compelling Interest

Given the dissenting justices' acceptance in *Parents Involved* of racial integration, racial diversity, avoidance of racial isolation, and racial balancing as compelling interests,[613] it would not have been surprising if the University of California's interest in "operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools"[614] was found compelling by at least

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609. *Id.* at 1066 ("But both Dr. Stipek and Dr. Handler testified that it was necessary to explicitly consider race/ethnicity in UES's admissions process to achieve the precise student population required for UES's research. Therefore, even if California were to establish one or more other lab schools elsewhere, this would not address *UES's* need to maintain the representative sample of students UES needs to fulfill its research mission.").

610. *Id.* at 1066 n.10.

611. *Id.*; *see also id.* at 1067 n.11:

> No one would challenge a decision of UCLA medical school to explicitly consider ethnicity in selecting study participants for research on Gauchers disease or Tay-Sachs-diseases that occur predominantly in the Jewish population. Nor would anyone have a problem with a study on the effects of nutrition in the prevention of sickle-cell anemia that limited study participants to Black children. Nor would anyone object to a similar study of pernicious anemia that limited participants to older persons of Northern European descent. The National Institute for Health is currently calling for grant applications for research investigating why prostate cancer occurs with greater frequency in white and black men than in Hispanic and Asian men.

612. *Id.* at 1067.

613. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 838 (2007).

614. *Hunter ex rel. Brandt*, 190 F.3d at 1063.

four Justices. This is even more likely because the dissenting opinion in *Parents Involved* viewed beneficial uses of race-conscious plans favorably.[615] This view might also embrace the laboratory school's goal of social development and education of urban children[616] and the generation of innovative teaching.[617] Because diversity is not the university's asserted compelling interest, it might not need to satisfy the three essential elements of diversity: educational, remedial and democratic.[618] Nevertheless, in the interest of wisdom and prudent precautions, the university should be prepared to make a case for each element within its race-conscious plan.

The *Hunter ex rel. Brandt* case presents a peculiar situation because of its research orientation. The following statement by the Ninth Circuit ardently makes this clear:

> No one would challenge a decision of UCLA medical school to explicitly consider ethnicity in selecting study participants for research on Gauchers disease or Tay-Sachs-diseases that occur predominantly in the Jewish population. Nor would anyone have a problem with a study on the effects of nutrition in the prevention of sickle-cell anemia that limited study participants to Black children. Nor would anyone object to a similar study of pernicious anemia that limited participants to older persons of Northern European descent. The National Institute for Health is currently calling for grant applications for research investigating why prostate cancer occurs with greater frequency in white and black men than in Hispanic and Asian men.[619]

A plurality of the *Parents Involved* Court would likely find the district's interest non-compelling, particularly because these Justices are more disposed to only one compelling interest in the elementary and secondary education context: the remedial use of racial classifications.[620] This is evident in their insistence that the interest in diversity be restricted to higher education.[621] Justice Kennedy might be more inclined to accept the university's asserted interest as compelling if race is only "one aspect" of the plan.[622] The laboratory school plan certainly

615. *Parents Involved*, 551 U.S. at 829-30.
616. *Hunter ex rel. Brandt*, 190 F.3d at 1062.
617. *Id.*
618. *See Parents Involved*, 551 U.S. at 720-24.
619. *Hunter ex rel. Brandt*, 190 F.3d at 1066-67, n.11.
620. *Parents Involved*, 551 U.S. at 724-27.
621. *Id.* at 724-25.
622. *Id.* at 788.

considers race, permanence of residence, family income, gender, and "parents' willingness to comply with UES's [Corinne A. Seeds University Elementary School] mandatory involvement requirement"[623] in determining the "research subjects" admitted to the school.[624] Race does not appear to be *the* dispositive factor in all admissions.[625] In fact Keeley's sister, a white student, was admitted to the school under the race-conscious plan.[626]

b. Narrow Tailoring

Because it does not appear that the university used explicit racial percentages in its admissions process,[627] the dissenting justices might not require evidence that the plan was based on broad ranges serving as a "useful starting point"[628] for its goals. If the university required specific numbers or percentages of different races in its program, it might be required to show that the broad ranges were used as mere starting points.[629] Moreover, because this was a research laboratory school, it is uncertain whether the justices would require the university to show that student choice, rather than race, drove the admissions.[630] If the plan required numbers or percentages of races, the university should be prepared to show that the plan was a "less burdensome"[631] one that included "broad-range limits on voluntary school choice."[632] To satisfy this, the university must show that race was "a factor only in a fraction of students' non-merit-based assignments [and] not in large numbers of students' merit-based applications."[633]

Further, given that this case involved a research laboratory school, the dissenting justices might not require the university to prove that its plan "embodie[d] the results of local experience and community consultation . . . the product of a process that has sought to enhance

623. *Hunter ex rel. Brandt*, 190 F.3d at 1062.

624. *Id.* at 1062.

625. *See id.* at 1062-63 (there are several other factors for admission other than race, e.g. gender and family income).

626. *Id.* at 1063.

627. *See id.* at 1062-63.

628. *Parents Involved*, 551 U.S. at 724. Recall, this was the first factor considered in the dissenting justices' narrow-tailoring analysis.

629. *Id.*

630. *Id.* at 847-48.

631. *Id.* at 847.

632. *Id.* Recall, this was the second factor the dissenting justices considered in their narrow-tailoring analysis.

633. *Id.*

student choice." [634] Like research studies in various fields, the needs of the researcher, rather than the choice of the participant, dictate the research participants chosen. Consequently, student choice might not be a critical variable in a race-conscious research study. However, in order to be prepared, the university should have evidence showing that it considered "reasonably evident alternatives"[635] before deciding to implement the race-conscious plan.

For Justice Kennedy, the university needs to work on explicitly and clearly defining the "how and when"[636] of its racial classifications.[637] It is critical that these definitions not be "in terms so broad and imprecise that they cannot withstand strict scrutiny."[638] In this respect, the university must clearly spell out who made student assignment decisions,[639] the oversight provided for the plan,[640] "the *precise* circumstances in which an assignment decision will or will not be made on the basis of race,"[641] and "how it [was] determined which of two similarly situated children will be subjected to a given race-based decision."[642] In considering other factors such as "dominant language, permanence of residence, and parents' willingness to comply with UES's mandatory involvement requirement,"[643] and making race only *a* factor, the university's plan would seem to satisfy Justice Kennedy's requirement that race-conscious plans include "a more nuanced, individual evaluation of school needs and student characteristics that might include race as *a* component."[644] Scholarly expert testimony in the case made it clear, however, that in the university's study of urban population through this laboratory school, race was a critical variable.[645] For example, one expert testified that "[b]ecause of the small sample size, it [was] highly unlikely that such a small group, if selected without some explicit consideration of race/ethnicity, would be representative of Los Angeles' or the State's urban school population."[646]

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634. *Parents Involved*, 551 U.S. at 848. Recall, this was the third factor the dissenting justices considered in their narrow-tailoring analysis.

635. *Id.* at 855. Recall, this was the fourth factor the dissenting justices considered in their narrow-tailoring analysis.

636. *Id.* at 784-85.

637. *Id.*

638. *Id.*

639. *Id.* at 785.

640. *Parents Involved*, 551 U.S. at 785.

641. *Id.* (emphasis added).

642. *Id.*

643. *Hunter ex rel. Brandt*, 190 F.3d at 1062.

644. *Parents Involved*, 551 U.S. at 790 (emphasis added).

645. *Hunter ex rel. Brandt*, 190 F.3d at 1065-66.

646. *Id.* at 1066.

