No. 11-1135

In The Supreme Court of the United States

STUDENT DOE 1, et al.,

Petitioners,

v.

LOWER MERION SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in rejecting an Equal Protection challenge based on its highly factbound review of a school redistricting plan that does not classify students based on race, does not use race to assign benefits or burdens to particular students, does not have a discriminatory purpose, and is not applied in a discriminatory manner.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

In every school redistricting plan, at least some students must attend a different school than they previously attended or would have attended before redistricting. In every school redistricting process, district officials and school board members must balance a number of competing concerns—from educational policies to budgetary constraints. And with every school redistricting outcome, there will be some who, for whatever reason, are displeased. That displeasure by itself, however, does not amount to a constitutional violation.

The redistricting process that occurred in this case is no exception to these general principles. Over the course of nearly a year, the District listened to, considered, and attempted to reconcile a host of competing issues raised by stakeholders, ranging from the District's concern about the time and distance students would need to spend in District buses traveling to and from school, and the community's desire for students who start elementary school together to stay together throughout their school years for educational continuity's sake.

After hosting numerous meetings during which it sought community feedback and reviewing thousands of e-mails from concerned citizens, the Board ultimately voted to adopt a redistricting plan that would achieve the principal objective of equalizing the total numbers of students enrolled in the District's two

high schools—which are both among the best in the State, if not the Nation—while addressing what the Board understood to be the primary concerns of the community.

After a nine-day trial with testimony from 26 witnesses, the district court concluded that the re-districting plan comported with Equal Protection. The Third Circuit, after conducting its own exhaustive analysis, reached the same conclusion. That highly factbound conclusion is correct and creates no conflict with the decision of any other court, including this Court. The petition should be denied.

I. FACTUAL BACKGROUND

Respondent Lower Merion School District ("the District") operates six elementary schools, two middle schools, and two high schools. Its high schools, Lower Merion High School ("Lower Merion") and Harriton High School ("Harriton"), are both ranked among the best in Pennsylvania, if not in the Nation.[1] App. 78a.

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[1] The District is a governmental entity within a geographic territory. It is located in Montgomery County, Pennsylvania, and includes both Lower Merion Township and Narberth Borough. The District is governed by a nine-member Board of School Directors ("Board") which is charged by law with providing a system of public schools for students living within the District, and is vested with the authority and obligation to subdivide the district and assign students in the District to schools therein as it may deem best, in order to properly educate them. App. 78a; *see also* 24 P.S. §§ 7-701; 13-1310. The day-to-day

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In 1997, the District embarked upon an ambitious, long-term capital improvement program to modernize its schools. In May 2004, the District established a 45-member Community Advisory Committee ("the Committee") made up of a broad cross-section of school, community, and other interested individuals with a wide range of perspectives—including residents of the neighborhood in which Petitioners live—to evaluate options for modernizing the District's two high schools to adequately address current and future educational needs. App. 85.

After considering several proposals, the Committee recommended building two new high schools on the sites of the existing schools and equalizing student enrollment at approximately 1,250 students per school. The Committee voted in favor of that proposal, as opposed to other options such as unequally sized schools or one single mega-school, based on its findings that smaller schools provide students a stronger sense of community, better student-faculty interactions, and better educational outcomes. The Committee further determined that this option would allow students the most equitable access to programs and facilities, while at the same time making the best use of existing school sites. App. 85a-87a.

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operations of the District are carried out by the Administration, which includes, *inter alia*, the Superintendent, Assistant Superintendent, Business Manager, Director of Operations, and Supervisor of Transportation. App. 81a.

The Board accepted the Committee's recommendation, and made plans to construct new buildings for Harriton and Lower Merion on their existing sites to accommodate equal student enrollments. App. 87a. Construction began in 2007, and the District spent approximately $200 million to construct two state-of-the-art high schools, which opened in time for the beginning of the 2009-2010 (Harriton) and 2010-2011 (Lower Merion) school years.

