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MEMORANDUM

To: School District Clients and Friends

From: Maree Sneed
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Re: United States Supreme Court Decision in Parents Involved in Community Schools v. Seattle School District No. 1 and Meredith v. Jefferson County Board of Education

On June 28, 2007, the Supreme Court announced its decision in Parents Involved in Community Schools v. Seattle School District No. 1, No. 05-908, and Meredith v. Jefferson County Board of Education, No. 05-915. In a 5-4 decision, the Court struck down the voluntary integration plans used by the Seattle and Jefferson County school districts. However, the concurring opinion by Justice Kennedy and the dissenting opinion by Justice Breyer, which was joined by three other Justices, make clear that five justices (a majority of the Court) find that preventing racial isolation and obtaining diverse student enrollments are compelling interests and that school districts may use race-conscious measures to address those compelling interests. In addition, Justice Kennedy's concurrence identifies several race-conscious measures, such as siting of schools and drawing of attendance boundaries, that he concludes school districts may use without even raising constitutional concerns. Hogan & Hartson served as co-counsel, representing Seattle School District No. 1 in the Supreme Court.

I. Majority Opinion

In considering whether the student assignment plans in Seattle and Jefferson County violated the Equal Protection Clause, a majority of the Court concluded that strict scrutiny was the proper standard. Strict scrutiny requires a court to determine first, whether the government has articulated a compelling interest, and second, whether the means chosen to achieve that interest are narrowly tailored to that end. The majority of the Court noted that it did not have to decide whether the school districts in this case had a compelling interest, however, because it found that neither plan was narrowly tailored.

In the majority opinion, joined by Justices Scalia, Alito, Thomas and Kennedy, Chief Justice Roberts reasoned "the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from diversity." Slip Op. at 18. The Court first cited the limited number of students affected by the plans in both districts as evidence that racial classifications were unnecessary. The majority compared the impact in these cases with the fact that consideration of race more than tripled the minority enrollment at the University of Michigan's Law School under the race-conscious admissions policy upheld by the Court in its 2003 decision of Grutter v. Bollinger. The Chief Justice also criticized the districts' failure to demonstrate that they had seriously considered race-neutral alternatives. Specifically, the Court found that Seattle had rejected alternative assignments after cursory consideration, and that Jefferson County presented no evidence that it considered race-neutral plans.

In another part of his opinion, joined only by Justices Scalia, Alito, and Thomas, the Chief Justice went further and suggested that the school districts had not advanced a compelling interest. Only four justices, not a majority, joined this part of the opinion, so it does not establish the law on this point. These four justices suggested that concerns about racial imbalance or racial isolation in schools, in their view, would not be an acceptable justification for race-conscious decisionmaking: "We have many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake.'" Id. at 21.

II. Justice Kennedy's Concurring Opinion

In a concurring opinion stating views that appear to be shared by a majority of the Court on the question of compelling interest, Justice Kennedy staked out a middle ground. The tension in Justice Kennedy's position was evident from the first paragraph of his opinion. While he sympathized with the school districts' goals, which he said "should remind us that our highest aspirations are yet unfulfilled," he was suspicious of school districts' ability to use race responsibly and worried that "to make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome." Slip Op. at 1 (Kennedy, J., concurring).

Justice Kennedy, however, clearly departed from the Chief Justice and the three other justices who strongly suggested that the school districts did not have a compelling interest. Justice Kennedy found that "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue." Id. at 17. Justice Kennedy wrote that the four justices were "profoundly mistaken" to the extent that they "suggest[] the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools." Id. at 7-8. While recognizing a color-blind Constitution as a worthy aspiration, he cautioned "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle." Id. at 8.

Justice Kennedy offered further insight into what kinds of programs may be permissible. He listed selecting school sites, drawing attendance boundaries, allocating programming resources, targeting recruiting, and tracking important data by race as strategies that likely would withstand constitutional challenge and would not even trigger strict scrutiny, because they do not classify individual students by race. Id. at 8. He also suggested that an assignment plan that

used race as a factor in making individual student assignment decisions might be acceptable if it met the criteria established by the Court in Grutter. Id. at 11.