Another expert testified that "even if the applicant pool in the aggregate [was] sufficiently diverse, an entirely random selection would not yield a population that balances ethnicity with other factors, such as age, gender and family income."[647] Further, "both Dr. Stipek and Dr. Handler testified that it was necessary to explicitly consider race/ethnicity in UES's admissions process to achieve the precise student population required for UES's research."[648] Withal, the university might be able to defend its plan by basing its arguments on Justice Kennedy's use of the word "solely" when he declared that narrowly tailored plans must deal with race "in a general way and without treating each student in different fashion *solely* on the basis of a systematic, individual typing by race."[649]

For the *Parents Involved* majority, the university must be prepared to show that its plan had more than a minimal impact in achieving its goals.[650] The Ninth Circuit found, for example, that the school's research mission impacted "the day-to day experience of its students."[651] The impact of UES's plan in achieving its goals is evident in the following Ninth Circuit Court finding:

> UES identifies issues relevant to the education and social development of children in multicultural, urban communities, conducts research on these issues, and develops innovations in teaching based on this research.
>
> UES shares its research results with public school teachers throughout the State of California through seminars, workshops, teacher training programs, and published articles.[652]

The Ninth Circuit noted the district court's comments, which opined that it "simply cannot hope to recount each of the particular innovative educational techniques developed at UES."[653] While it appears that the university's plan had more than a minimal impact, the university should document its impact and be prepared to provide measurable research results to satisfy the *Parents Involved* majority.

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647. *Id.*
648. *Id.*
649. *Parents Involved*, 551 U.S. at 788-89 (emphasis added).
650. *See id.* at 733-34.
651. *Hunter ex rel. Brandt*, 190 F.3d at 1065.
652. *Id.* at 1062.
653. *Id.* at 1066.

The *Parents Involved* majority would likewise require the university to demonstrate that, before adopting the race-conscious plan, it gave "serious [and] good-faith consideration"[654] to "workable race-neutral alternatives."[655] In the *Hunter ex rel. Brandt* case, it was argued that the location of laboratory schools at sites beyond UES or the creation of laboratory situations at all the state's schools would have been more narrowly tailored than the race-conscious plan at UES.[656] Nonetheless, as the Ninth Circuit concluded, "even if California were to establish one or more other lab schools elsewhere, this would not address UES's need to maintain the representative sample of students UES needs to fulfill its research mission."[657] The research nature of the laboratory school could potentially influence the Court, because as one expert stated, "[t]here is a simple rule about being a researcher . . . . If you're trying to find a sample that has some [particular] distribution of race, you use race as the variable to make that. You don't use an approximation or some variable of it."[658] Therefore, it limits or even eliminates "*workable* race-neutral alternatives"[659] available for viable and authentic research. The university might explicitly need to include a "logical stopping point" for its race-conscious plan,[660] however, as even research should come to a conclusion at some point.

F. Tuttle v. Arlington County School Board[661]

1. The Arlington County School District Plan

In Virginia, the parents of Grace Tuttle and Rachel Sechler brought an equal-protection challenge against the race-conscious admissions plan for Arlington County School District's alternative kindergarten school–Arlington Traditional School (ATS).[662] The plaintiffs' children, applicants to ATS, were denied admission for the 1998-99 school year

654. *Parents Involved*, 551 U.S. at 735 (quoting *Grutter*, 539 U.S. at 339).
655. *Id.*
656. *Hunter ex rel. Brandt*, 190 F.3d at 1077-78 (Beezer, J., dissenting).
657. *Id.* at 1066.
658. *Id.*
659. *Parents Involved*, 551 U.S. at 735 (emphasis added) (quoting *Grutter*, 539 U.S. at 339).
660. *Id.* at 731 (quoting *J.A. Croson*, 488 U.S. at 498).
661. *Tuttle II*, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000).
662. *Id.* at 700, 703-04.

based on the district's race-conscious weighted admissions plans.[663] They sought to enjoin implementation of the plan.[664]

In the first place, ATS admissions depended on availability, not merit.[665] However, the district implemented an admissions plan, using a weighted lottery, for oversubscribed alternative schools.[666] The two goals of the plan were: (1) preparation and education of "students to live in a diverse, global society by reflect[ing] the diversity of the community";[667] and (2) to "serve the diverse groups of students in the district, including those from backgrounds that suggest they may come to school with educational needs that are different from or greater than others."[668] The admissions policy—designed to achieve diversity—for oversubscribed schools gave equal weight as race to the following factors: (1) income and family background;[669] (2) "whether English was the applicant's first or second language,"[670] and (3) race or ethnicity.[671] It was aimed at enrolling a student population proportionately approximating "the distribution of students from those groups in the district's overall student population."[672]

ATS was oversubscribed for the 1998-99 school year,[673] and the weighted lottery used for admissions to the school worked as follows: (1) siblings of existing students at ATS got admitted first;[674] (2) "[n]ext, because the total ATS applicant pool, including siblings, was not within 15% of the county-wide student population percentages for all three factors [race, income/family background, and English as a first/second language], a sequential, weighted random lottery"[675] was used to determine the remaining admittees.[676] The policy weighted the probabilities for each applicant's lottery number, "so that applicants from under-represented groups ... had an increased probability of selection."[677] The "lottery weight" for each applicant was determined by

663. *Id.* at 702.
664. *Id.* at 700-01.
665. *Id.* at 701.
666. *See id.* at 700-01.
667. *Tuttle II*, 195 F.3d at 701 (internal quotation marks omitted).
668. *Id.*
669. *Id.*
670. *Id.*
671. *Id.* at 707.
672. *Id.*
673. *See Tuttle II*, 195 F.3d at 701. Specifically, the school received 185 applications for its sixty-nine spots.
674. *Id.* at 702.
675. *Id.*
676. *Id.*
677. *Id.*

multiplying the weights for each of the three factors for that applicant.[678] The plaintiffs' children had no siblings at the school and their diversity "lottery weight" precluded their admission.[679] The following table represents the diversity "lottery weights" for the 1998-99 school year:

Table 2[680]

	Population Subset				
	County-wide public school students	Applicant pool (including siblings)	Applicants offered admission (including siblings)	Relative lottery weights of each applicant subgroup	Percent of each applicant subgroup (excluding siblings) offered admission
Income Factor					
Low income	40%	13.5%	25%	2	67%
High income	60%	86.5%	75%	1	22%
First Language Factor					
English	57%	88.1%	77%	1	22%
Non-English	43%	11.9%	23%	3	70%
Race/Ethnicity Factor					

678. *Id.* at 702 n.5.
679. *Tuttle II*, 195 F.3d at 702.
680. *Id.* at 702 n.4.

Asian/ Pacific Islander	10%	13.5%	13%	4	20%
Black	17%	8.6%	10%	11	36%
Hispanic	31%	10.8%	22%	9	71%
White	41%	67%	55%	5	23%
Other	<1%	-%	-%		

The federal district court for the Eastern District of Virginia granted the plaintiffs' motion for injunctive relief.[681] The court ruled that "as a matter of law, diversity was not a compelling governmental interest because the only compelling governmental interest to justify racial classifications was to remedy the effects of past discrimination."[682] The court ordered the district to admit students to ATS using a "double-blind random lottery without the use of any preferences."[683] The school board appealed.[684]

The question before the Fourth Circuit Court of Appeals was "whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body."[685] The court concluded that the ATS admissions plan was designed to promote racial diversity, not as a remedial measure for past discrimination.[686] The court emphasized that strict scrutiny review governed all racial classifications.[687] It observed that the Fourth Circuit had never ruled on whether diversity constituted a compelling interest.[688] Further, it pointed out that, at the time, the U.S. Supreme Court had not resolved the issue either.[689] The Fourth Circuit avoided resolution of the issue in declaring that: "[u]ntil the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a

681. *Id.* at 702-03 (citing Tuttle v. Arlington Cnty. Sch. Bd. (*Tuttle I*), No. CA-98-418-A, 1998 U.S. Dist. LEXIS 22578, at *11 (E.D. Va. April 14, 1998) (unpublished memorandum opinion)).

682. *Id.* at 703 (internal quotation marks omitted) (citing *Tuttle I*, 1998 U.S. Dist. LEXIS 22578, at *8).

683. *Id.*

684. *Id.*

685. *Tuttle II*, 195 F.3d at 700.

686. *Id.*

687. *Id.* at 704.

688. *Id.* at 704-05. *See also id.* at 705 ("[w]e have explicitly avoided deciding the question of whether diversity is a compelling interest.").