Historically, Lower Merion had a significantly larger student population than Harriton, primarily because the overwhelming majority of the District's students live much closer to Lower Merion than to Harriton. Consequently, attracting more students to Harriton has been a longstanding goal. App. 88a. Although the District attempted to further that goal by offering magnet programs at Harriton—including an International Baccalaureate program—those programs did not attract sufficient numbers of students to fill Harriton even at its smaller size, not to mention enough to equalize the student populations between the two new high schools. *Id.* As of 2008—before the new construction was completed and the redistricting plan at issue was implemented—approximately 1,600 students attended Lower Merion, while only 900 students attended Harriton. Thus, the decision to build two new high schools housing equal numbers of students required the District to redistrict in order to shift approximately 350 students from the previously larger Lower Merion to the enlarged Harriton. App. 87a.

In April 2008, the Board developed and approved a set of mandatory criteria, known as "Non-Negotiables," to govern the redistricting process:

(1) The enrollment of the two high schools and two middle schools would be equalized;

(2) Elementary students would be assigned so that the schools are at or under capacity;

(3) The plan should not increase the number of buses required;

(4) At a minimum, the class of 2010 would have the choice to either follow the redistricting plan or stay at the high school of their previous year (*i.e.*, "grandfathering"); and

(5) Redistricting decisions would be based upon current and expected future needs and not based upon past redistricting outcomes or perceived past promises or agreements. App. 90a.

In May 2008, the District engaged outside consultants to identify values important to the community that would inform the redistricting process. After conducting a series of public forums and collecting online surveys, the consultants issued a report summarizing the values identified by the community and expressed as follows: (1) "Social networks are at the heart of where people live, and those networks expand as people grow older"; (2) "Lower Merion public schools are known for their excellence: academic as well as extracurricular"; (3) "Those who walk should continue to walk while the travel time for

non-walkers should be minimized"; (4) "Children learn best in environments when they are comfortable—socially as well as physically"; and (5) "[E]xplore and cultivate whatever diversity—ethnic, social, economic, religious and racial—there is in Lower Merion." App. 91a-92a.

In June 2008, the District engaged redistricting consultant Dr. Ross Haber to review and analyze District enrollment data and trends, transportation resources and needs, and other information to propose redistricting alternatives that were in line with the established Non-Negotiables. Dr. Haber was selected as the District's redistricting consultant primarily because he had proprietary software that allowed him to "move" school attendance lines and quickly determine how many students would fall within those lines. App. 94a.

During July and August 2008, Dr. Haber worked with the District to create various redistricting alternatives, called "Scenarios." App. 94a. Over the course of the redistricting process, Dr. Haber prepared numerous sets of Scenarios for consideration. Using certain of the Scenarios, the Administration ultimately chose four Proposed Plans to present to the Board and the community at public meetings.[2] After each public presentation of a Proposed Plan, the

[2] In contrast to the Proposed Plans, the Scenarios were neither presented to nor voted upon by the Board as a whole. App. 95a.

District sought and reviewed feedback from the community that it then considered in developing a subsequent Proposed Plan. App. 95a.

Each Proposed Plan attempted to equalize high school enrollment while also taking into account travel time to Harriton and transportation costs. Critically, the District was constrained by its inability to increase its number of buses because of limitations on bus storage facilities and the increased fuel, storage, and employee costs that would result from any such increase—and so every Proposed Plan took into account that significant limitation. 81a, 90a, 180a. Thus, to minimize both travel times and transportation costs, the District had to redistrict students to Harriton from neighborhoods that were closest to the high school. App. 181a.

In addition, over time, members of the community began stressing the importance of having a plan that (i) allowed as many students as possible to walk to school, and (ii) enabled students who attend elementary school together to attend the same middle and high school ("K-12 continuity"). App. 117a-118a.

On January 12, 2009, the Board voted to adopt the Plan under challenge in this litigation. App. 132a.