Even though Justice Kennedy joined the majority on the question of narrow tailoring, he also wrote separately to identify what he found particularly problematic with both plans. Essentially, he found that neither plan met the requirements of narrow tailoring articulated in previous decisions of the Court. In addition, Justice Kennedy was troubled by what he apparently considered a lack of transparency in the Jefferson County plan. He explained that to meet its burden of justifying its use of racial classifications, the school district "must establish, in detail, how decisions based on an individual student's race are made in a challenged government program. The Jefferson County Board of Education failed to meet this threshold mandate." Id. at 3. In Justice Kennedy's view, the fatal flaw for the Seattle plan was that the district failed to explain why the binary "white"/"non-white" classification employed by the plan was appropriate, given the district's racial demographics and the fact that less than half of Seattle's students are white. Justice Kennedy considered that classification a poor fit.

III. Justice Breyer's and Justice Stevens's Dissents

In dissent, Justice Breyer, joined by Justices Stevens, Souter and Ginsberg, focused on the Court's precedent in desegregation cases and found that, in the past, the Court had "required, permitted, and encouraged" districts to undertake plans strikingly similar to those implemented in Seattle and Jefferson County. Slip Op. at 1 (Breyer, J., dissenting). He rested his conclusion that these plans were constitutional on four grounds: 1) both districts have a complex history of segregation and integration efforts; 2) precedent has always allowed for voluntary integration plans; 3) the plans here meet strict scrutiny by serving a compelling interest in a narrowly tailored way; and 4) to decide otherwise "risks serious harm to the law and for the Nation." Id. at 63-65. He also recognized an important distinction between what the Constitution requires school districts to do and what it permits them to do.

Justice Breyer lamented the consequences of the Court's decision, fearing that districts will be forced to return to ineffective race-neutral plans. He noted that in the hundreds of districts nationwide that use some form of race-conscious assignment plans, "the contentious force of legal challenges…would displace earlier calm." Id. at 61. He cautioned that in a time when many parents want their children to attend integrated schools, the majority had just removed one of the most effective means of achieving that end. Finally, he invoked the promise of Brown that America might one day be "one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live." Id. at 67. His conclusion noted that "[t]o invalidate the plans under review is to threaten the promise of Brown. The [position of the Chief Justice, and Justices Scalia, Thomas, and Alito, he] fears, would break that promise." Id. at 68. Justice Breyer felt so strongly about this case that he read a lengthy and impassioned statement from the bench explaining his dissent.

Justice Stevens joined in Justice Breyer's opinion and shared his passion: In his separate dissenting opinion, Justice Stevens noted the "cruel irony in the Chief Justice's reliance on our decision in Brown v. Board of Education, 349 U.S. 294 (1955)." Slip Op. at 1 (Stevens, J., dissenting). He argued that the portion of the Chief Justice's opinion joined by Justices Scalia, Thomas, and Alito, "rewrites the history of one of this Court's most important decisions" by

rejecting the important distinction between invidious racial classifications and those that do not burden a single group or stigmatize – a distinction well-supported by precedent. Id. at 2-4. Finally, in conclusion, Justice Stevens proclaimed his "firm conviction that no Member of the Court [he] joined in 1975 would have agreed with today's decision. Id. at 6.

IV. Conclusion

The opinions in this case reveal a Supreme Court deeply divided on the role race-conscious decisionmaking should play in public schools. There is one important victory in these cases: five justices on the Supreme Court recognize compelling interests in preventing racial isolation and achieving a diverse student population in the K-12 context. Thus, this decision clarifies some uncertainty that existed in the wake of Grutter and its companion case striking down a race-conscious plan employed by the University of Michigan, Gratz v. Bollinger. Justice Kennedy's opinion also provides important guidance as to measures that do not make individual decisions based upon a student's race, such as drawing of attendance boundaries and siting schools, and signals that such measures will withstand constitutional scrutiny. Justice Kennedy's opinion also suggests, that, where necessary, race may play a factor in more carefully designed plans that consider several factors in making individualized student-assignment decisions.

At the same time, however, the majority's determination that the plans employed in Seattle and Louisville were not narrowly tailored and failed strict scrutiny means that school districts that currently use the race of students as a factor in individual assignment determinations should carefully examine their student assignment plans in light of the Court's various opinions. While the majority opinion makes clear that the precise measures used by Seattle and Louisville are not permissible, Justice Kennedy and four other members of the Court leave the door open to some more narrowly tailored plan.

If you have questions about this case or its implications, please feel free to contact Maree Sneed (at 202-637-6416, MFSneed@HHlaw.com), John W. Borkowski (at 574-239-7010, JWBorkowksi@HHlaw.com), or Audrey J. Anderson (at 202-637-5689, AJAnderson@HHlaw.com).