689. *Id.* at 705.

compelling governmental interest and proceed to examine whether the [p]olicy is narrowly tailored to achieve diversity."[690]

The court concluded that the plan was not narrowly tailored because it was a racial balancing plan, ruling that "nonremedial racial balancing is unconstitutional."[691] For its narrow-tailoring analysis, the court considered the following five factors:

> (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties.[692]

The court found that the ATS plan failed the first factor "because the School Board's own Alternative Schools Admission Study Committee offered one or more alternative race-neutral policies in its Report to the Superintendent."[693] The plan failed the second factor because the district policy stated that the plan would be implemented "for the 1999-2000 school year and thereafter";[694] in other words, the plan had no "logical

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690. *Id.*

691. *Tuttle II*, 195 F.3d at 705.

692. *Id.* at 706 (citing Hayes v. N. State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993)).

693. *Id.* The three proposed alternatives were:

> 1. Assign a small geographic area to identified alternative schools as the home school for that area, and fill the remaining spaces in the entering class by means of an unweighted random lottery from a self-selected applicant pool. The geographic area would presumably be selected so that its residents would positively effect the diversity of the school
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> 2. An additional option was to have all names of an entering class in the county automatically put into the lottery. All students are then selected at random and offered admission until the class is full. Another method would be to offer randomly selected families the opportunity to have their child's name placed in a second lottery from which those students selected would be offered admission. This method would require all families, even those not interested in alternative schools, to make an active choice
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> 3. Each neighborhood school would be allotted a certain number of slots at each alternative school. The number of slots per school would be determined either by the percentage of that school's population relative to ATS student population or by the extent of overcrowding at the school . . . .

Id. at 706 n.11.

694. *Id.*

stopping point."[695] The court objected to the ATS plan under the third factor because the district used racial balancing to attempt to achieve numerical racial diversity.[696] The court concluded that while the plan did not "explicitly set aside spots solely for certain minorities, it ha[d] practically the same result by skewing the odds of selection in favor of certain minorities."[697] Further, the court reasoned that "[e]ven if the final results ... [had] some statistical variation, what [drove] the entire weighted lottery process-the determination of whether it applie[d] and the values of its weights-[was] racial balancing."[698] The court also found that racial balancing was not necessary for attainment of the admissions plan's goals.[699] Under the fourth factor, the plan was not flexible because "[t]he race/ethnicity factor grant[ed] preferential treatment to certain applicants *solely* because of their race."[700] Besides, the district adjusted each applicant's selection probability based on his/her race if the applicant pool was not reflective of the plan's 15-percent racial representation requirement.[701] Furthermore, the plan did not treat applicants as individuals but rather as members of a group.[702] The plan failed the fifth factor of narrow-tailoring analysis because it imposed a great burden on innocent third parties.[703] The Fourth Circuit Court reasoned that "[t]he innocent third parties in this case are *young* kindergarten-age children like the [a]pplicants who [did] not meet any of the [p]olicy's diversity criteria."[704] It vacated the district court's injunctive relief but affirmed the holding of unconstitutionality and remanded for trial.[705]

2. *Parents Involved Analysis*

a. *Compelling Interest*

The Arlington County school district asserted a compelling interest in diversity,[706] which the dissenting justices in *Parents Involved* would

695. *Id.* (citing *Croson,* 488 U.S. at 498).
696. *Id.* at 707.
697. *Tuttle II,* 195 F.3d at 707.
698. *Id.*
699. *Id.*
700. *Id.* (emphasis added).
701. *Id.* at 707. Recall, that the plan required racial representation within "15% of the county-wide student [racial] population percentages." *Id.* at 702.
702. *Id.* at 707.
703. *Tuttle II,* 195 F.3d at 707.
704. *Id.* (emphasis added).
705. *Id.* at 708.
706. *Id.* at 700-01.

likely accept as such.[707] The Fourth Circuit Court of Appeals concluded that the school district had no compelling interest in the remedial use of race.[708] Thus, for the dissenting justices, the district might need to develop the record to show that it satisfies the remedial element for a compelling interest in diversity.[709] To do this, the district must present evidence showing that it has an interest in averting the resegregation of its schools and combating remnants of segregation resulting from school-related policies.[710] The focus of the evidence must not be on remnants of "general *societal* discrimination, but of primary and secondary school segregation."[711]

For the educational element, the district must present evidence of the highly segregated nature of its schools.[712] It must then show that its race-conscious plan was designed to overcome "the adverse educational effects"[713] of those highly segregated schools.[714] The goals of the Arlington County school district plan should serve as evidence of the democratic element—the "interest in producing an educational environment that reflects the pluralistic society in which our children will live."[715] Specifically, the district's goals included (1) preparation and education of "students to live in a diverse, global society by reflect[ing] the diversity of the community";[716] and (2) attending to "the diverse groups of students in the district, including those from backgrounds that suggest they may come to school with educational needs that are different from or greater than others."[717]

The Fourth Circuit in *Tuttle II* observed that the district's plan was designed to achieve numerical racial diversity or racial balancing.[718] These interests would be deemed non-compelling by a plurality of the *Parents Involved* Court.[719] Indeed, the *Parents Involved* justices would find these interests "illegitimate."[720] Further, the district is unlikely to prove a compelling interest with the plurality because those justices are

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707. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 838 (2007).

708. *Tuttle II*, 195 F.3d at 704-05.

709. *See Parents Involved*, 551 U.S. at 838.

710. *Id.* at 838.

711. *Id.* at 843 (emphasis added) (internal quotations marks and citations omitted).

712. *Id.* at 839.

713. *Id.*

714. *Id.*

715. *Parents Involved*, 551 U.S. at 840 (internal quotation marks omitted).

716. *Tuttle II*, 195 F.3d at 701 (internal quotation marks omitted).

717. *Id.*

718. *Id.* at 700-01, 705, 707.

719. *Parents Involved*, 551 U.S. at 725-27.

720. *Id.* at 726.

inclined to only allow diversity as a compelling interest in higher education.[721]

Like the plurality, Justice Kennedy will most likely find the interest in numerical racial diversity or racial balancing non-compelling.[722] However, if the district uses a broader definition of diversity, such that race is only "one aspect" of the race-conscious plan,[723] it might have a stronger case with Justice Kennedy.[724] It is nebulous whether the district could successfully make this case with the *Tuttle* plan, especially with the Fourth Circuit Court finding that the district's goal was numerical racial diversity or racial balancing.[725] The circuit court observed, for example, that "what [drove] the entire weighted lottery process-the determination of whether it applie[d] and the values of its weights-[was] racial balancing."[726] On the other hand, however, the district could argue that its lottery weighting system gave equal weights to (1) race, (2) income/family background and (3) English as a first/second language.[727] Besides, each applicant's "lottery weight" was determined by multiplying weights for each of these three factors for each applicant.[728] Hence, the district *might* be able to successfully contend that race was merely one aspect of its race-conscious plan.

b. Narrow Tailoring

Out of prudence, for the dissenting justices of *Parents Involved*, the Arlington County School District should redesign its plan so that it uses "broad ranges,"[729] functioning "less like a quota and more like . . . useful starting points."[730] This is especially critical given that in *Tuttle*, the Fourth Circuit Court of Appeals found that the district's plan effectively functioned like a quota.[731]

Additionally, the *Parents Involved* dissenting opinion requires that student choice, rather than race, drive the plan.[732] However, in *Tuttle*, the Fourth Circuit found that "what [drove] the entire weighted lottery

721. *Id.* at 724-25.
722. *Id.* at 783-87.
723. *Id.* at 788.
724. *See id.* at 788-89.
725. *Tuttle II*, 195 F.3d at 700-01, 705, 707.
726. *Id.* at 707.
727. *Id.* at 701.
728. *Id.* at 702, n.5.
729. *Parents Involved*, 551 U.S. at 846. Recall, this was the first factor considered in the dissenting justices' narrow-tailoring analysis.
730. *Id.* at 847 (internal quotation marks omitted).
731. *Tuttle II*, 195 F.3d at 705-07.
732. *Parents Involved*, 551 U.S. at 846.

process-the determination of whether it applie[d] and the values of its weights-[was] racial balancing."[733] The dissenting justices from the *Parents Involved* case would want to see that race was "but one part of plans that depend *primarily* upon other, nonracial elements."[734]

Considering a similar requirement as the dissenting justices' "less burdensome" requirement,[735] the Fourth Circuit found the district's plan burdensome because the goals of the plan did not require racial balancing.[736] For this requirement, the dissenting justices would want the district to establish that race was "a factor only in a fraction of students' non-merit-based assignments not in large numbers of students' merit-based applications."[737] The plan must also be shown to "embod[y] the results of local experience and community consultation ... the product of a process that has sought to enhance student choice."[738]

As for consideration of any "reasonably evident alternatives,"[739] the district seemed to satisfy this.[740] For example, the Fourth Circuit observed that "the School Board's own Alternative Schools Admission Study Committee offered one or more alternative race-neutral policies in its Report to the Superintendent."[741] This could likewise help the district show the *Parents Involved* majority that prior to implementation of the plan, there was "serious [and] good-faith consideration of workable race-neutral alternatives"[742] Moreover, the district must show the majority that the plan had more than a minimal impact in attaining the plan's compelling interests.[743]

The district's plan would likely fail the plurality's narrow-tailoring analysis because it was "tied to [the] district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[744] For instance, the circuit court found that, under the plan, when the "the

733. *Tuttle II*, 195 F.3d at 707.