The Plan does not individually select students for assignment to Lower Merion or Harriton. Instead, students are assigned based on the District's "feeder" patterns. That is, the Plan uses what is known as a "3-1-1" feeder system in which three elementary

schools feed into one middle school, which in turn feeds into one high school. A 3-1-1 system is beneficial because, among other things, it enables students to transition more easily from elementary school to middle school and high school. App. 123a. The 3-1-1 system preserved the elementary and middle school "attendance zones" as they existed before redistricting. App. 123a, 126a, 149a.

To accommodate the community's desire that students who walked to school before redistricting could continue to do so, the Plan allows students who live in the official, historic Lower Merion walk zone and who would otherwise be zoned to attend Harriton to continue to choose whether to attend Harriton or Lower Merion, as they had been able to do before redistricting.[3] And just as they could before redistricting, all students zoned for Lower Merion can choose to attend Harriton instead. App. 126a-128a.

Under the Plan, all students in Petitioners' neighborhood—known as "South Ardmore" and referred to throughout this litigation as the "Affected Area"—were redistricted to Harriton. Before the Plan took effect, Petitioners (like all other students in the Affected Area) could choose whether to attend Lower Merion or Harriton. App. 141a.

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[3] All students districted to Harriton, both before and after redistricting, are provided bus transportation to Harriton because Harriton does not have an official walk zone, as the roadways on which students must walk to get to Harriton were deemed hazardous. App. 88a-89a.

Petitioners' neighborhood falls outside *any* official "walk zone"—that is, the designated area within which the District does not provide bus transportation to students.[4]

Thus, Petitioners—and all other students in the Affected Area, including those who attended Lower Merion before redistricting and those who attended Lower Merion after redistricting, pursuant to the grandfathering provision of the Plan—have *always* received bus transportation to school. The travel time of students in the Affected Area to Harriton averages 18 to 19 minutes on District buses—half the time (and distance) of the longest bus ride in the District. App. 124a.

Under the Plan, there were several other neighborhoods, like the Affected Area, that were not previously districted to Harriton but are zoned to one of

[4] Some students may live within walking distance of a school and yet do not live within an official walk zone, which is the area designated by the District within which it is not obligated to provide, and does not provide, bus transportation to students. Official walk zones are based on walking route or driving route distance to a school and are constrained by areas designated as hazardous by the Pennsylvania Department of Transportation. A1293, A1295. The District therefore defines "walkability" to mean that those students who live within an official walk zone do not receive bus transportation provided by the District. Petitioners do not live within the official Lower Merion walk zone. App. 127a. While they contend that they can walk to Lower Merion and should therefore be provided the option to attend Lower Merion, they tellingly do not argue that they should not be provided bus transportation to Lower Merion.

the three elementary schools that feed into the middle school that, in turn, now feeds into Harriton. All students in these other neighborhoods, like all students in the Affected Area (who do not reside within the official Lower Merion walk zone), are now also districted to Harriton (without the choice of attending Lower Merion). App. 136a-137a.

In considering the impact of various redistricting plans, some school officials expressed concern about assigning both the Affected Area and an adjacent area known as "North Ardmore" to the same high school. App. 104a-105a. Because North and South Ardmore, together, have the highest residential concentration of African-American students in the District, assigning the entire neighborhood to one high school would leave only a small number of African-American students at the other high school. It would also inhibit the District's overarching goal of equalizing enrollment at 1,250 students per school unless geographic areas farther away from, and with longer bus rides to, Harriton were redistricted to Harriton. It would also interfere with K-12 educational continuity, which became one of the primary concerns raised by the community during the redistricting process. App. 104a-105a, 117a-118a.

Under the Plan approved by the District, the Affected Area is zoned to Harriton, and North Ardmore is zoned to Lower Merion. It bears emphasis that North Ardmore, in fact, has a higher concentration of African-American families than the Affected Area. App. 82a n.2. Moreover, African-Americans do

not constitute a majority of the students from the Affected Area currently enrolled in the District. As of September 2009, the Affected Area had 308 students in kindergarten through twelfth grade (140 were white, 140 were African-American, 9 were Asian, and 18 were Hispanic). App. 82a n.2. All students from the Affected Area, regardless of their race, received the same high school assignment. App. 141a. All told, less than one-third of the students redistricted to Harriton under the Plan are African-American. App. 136a-137a. And neither Lower Merion nor Harriton is (or was before redistricting) a predominantly minority school.[5]

II. PROCEEDINGS BELOW

In 2009, Petitioners—nine African-American students and their parents who live in the Affected Area—filed a complaint alleging that by adopting the Plan the District discriminated against them because of their race, in violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1981, and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d.