734. *Parents Involved*, 551 U.S. at 846 (emphasis added).

735. *Id.* at 847. Recall, this was the second factor the dissenting justices considered in their narrow-tailoring analysis.

736. *Tuttle II*, 195 F.3d at 707.

737. *Parents Involved*, 551 U.S. at 847.

738. *Id.* at 848. Recall, this was the third factor the dissenting justices considered in their narrow-tailoring analysis.

739. *Id.* at 855. Recall, this was the fourth factor the dissenting justices considered in their narrow-tailoring analysis.

740. *Tuttle II*, 195 F.3d at 706.

741. *Id.*

742. *Parents Involved*, 551 U.S. at 735 (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).

743. *See id.* at 733-35.

744. *Id.* at 726.

applicant pool [did] not reflect the required 15% racial and ethnic diversity, each child's probability of selection in the lottery [was] adjusted corresponding to his or her stated race."[745] The circuit court also found that the plan failed to specify a logical stopping point[746]—a requirement of the *Parents Involved* plurality.[747] Indeed, the district's race-conscious plan stated that the plan would be in effect "for the 1999-2000 school year *and thereafter*."[748]

Even though the district's plan seems to have details on its when and how,[749] as part of supernumerary planning, the district should detail the following in its plan so that it has a stronger chance of passing Justice Kennedy's narrow-tailoring analysis: who makes student assignment decisions,[750] the oversight provided for the plan,[751] "the *precise* circumstances in which an assignment decision will or will not be made on the basis of race,"[752] and "how it is determined which of two similarly situated children will be subjected to a given race-based decision."[753]

Justice Kennedy would likely take issue with the *Tuttle* plan because it used "individual typing by race."[754] This is evident in the fact that the Fourth Circuit Court, for example, found that the "[t]he race/ethnicity factor grant[ed] preferential treatment to certain applicants *solely* because of their race."[755] Moreover, the circuit court found that "if the applicant pool [did] not reflect the required 15% racial and ethnic diversity, each child's probability of selection in the lottery [was] adjusted corresponding to his or her stated race."[756] The circuit court found that the result of the plan was "skewing the odds of selection in favor of certain minorities."[757] Hence, the district should redesign its plan so that it targets diversity "in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[758] Finally, the redesigned plan should invoke "a more nuanced,

745. *Tuttle II*, 195 F.3d at 707.
746. *Id.* at 706.
747. *Parents Involved*, 551 U.S. at 731 (quoting *J.A. Croson*, 488 U.S. at 498).
748. *Tuttle II*, 195 F.3d at 706 (emphasis added).
749. *See id.* at 701.
750. *Parents Involved*, 551 U.S. at 785.
751. *Id.*
752. *Id.*
753. *Id.* at 785 (emphasis added).
754. *Id.* at 788-89.
755. *Tuttle II*, 195 F.3d at 707 (emphasis added).
756. *Id.*
757. *Id.*
758. *Parents Involved*, 551 U.S. at 788-89.

individual evaluation of school needs and student characteristics that might include race as *a* component."[759]

G. Wessmann v. Gittens[760]

1. The Boston School Committee Plan

The Boston School Committee implemented a race-conscious plan for admissions to the Boston Latin School (BLS).[761] BLS was the most prestigious of three examination schools run by the city of Boston.[762] While a federal court in 1974 had adjudicated that the district itself was a dual school system practicing *de jure* segregation, there was no evidence of intentional segregation by BLS.[763] The school, however, had "symptoms of segregation"[764] such as: (1) a peculiarly low African American student enrollment,[765] (2) the recent change of the school's "entrance testing methods pursuant to a consent decree settling charges that the earlier methods were themselves discriminatory,"[766] and (3) the "inability to demonstrate that existing racial imbalances [at BLS] were not a result of discrimination."[767]

Consequently, the district court found BLS "complicit in promoting and maintaining the dual system."[768] That court then ordered BLS to set aside for African Americans and Hispanics a minimum 35 percent of each new admitted class.[769] The First Circuit affirmed this set-aside in 1976.[770] In 1987, the circuit court found the Boston School District had attained unitary status with respect to student assignments.[771] In other

759. *Id.* at 790 (emphasis added).

760. *Wessman II*, 160 F.3d 790 (1st Cir. 1998).

761. *Id.* at 791-92.

762. *Id.* at 791.

763. *Id.* at 792 (citing Morgan v. Hennigan (*Morgan I*), 379 F. Supp. 410, 480-81 (D. Mass. 1974)).

764. *Id.* at 792.

765. *Id.* (citing *Morgan I*, 379 F. Supp. at 466).

766. *Wessmann II*, 160 F.3d at 792 (citing *Morgan I*, 379 F. Supp. at 467-68).

767. *Id.*

768. *Id.*

769. *Id.* at 792 (citing Morgan v. Kerrigan (*Morgan II*), 401 F. Supp. 216, 258 (D. Mass. 1975)).

770. *Id.* at 792 (citing Morgan v. Kerrigan (*Morgan III*), 530 F.2d 401, 425 (1st Cir. 1976)).

771. *Id.* at 792 (citing Morgan v. Nucci (*Morgan IV*), 831 F.2d 313, 326 (1st Cir. 1987)). The district court retained supervisory authority over other parts of the district, such as facilities, staff, faculty, extracurricular activities and transportation. These, along with student assignment represent the *Green* factors the Supreme Court identified as factors in determining unitary status in Green v. County School Board, 391 U.S. 430, 435

words, BLS, as well as the district's other schools, was no longer under the 35% set-aside requirement.[772] The school district voluntarily continued the set-aside at BLS and its other examination schools.[773] In 1995, however, the constitutionality of the policy was challenged.[774] A year later, after the district court issued an injunction ordering the plaintiff's admission to BLS,[775] the school district abandoned the set-asides.[776] Fears that this abandonment would negatively impact minority enrollment led the school district to hire a consulting firm (Bain) to study admissions alternatives.[777] These options varied from "lotteries to strict merit-selection plans,"[778] and Bain was required to "report on how each option might affect the racial and ethnic composition of the examination schools' entering classes."[779] A task force established to further analyze the Bain-study options as well as the school committee settled on one option that would "minimize the diminution of black and Hispanic student admissions expected to result from abandonment of the 35% set-aside."[780] This option, implemented beginning with the 1997-98 school year, was the subject of the challenge in this case.[781]

Under this admissions plan, students were ranked based on a mathematical formula designed to forecast academic performance.[782] This formula derived a composite score for each applicant by combining the applicant's grade point average and performance on a standardized test.[783] Based on the rankings, each applicant then was assigned to the applicant pool for the examination school in which he had expressed interest.[784] The qualified applicant pool (QAP) for each school represented only applicants ranked in the "top 50% of the overall applicant pool for that particular school."[785] Admittees were selected from the QAP for each school.[786] The plan allocated 50 percent of the

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(1968). Another factor courts consider is educational quality. *See* Freeman v. Pitts, 503 U.S. 467, 492 (1992)).

772. *Wessmann II*, 160 F.3d at 792.

773. McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001, 1003 (D. Mass. 1996).

774. *Id.*

775. *Wessman II*, 160 F.3d at 792-93.

776. *Id.* at 1018.

777. *Id.* at 793.

778. *Id.*

779. *Id.*

780. *Id.*

781. *Wessmann II*, 160 F.3d at 793.

782. *Id.*

783. *Id.*

784. *Id.*

785. *Id.*

786. *Id.*

available seats at each school strictly based on the composite score rankings.[787] The remaining 50 percent of admitted applicants was based on race.[788]

Under this race-conscious plan, school officials "first determine[d] the relative proportions of five different racial/ethnic categories—white, black, Hispanic, Asian, and Native American—in the remaining pool of qualified applicants (RQAP), that is, the QAP for the particular school *minus* those persons already admitted on the basis of composite score rank order alone."[789] The plan then required school officials to "fill the open seats in rank order"[790] with a proviso that "the number of students taken from each racial/ethnic category must match the proportion of that category in the RQAP."[791] Because the racial distribution of admittees from the RQAP must match the racial distribution of the RQAP, "a member of a designated racial/ethnic group may be passed over in favor of a lower-ranking applicant from another group if the seats allotted for the former's racial/ethnic group have been filled."[792]

Sarah Wessmann, an applicant for BLS' 1997 ninth-grade incoming class, was denied admission pursuant to this race-conscious plan.[793] Of the 705 students in the QAP, composite scoring ranked her ninety-first.[794] The school had 90 seats available that year and the first forty-five were selected solely on the basis of composite score rankings.[795] Since two students in the top forty-five declined BLS' admission offer, forty-seven students were considered in this first round of the admissions process.[796] Consequently, if the school had only used the composite scores, without the race-conscious part, Sarah would have received admission.[797]

The other forty-five seats were filled using the race-conscious plan.[798] The RQAP's racial distribution was as follows: 40.41-percent white, 27.83-percent black, 11.64-percent Hispanic, 19.21-percent Asian and 0.31-percent Native American.[799] Therefore, based on the plan, the

787. *Wessmann II*, 160 F.3d at 793.
788. *Id.*
789. *Id.* RQAP is an acronym for "remaining pool of qualified applicants." *Id.*
790. *Id.*
791. *Id.*
792. *Id.*
793. *Wessmann II*, 160 F.3d at 793-94.
794. *Id.* at 793.
795. *Id.*
796. *Id.*
797. *Id.*
798. *Id.*
799. *Wessmann II*, 160 F.3d at 793.

final forty-five seats were assigned to eighteen whites, thirteen blacks, five Hispanics and nine Asians.[800] "[B]lack and Hispanic students whose composite score rankings ranged from 95th to 150th displaced Sarah and ten other white students who had higher composite scores and ranks."[801] Sarah's father sued the school committee and various school officials, claiming that the race-conscious admissions plan violated the Equal Protection Clause.[802] The federal district court for the District of Massachusetts ruled in favor of the school district.[803] The court found the district had compelling interests in remedying past discrimination and in diversity.[804] The court also found the plan narrowly tailored to achieving those interests.[805] The plaintiff appealed to the First Circuit, which reversed the district court decision.[806]

The First Circuit ruled that whether or not the nature of the race-conscious plan was a quota was a constitutional irrelevancy;[807] the relevant part for Equal Protection scrutiny was its use of racial classifications.[808] The court iterated that strict scrutiny governs all racial classifications.[809] The court objected to the plan's treatment of applicants as members of a group, rather than as individuals.[810] Specifically, the court declared that "the manner in which the [p]olicy functions is fundamentally at odds with the equal protection guarantee that citizens will be treated as individuals, not as simply components of a racial, religious, sexual or national class."[811]

The circuit court pointed out that provision of role models for minorities was not a compelling interest justifying racial

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800. *Id.*

801. *Id.* at 793-94.

802. Wessmann v. Boston Sch. Comm. (*Wessman I*), 996 F. Supp. 120, 121 (D. Mass. 1998).

803. *Id.*

804. *Id.* at 127-32.

805. *Id.*

806. *Wessmann II*, 160 F.3d at 808-09.

807. *See id.* at 794 ("[w]hether the [p]olicy is truly a quota or whether it is best described otherwise is entirely irrelevant for the purpose of equal protection analysis. Attractive labeling cannot alter the fact that any program which induces schools to grant preferences based on race and ethnicity is constitutionally suspect.") (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (opinion of Powell, J.) ("noting that regardless of whether the limitation at issue is described as 'a quota or a goal,' it is 'a line drawn on the basis of race and ethnic status.'")).

808. *Id.* at 794.

809. *Id.* at 794-95.

810. *Id.* at 794.

811. *Id.* (internal quotation marks omitted) (citing *Miller*, 515 U.S. at 911).

classifications.[812] The court also acknowledged that the remedial use of race constituted a compelling interest.[813] Under its compelling interest analysis, however, the court found that the district failed to demonstrate with a "strong basis in evidence"[814] that past discrimination was the cause of current race-related educational problems in the district.[815] In other words, the district failed to prove that there were any vestiges of past discrimination that justified use of the admissions plan.[816] The court also concluded that because the district had attained unitary status, "the

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812. *Wessmann II*, 160 F.3d at 795 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 497-98).

813. *Id.* at 795. *See also id.* at 802 (stating that the district had to "identify a vestige of bygone discrimination and provide convincing evidence that ties this vestige to the *de jure* segregation of the benighted past").

814. *Id.* at 801-02. The circuit court ruled that plan was not narrowly tailored to remedy past discrimination partly because of the following:

> [I]f palliating the effects of past discrimination is the ostensible justification for the [p]olicy, then the [p]olicy, on its face, has been crafted in puzzling ways. Suppose that in a particular year a group of Hispanic students does very well, such that they cluster between ranks 45 and 90, but that the Hispanic student population in the RQAP is sparse. Suppose further that whites and Asians form a significant majority of the RQAP. There is then a likelihood that, by reason of the [p]olicy, a number of the Hispanic students—archetypal victims of discrimination—will be displaced by white and Asian students. Nor need we resort to hypotheticals to see such effects. At the O'Bryant School, the [p]olicy's flexible racial/ethnic guidelines resulted in the rejection from the 1997 ninth-grade entering class of two Hispanic students in favor of a white student. Then, too, given the [s]chool [c]ommittee's position that Asian students have not been victims of discrimination, we are unable to comprehend the remedial purpose of admitting Asian students over higher-ranking white students, as happened in the case of Sarah Wessmann. This brings us back to the point of our beginning: in structure and operation, the Policy indicates that it was not devised to assuage past harms, but that it was simply a way of assuring racial/ethnic balance, howsoever defined, in each examination school class.

Id. at 808.

815. *Id.* at 800-08. *See also id.* at 802 (emphasizing that the First Circuit had taken "pains to warn against indiscriminate reliance on history alone lest it permit the adoption of remedial measures ageless in their reach into the past, and timeless in their ability to affect the future") (internal quotation marks omitted) (citing Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 21 (1st Cir. 1998)).

816. *Id.* at 802 ("In sum, whether past discrimination necessitates current action is a fact-sensitive inquiry, and courts must pay careful attention to competing explanations for current realities . . . . The mere fact that an institution once was found to have practiced discrimination is insufficient, in and of itself, to satisfy a state actor's burden of producing the reliable evidence required to uphold race-based action") (internal quotation marks omitted) (citing *Freeman*, 503 U.S. at 495-96 and Middleton v. City of Flint, 92 F.3d 396, 409 (6th Cir. 1996)).

affirmative duty to desegregate ha[d] been accomplished."[817] Therefore, "school authorities [were] not expected to make year-by-year adjustments of the racial composition of student bodies absent a showing that either the school authorities or some other agency of the State ha[d] deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools."[818]

The absence of clear Supreme Court precedent and the lack of clear consensus in the circuit courts prompted the First Circuit to refrain from resolving whether diversity was a compelling interest.[819] The court stated: "we need not definitively resolve this conundrum today. Instead, we assume *arguendo*—but we do not decide—that . . . some iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions."[820]

The court dismissed the school district's contention that diversity was a compelling interest because of the societal need for cross-cultural communication, especially in the face of technological advancements.[821] Other virtues the court dismissed as justifications for finding diversity compelling included: (1) "vigorous exchange of ideas";[822] (2) mutual understanding and respect";[823] (3) "eroding prejudice";[824] and (4) "social harmony."[825] Particularly, the court observed that these virtues were generalizations undercutting the construct of diversity.[826] The court reasoned that "[i]f one is to limit consideration to generalities, any proponent of any notion of diversity could recite a similar litany of virtues. Hence, an inquiring court cannot content itself with abstractions."[827]

With respect to narrow tailoring, the court concluded that BLS's race-conscious admissions plan was not designed to promote the virtues

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817. *Id.* at 801 (internal quotation marks omitted) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971) and *Freeman,* 503 U.S. at 494)).