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[5] For example, African-American enrollment at Harriton was 5.7 percent of the student population before redistricting, and 8.2 percent of the student population in the year after redistricting. African-American enrollment at Lower Merion was 11.1 percent of the student population before redistricting and 12.6 percent of the student population in the year after redistricting. App. 87a, 136a.

The district court conducted a nine-day bench trial, with testimony from 26 witnesses, to evaluate the direct and circumstantial evidence regarding the process by which the Board adopted the Plan, and conducted a comprehensive factual inquiry into whether the Board purposefully discriminated against Petitioners on the basis of their race. The district court's exhaustive analysis culminated in a 57-page Memorandum on Factual Findings. App. 73a-145a.

The district court found that the District's primary objective in redistricting was the "race-neutral goal of equalizing the student enrollment at the two high schools." App. 140a. The district court rejected any allegation of invidious discrimination toward African-American students by the Administration or the Board. It found that the Board and Administration were most interested in providing all students an excellent education, and ensuring that Harriton and Lower Merion continued to be outstanding schools. *Id.* And it found that the Board and Administration followed sound educational policies, including the Non-Negotiables that guided the redistricting process, as well as its efforts to reduce the empirically measured achievement gap between African-American students and their peers, and its desire to address the problem of racial isolation at Harriton. *Id.*

The district court ultimately found that the Board's adoption of the Plan resulted from the District's "existing demographics, rather than an express intent to discriminate," that the majority of students

in the Affected Area are not African-American, and that the Plan treats all students in the Affected Area—of all races—alike. App. 141a. Subsequently, the district court issued a 31-page Memorandum on Conclusions of Law upholding the Plan. App. 150a-189a.

Petitioners appealed to the Third Circuit, which agreed that the Plan was constitutional. In so holding, the Third Circuit emphasized that the District used "pristine, non-discriminatory goals as the focal points of its redistricting plan." App. 2a. And it emphasized that the Plan "neither classifies on the basis of race nor has a discriminatory purpose." App. 3a.

Accordingly, the Third Circuit concluded that strict scrutiny does not apply because the Plan "does not select students based on racial classifications, it does not use race to assign benefits or burdens in the school assignment process, it does not apply the plan in a discriminatory manner, and it does not have a racially discriminatory purpose." App. 3a. It therefore determined that rational basis review applies, and that the Plan satisfied that standard. *Id*.

The court explained that "'absent a racially discriminatory purpose,[6] explicit or inferable, on the

[6] As the Third Circuit noted, the district court misinterpreted this Court's holding in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977)—that judicial deference is no longer justified when

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part of the [decisionmaker], the statutory distinction is subject only to rational basis review.'" App. 35a-36a. A "racially discriminatory purpose" that triggers strict scrutiny can be shown where: (1) a law or policy explicitly classifies citizens on the basis of race; (2) a facially neutral law or policy is applied differently on the basis of race; or (3) a facially neutral law or policy that is applied evenhandedly is motivated by discriminatory intent and has a racially discriminatory impact. App. 34a-35a. The court determined that none of those circumstances is present here.