818. *Wessmann II,* 160 F.3d at 801 (internal quotation marks omitted).

819. *Id.* at 795-96.

820. *Id.* at 796. *See also id.* at 800 ("For purposes of resolving this appeal, however, we need not speak definitively to that vexing question.").

821. *Id.* at 797.

822. *Id.*

823. *Id.*

824. *Wessmann II,* 160 F.3d at 797.

825. *Id.*

826. *Id.*

827. *Id.*; *see also id.* at 798 ("[w]e must look beyond the [s]chool [c]ommittee's recital of the theoretical benefits of diversity and inquire whether the concrete workings of the [p]olicy merit constitutional sanction. Only by such particularized attention can we ascertain whether the [p]olicy bears any necessary relation to the noble ends it espouses. In short, the devil is in the details.").

the district extolled in the case.[828] Instead, the exclusive focal point of the plan was *racial* diversity.[829] Further, the plan only considered five racial groups (whites, blacks, Asians, Hispanics and Native Americans) "without recognizing that none is monolithic."[830] The court emphasized that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[831] It characterized the district's plan as a "single-minded focus on ethnic diversity"[832] which "hinder[ed] rather than further[ed] attainment of genuine diversity."[833] The court found the district's race-conscious plan only led to "relatively modest deviations" in minority representations when compared with minority representations under a strict merit-selection plan.[834] The court ruled that the race-conscious plan was

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828. *Id.* at 798; *see also id.* at 799-800:

> The [s]chool [c]ommittee has provided absolutely no competent evidence that the proportional representation promoted by the [p]olicy is in any way tied to the vigorous exchange of ideas, let alone that, in such respects, it differs significantly in consequence from, say, a strict merit-selection process. Nor has the [s]chool [c]ommittee concretely demonstrated that the differences in the percentages of students resulting from the [p]olicy and other, constitutionally acceptable alternatives are significant in any other way, such as students' capacity and willingness to learn. To the contrary, the [s]chool [c]ommittee relies only on broad generalizations by a few witnesses, which, in the absence of solid and compelling evidence, constitute no more than rank speculation.

829. *Id.* at 798.

830. *Wessmann II*, 160 F.3d at 798.

831. *Id.* (citing *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)).

832. *Id.* (citing *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)).

833. *Wessmann II*, 160 F.3d at 798 (adding, "[n]or is the [p]olicy saved because the student assignments that it dictates are proportional to the composition of the RQAP"). *See also id.* (citing *Bakke*, 438 U.S. at 315 (opinion of Powell, J.), for the proposition that "adoption of a 'multitrack' program with a prescribed number of seats set aside each for identifiable category of applicants would not heal the admissions plan's constitutional infirmity.") (internal quotation marks omitted).

834. *See id.* at 798:

> Statistics compiled for the last ten years show that under a strict merit-selection approach, black and Hispanic students together would comprise between 15% and 20% of each entering class, and minorities, *in toto,* would comprise a substantially greater percentage. Even on the assumption that the need for racial and ethnic diversity alone might sometimes constitute a compelling interest sufficient to warrant some type of corrective governmental action, it is perfectly clear that the need would have to be acute—much more acute than the relatively modest deviations that attend the instant case. In short, the [s]chool [c]ommittee's flexible racial/ethnic guidelines appear to be less a means of attaining diversity in any constitutionally relevant sense and more a means for racial balancing.

essentially unconstitutional racial balancing.[835] Specifically, it declared that the plan was "at bottom, a mechanism for racial balancing–and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden."[836]

The school district attempted to use the term "racial isolation" to link racial balancing to the virtues of diversity asserted in the case.[837] The First Circuit Court dismissed this argument, characterizing it as "extremely suspect because it assumes that students cannot function or express themselves unless they are surrounded by a sufficient number of persons of like race or ethnicity."[838] The court also took exception to the argument because of its focus on group identity, rather than individual identity recognized under the constitution, noting that the Supreme Court had declared such practices "impermissible stereotyping."[839] In response to the school district's arguments that individualized typing in admissions would be administratively cumbersome, the circuit court stated that "administrative convenience is not a sufficient justification for promoting racial distinctions."[840] The court explained that a constitutionally "proper admissions policy would be such that if an

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835. *Id.* ("the [s]chool [c]ommittee's flexible racial/ethnic guidelines appear to be less a means of attaining diversity in any constitutionally relevant sense and more a means for racial balancing. The [p]olicy's reliance on a scheme of proportional representation buttresses this appearance and indicates that the [s]chool [c]ommittee intended mainly to achieve a racial/ethnic 'mix' that it considered desirable").

836. *Id.* at 799 (citing *Freeman*, 503 U.S. at 494). *See also id.* at 799 ("Nor does the [s]chool [c]ommittee's reliance on alleviating underrepresentation advance its cause. Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions") (citing Lutheran Church-Mo. Synod v. FCC, 141 F.3d 344, 352 (D.C. Cir. 1998)).

837. *Id.* at 799:

> The closest the [s]chool [c]ommittee comes to linking racial balancing to these ideals is by introducing the concept of 'racial isolation.' The idea is that unless there is a certain representation of any given racial or ethnic group in a particular institution, members of that racial or ethnic group will find it difficult, if not impossible, to express themselves. Thus, the [s]chool [c]ommittee says, some minimum number of black and Hispanic students—precisely how many, we do not know—is required to prevent racial isolation.

838. *Wessmann II*, 160 F.3d at 799.

839. *Id.* (citing Miller v. Johnson, 515 U.S. 900, 912). *See also id.* at 800 ("Given both the Constitution's general prohibition against racial balancing and the potential dangers of stereotyping, we cannot allow generalities emanating from the subjective judgments of local officials to dictate whether a particular percentage of a particular racial or ethnic group is sufficient or insufficient for individual students to avoid isolation and express ideas.").

840. *Id.* at 799 n.5 (citing *Croson*, 488 U.S. at 508).

applicant 'loses out' to another candidate, he will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname."[841]

2. Parents Involved Analysis

a. Compelling Interest

The Boston School Committee asserted racial diversity,[842] avoidance of racial isolation,[843] racial balancing,[844] and remedy of past discrimination, as compelling interests.[845] The *Parents Involved* dissenting Judges would agree that these interests are compelling.[846] Indeed, the Justices regard racial diversity, racial balancing and avoidance of racial isolation as one and the same.[847]

As for the remedial use of race, a federal district court had found the Boston Latin School (BLS) "complicit in promoting and maintaining the dual system"[848] operated by the Boston School District.[849] Besides, "symptoms of segregation"[850] existed at BLS, such as: (1) the recent change of the school's "entrance testing methods pursuant to a consent decree settling charges that the earlier methods were themselves discriminatory";[851] (2) a peculiarly low African American student enrollment;[852] and (3) the "inability to demonstrate that existing racial imbalances [at BLS] were not a result of discrimination."[853] Withal, in 1987, the First Circuit Court ruled that, on student assignments, the school had achieved unitary status.[854] Nevertheless, the dissenting justices in *Parents Involved* ruled that remedial interests do not "vanish the day after a federal court declares that a district is unitary."[855]

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841. *Id.* at 799 (internal quotation marks omitted) (citing *Bakke,* 438 U.S. at 318).

842. *Wessman I,* 996 F. Supp. at 127-32.

843. *Wessman II,* 160 F.3d at 799.

844. *Id.* at 798-99.

845. *Wessmann I,* 996 F. Supp. at 131.

846. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 804-45 (2007).

847. *Id.* at 838.

848. *Wessmann II,* 160 F.3d at 792 (citing Morgan v. Hennigan (*Morgan I*), 379 F. Supp. 410, 467-68 (D. Mass. 1974)).

849. *Id.*

850. *Id.* at 792.

851. *Id.* (citing *Morgan I,* 379 F. Supp. at 467-68).

852. *Id.* at 792 (citing *Morgan I,* 379 F. Supp. at 466).

853. *Id.*

854. *Wessmann II,* 160 F.3d at 792 (citing *Morgan IV,* 831 F.2d at 326).

855. *Parents Involved,* 551 U.S. at 844 (internal quotation marks omitted).

Consequently, if the district can show continuing vestiges of past discrimination, they might successfully argue that they not only have a compelling interest in using race to remedy past discrimination, but also that they satisfy the remedial element–one of the three essential elements *the Parents Involved* dissent requires for a compelling interest in diversity.[856]

As for the democratic element, the district has to show that it has an "interest in producing an educational element that reflects the pluralistic society in which our children will live."[857] The following virtues presented by the Boston School Committee as part of its plan could help satisfy this element: (1) "eroding prejudice";[858] (2) mutual understanding and respect";[859] and (3) "social harmony."[860] However, the district needs to prove evidentially that its race-conscious plan was designed to achieve these virtues, especially because the First Circuit Court has ruled that these virtues–mere generalizations–undercut the construct of diversity.[861]

For the educational element, the district must show that it had an "interest in overcoming the adverse educational effects produced by and associated with highly segregated schools."[862] While the district operated highly segregated schools and BLS was complicit in this regard,[863] the district still needs to prove that the plan was designed to "[overcome] the adverse educational effects produced by and associated with highly segregated schools."[864]

The *Parents Involved* plurality would find the district's interests in avoidance of racial isolation and racial balancing "illegitimate."[865] In essence, these Justices would find the district's interest in diversity non-compelling.[866] As for the interest in remedying past discrimination, a majority of the Court would rule that because the district had attained unitary status, it had no compelling interest in the remedial use of race.[867]

Like the plurality, Justice Kennedy would find the interest in racial balancing a non-compelling interest.[868] Nevertheless, for him, diversity

856. *Id.* at 838.
857. *Id.* at 840 (internal quotation marks omitted).
858. *Wessmann II*, 160 F.3d at 797.
859. *Id.*
860. *Id.*
861. *Id.*
862. *Parents Involved*, 551 U.S. at 839.
863. *Wessmann II*, 160 F.3d at 792.
864. *Parents Involved*, 551 U.S. at 839.
865. *Id.* at 726.
866. *Id.* at 724-25. They would likely limit the compelling interest in diversity to the context of higher education. *See id.*
867. *Id.* at 720-21.
868. *Id.* at 783-87.

would be a compelling interest if race is only "one aspect" of the race-conscious plan.[869] The district's plan in *Wessmann* probably would not satisfy this requirement, as race was the core and not just "one aspect" of the district's plan.[870] Indeed, the First Circuit Court found that the plan had a "single-minded focus on ethnic diversity."[871]

b. Narrow Tailoring

The Boston School District designed its plan to "minimize the diminution of black and Hispanic student admissions expected to result from abandonment of the 35-percent set-aside"[872] it previously used.[873] However, it is not evident that the district used "broad ranges"[874] that functioned "less like a quota and more like . . . useful starting points."[875] Hence, it would be prudent for the district to develop its plan so that it meets this dictate of the dissenting opinion. The district must likewise show that the heart of the race-conscious plan was student choice, not race.[876] The *Wessmann* plan, however, revealed that 50% of the seats for new admittees at BLS were exclusively based on race.[877] Even if the Justices examined the whole plan—beyond the race-conscious plan—the other 50 percent of BLS' seats were based on composite scoring of grade-point averages and standardized test results;[878] these are not necessarily archetypes of choice.

Moreover, the district must show the dissenting justices that its plan was a "less burdensome"[879] plan with "broad-range limits on voluntary school choice plans."[880] There is no question that the plan was burdensome; Sarah was denied admission and the plan provides that "a member of a designated racial/ethnic group may be passed over in favor of a lower-ranking applicant from another group if the seats allotted for the former's racial/ethnic group have been filled."[881] What the Justices

869. *Id.* at 788.

870. *See Wessmann II*, 160 F.3d at 792-94.

871. *Id.* at 798.

872. *Wessman II*, 160 F.3d at 793.

873. *See generally McLaughlin*, 938 F. Supp. at 1004-08.

874. *Parents Involved*, 551 U.S. at 846. Recall, this was the first factor considered in the dissenting justices' narrow-tailoring analysis.

875. *Id.* (internal quotation marks omitted).

876. *Id.*

877. *Wessmann II*, 160 F.3d at 793.

878. *Id.*

879. *Parents Involved*, 551 U.S. at 847.

880. *Id.* Recall, this was the second factor the dissenting justices considered in their narrow-tailoring analysis.

881. *Wessmann II*, 160 F.3d at 793.

would want the district to show under this "less burdensome" requirement is that race was "a factor only in a fraction of students' non-merit-based assignments and not in large numbers of students' merit-based applications."[882] Further, the record must show that the race-conscious plan "embodie[d] the results of local experience and community consultation . . . the product of a process that has sought to enhance student choice."[883]

As for the final factor, examination of any "reasonably evident alternatives,"[884] the district should be able to satisfy this. The record revealed that, prior to the challenged plan's adoption, the district commissioned a firm (Bain & Co.) to study admission alternatives.[885] The Bain firm considered various options ranging from "lotteries to strict merit-selection plans"[886] and the firm was required to "report on how each option might affect the racial and ethnic composition of the examination schools' entering classes."[887] The district also established a task force to further study the Bain-study options.[888]

The time, money, and efforts involved in studying these alternatives might help the district show the *Parents Involved* majority that the pre-implementation process involved "serious [and] good-faith consideration of workable race-neutral alternatives."[889] These justices would also require evidence that the race-conscious plan had more than a minimal impact in achieving its goals.[890] The First Circuit actually found that the district's plan only resulted in "relatively modest deviations" in minority representations when compared with minority representations under a strict merit-selection plan.[891] Specifically, the First Circuit revealed that:

> Statistics compiled for the last ten years show that under a strict merit-selection approach, black and Hispanic students together would comprise between 15% and 20% of each entering class, and minorities, *in toto,* would comprise a substantially greater

882. *Parents Involved*, 551 U.S. at 847.

883. *Id.* at 848. Recall, this was the third factor the dissenting justices considered in their narrow-tailoring analysis.

884. *Id.* at 855. Recall, this was the fourth factor the dissenting justices considered in their narrow-tailoring analysis.

885. *Wessmann II*, 160 F.3d at 793.

886. *Id.*

887. *Id.*

888. *Id.*

889. *Parents Involved*, 551 U.S. at 735 (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).

890. *See Parents Involved*, 551 U.S. at 733-34.

891. *See Wessmann II*, 160 F.3d at 798.

> percentage. Even on the assumption that the need for racial and ethnic diversity alone might sometimes constitute a compelling interest sufficient to warrant some type of corrective governmental action, it is perfectly clear that the need would have to be acute—much more acute than the relatively modest deviations that attend the instant case.[892]

To satisfy the plurality's narrow-tailoring analysis, the district must explicitly include a logical stopping point for the race-conscious plan.[893] The fact that the plan was tied to "specific *racial demographics*, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits,"[894] would likely cause it to fail the plurality's narrow-tailoring analysis.[895] For example, the plan required school officials to "*first* determine the relative proportions of five different racial/ethnic categories—white, black, Hispanic, Asian, and Native American—in the remaining pool of qualified applicants (RQAP), that is, the QAP for the particular school *minus* those persons already admitted on the basis of composite score rank order alone."[896] School officials then had to "fill the open seats in rank order"[897] with the following proviso: "the number of students taken from each racial/ethnic category must match the proportion of that category in the RQAP."[898] In other words, "the racial demographics . . . whatever they happen[ed] to be [drove] the required diversity numbers."[899]

A plan that defines the "how and when"[900] of its racial classifications "in terms so broad and imprecise that they cannot withstand strict scrutiny"[901] will fail Justice Kennedy's narrow-tailoring analysis.[902] The plan seemed to precisely describe the when and how of its plan, including "the *precise* circumstances in which an assignment decision [was] or [was] not . . . made on the basis of race"[903] and "how it [was] determined which of two similarly situated children will be subjected to

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892. *Id.*
893. *Parents Involved*, 551 U.S. at 731 (quoting *J.A. Croson*, 488 U.S. at 498).
894. *Id.* at 726 (emphasis added).
895. *See id.*
896. *Wessmann II*, 160 F.3d at 793 (emphasis added).
897. *Id.*
898. *Id.*
899. *Parents Involved*, 551 U.S. at 726-27 (internal quotation marks and citations omitted).
900. *Id.* at 784-85.
901. *Id.*
902. *Id.*
903. *Id.* at 785.

a given race-based decision."[904] This appears evident in the First Circuit's narrative of the plan:

> Half [of BLS's seats for new admittess] are allocated on the basis of 'flexible racial/ethnic guidelines' promulgated as part of the Policy. To apply these guidelines, school officials first determine the relative proportions of five different racial/ethnic categories—white, black, Hispanic, Asian and Native American—in the remaining pool of qualified applicants (RQAP), that is, the QAP for the particular school *minus* those persons already admitted on the basis of composite score rank order alone. They then fill the open seats in rank order, but the number of students taken from each racial/ethnic category must match the proportion of that category in the RQAP. Because the racial/ethnic distribution of the second group of successful applicants must mirror that of the RQAP, a member of a designated racial/ethnic group may be passed over in favor of a lower-ranking applicant from another group if the seats allotted for the former's racial/ethnic group have been filled.[905]

It remains to be seen whether this description would be sufficient for Justice Kennedy. It might not hurt to be as specific as possible.[906] According to Justice Kennedy, a viable plan needs to clearly specify who made student assignment decisions[907] and the oversight provided for the plan.[908] The plan must not engage in "individual typing by race."[909] The BLS plan seemed to engage in individual typing, as evident in the following description of the plan: "a member of a designated racial/ethnic group may be passed over in favor of a lower-ranking applicant from another group if the seats allotted for the former's racial/ethnic group have been filled."[910] In fact, the First Circuit found that the plan encouraged individual typing by race.[911] The individual typing was further evident in the fact that "black and Hispanic students

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904. *Id.* (emphasis added).

905. *Wessmann II*, 160 F.3d at 793.

906. *See Parents Involved*, 551 U.S. at 786; *cf.* 723-24. On another note, the plan only considered five racial groups (whites, blacks, Asians, Hispanics and Native Americans). Justice Kennedy might have an issue with the district's consideration of only five racial groups as might in fact a majority of the Court.

907. *Id.* at 785.

908. *Id.*

909. *Id.* at 788-89

910. *Wessmann II*, 160 F.3d at 793.

911. *See id.* at 794, 798-99.

whose composite score rankings ranged from 95th to 150th displaced Sarah and ten other white students who had higher composite scores and ranks."[912] Justice Kennedy would want the district plan to address diversity "in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[913] Under Justice Kennedy's analysis, the plan must be revamped as "a more nuanced, individual evaluation of school needs and student characteristics that might include race as *a* component."[914]

VIII. CONCLUSION AND IMPLICATIONS FOR SCHOOL DISTRICTS' RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS

Nationwide, school districts currently employing or seeking to implement race-conscious measures should be mindful of the *Parents Involved* principles discussed herein. School districts previously segregated by law and presently under desegregation decree do have a compelling interest in "remedying effects of past intentional discrimination"[915] through race conscious plans.[916] However, causation must be shown; the "harm being remedied"[917] must be "traceable to segregation."[918] School districts that have reached unitary status, however, would not get a majority of the *Parents Involved* Court to uphold a compelling interest in remedying effects of past intentional discrimination.[919] Race-conscious plans must not be designed to remedy past *societal* discrimination, as the Court will not recognize that as compelling interest.[920]

The court also requires school districts to document the "serious, good-faith consideration of workable race-neutral alternatives."[921] However, this is not a requirement of "exhaustion of *every* conceivable race-neutral alternative."[922] Additionally, districts should be prepared to show that their race-conscious plans have more than a minimal, subtle or indirect impact on attaining their compelling interest.[923] The district

912. *Wessmann II*, 160 F.3d at 793-94.
913. *Parents Involved*, 551 U.S. at 788-89.
914. *Id.* at 790 (emphasis added).
915. *Parents Involved*, 551 U.S. 701, 720-21 (2007).
916. *See id.*
917. *Id.* at 721.
918. *Id.*
919. *Id.* at 722.
920. *Id.* at 731.
921. *Parents Involved*, 551 U.S. 701, 735 (2007) (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).
922. *Id.* at 734 (emphasis added).
923. *Id.*

should be prepared to put on scientifically reliable experts who can garner the confidence of the Court in the "battle of experts" over whether the race-conscious plan actually leads to the achievement of the district's asserted compelling interests.[924]

The district should link its race-conscious plans to the "pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[925] Further, the plan should not be primarily driven by racial demographics.[926] In fact, school districts should avoid tying their race-conscious plans, explicitly or substantively, to demographic changes.[927] Racial balancing or avoidance of racial isolation cannot be the goal of the district, in word or substance, as such a goal will only gain four votes upon Supreme Court review.[928] A logical stopping point for use of the race-conscious plan should be explicitly built into the plan.[929] Districts should not depend on summative evaluations to determine when to let the plan lapse; instead frequent formative evaluations of the plan should be instituted so the stopping point gets triggered once the compelling interest is attained.[930]

It appears that, unlike with "explicit racial classifications,"[931] *Parents Involved* did not necessarily foreclose for the plurality the following uses of race-conscious measures: "where to construct new schools, how to allocate *resources among schools*, and which academic offerings to provide to attract students to certain schools."[932] Those running the district's race-conscious plans and those called to testify on behalf of the district must have "a thorough understanding of how [the] plan works."[933] Integral to this, the plan "must establish, in detail, how decisions based on an individual student's race are made."[934] District plans must avoid use of "broad and imprecise"[935] terms in describing the "when and how" of the use of race in the plan.[936] As Justice Kennedy declared, districts must remember that "[w]hen a court subjects

924. *See id.* at 726.
925. *Id.*
926. *Id.*
927. *Parents Involved*, 551 U.S. at 726.
928. *Id.* at 726-27.
929. *See id.* at 731.
930. *Id.*
931. *Id.* at 745.
932. *Id.* (emphasis added).
933. *Parents Involved*, 551 U.S. at 784.
934. *Id.*
935. *Id.* at 785.
936. *See id.* at 784-85.

governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State."[937]

Justice Kennedy offered what might be more than an armistice in race-conscious in stating that "[i]f school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are *free to devise race-conscious measures* to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[938] The promise of continued use of race-conscious measures also seems evident in Justice Kennedy's following declaration:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.[939]

Justice Kennedy indicated he is unlikely to apply strict scrutiny to those means identified in his declaration since they do not involve individual typing by race.[940] Even when plans individually type by race, however, he might uphold them if they are "a *last* resort to achieve a compelling interest."[941] Nevertheless, school districts should not rely on a "last-resort" argument to rescue their plans. Finally, to comply with Justice Kennedy's requirements, race-conscious plans should be designed as a "nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[942]

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937. *Id.* at 786.

938. *Id.* at 788-89 (emphasis added).

939. *Parents Involved*, 551 U.S. at 789.

940. *See id.* at 789 (citing Bush v. Vera, 517 U.S. 952, 958 (1996)) (plurality opinion) ("These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.").

941. *Id.* at 790 (emphasis added).

942. *Id.*

All things considered, the best approach for districts is to design their plans to satisfy principles from not just the *Parents Involved* majority, but also the plurality, the dissenting justices and Justice Kennedy; Justice Kennedy could readily vote with the dissenting justices if his requirements are met.[943]

943. For further analysis of the *Parents Involved* principles, *see* Preston C. Green, Bruce D. Baker, & Joseph O. Oluwole, *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 STAN. J. C.R. & C.L.283-338 (2008).