First, the court observed that the Plan, unlike the school assignment plan at issue in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), "is facially race-neutral, assigning students to schools based only on the geographic areas in which they live. The Plan, on its

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"a *discriminatory purpose* has been a motivating factor" (emphasis added)—to mean that deference is no longer justified when *race* is a motivating factor. App. 172a. The district court similarly misinterpreted the Third Circuit's holding in *Pryor* v. *National Collegiate Athletic Association*, 288 F.3d 548, 562 (3d Cir. 2002)—that "a *discriminatory purpose* based on race" requires strict scrutiny (emphasis added)—to mean that once *race* has been shown to be a motivating factor in decisionmaking, all racial classifications must survive strict scrutiny. App. 168a-169a. The district court noted, however, that it was unclear whether *Pryo*r required it to apply strict scrutiny to student assignment plans that, like the Plan here, do not involve individual racial classifications. App. 169a n.6. The court of appeals subsequently ruled that *Pryor* does not control (and thus does not require strict scrutiny) based on that very distinction. App. 42a-43a.

face, neither uses racial classification as a factor in student assignment nor distributes any burdens or benefits on the basis of racial classifications." App. 39a. Second, the court reviewed the extensive record in this case and determined that it was devoid of any evidence that the District had applied the Plan in a discriminatory manner. App. 46a. Third, the court held that Petitioners could not show discriminatory impact, *i.e.*, that "similarly situated individuals of a different race were treated differently," because, among other reasons, (1) all students in the Affected Area are similarly assigned to Harriton, and (2) the great majority of students redistricted to Harriton are not African-Americans. App. 48a-49a.

Alternatively, the court held that even if the Plan had a discriminatory impact, Petitioners still could not prevail on their Equal Protection challenge because they could not show discriminatory purpose. App. 53a-54a. If anything, the court concluded, "Board members and Administrators adopted [the Plan] in an attempt *not* to discriminate on the basis of race." *Id.* at 55a-56a. That is, because African-American students are "more concentrated" geographically in certain areas of the District, assigning students based on geography *without* any consideration of those demographics during the redistricting process could potentially result in a disproportionate impact. *Id.* at 56a.

The court of appeals next considered this Court's electoral redistricting cases, under which strict scrutiny does not apply to mere consciousness of race

in the redistricting process; instead, strict scrutiny applies only if the plan were unexplainable on grounds other than race, or legitimate redistricting principles were subordinated to race such that race was the predominant factor motivating the redistricting decision. App. 60a-61a (citing *Bush* v. *Vera*, 517 U.S. 952 (1996) and *Shaw* v. *Reno*, 509 U.S. 630 (1992)). The court reasoned that Petitioners could not satisfy that standard either, as equalizing student enrollments at the two high schools was indisputably the primary objective of the Plan, and the Board's decision to adopt the Plan is explainable on grounds other than race. *Id.* at 61a-62a.

Accordingly, the court of appeals concluded that the Plan was properly subject to rational basis review, and upheld the plan because it is rationally related to legitimate government interests. App. 62a-65a.

Judge Roth concurred. In her view, the panel was bound by the Third Circuit's earlier decision in *Pryor*, 288 F.3d 548 (3d Cir. 2002), to apply strict scrutiny. Notably, Judge Roth expressed the view that she was "not happy" that should be the test. But she, like the district court, still would have upheld the Plan under that more rigorous standard. App. 67a.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS

Notably, Petitioners do not claim any conflict among the courts of appeals—and for good reason. There is none. Petitioners' *amicus curiae* attempts to manufacture a 1-1 split regarding whether strict scrutiny or rational basis is the appropriate standard for reviewing school district redistricting plans that, as here, do not classify any individual students on the basis of race. But this purported split is wholly illusory. And "the absence of any conflict" among the lower courts "is plainly a sufficient reason for denying certiorari." *Singleton* v. *Commissioner of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., respecting denial of certiorari).[7]

Petitioners' *amicus* asserts that the Third Circuit's decision in this case conflicts with the Fifth Circuit's decision in *Lewis* v. *Ascension Parish School Board*, 662 F.3d 343 (5th Cir. 2011). Not so. It is true enough that in *Lewis*, the Fifth Circuit reversed summary judgment in favor of the school board, where the district court had applied rational basis review to uphold the particular student assignment

[7] The District agrees with Petitioners' *amicus* that *Fisher* v. *University of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 131 S. Ct. 1536 (2012), has no bearing on the issues in this case.

plan at issue there. But crucially, the Fifth Circuit did *not* resolve the question whether rational basis review or strict scrutiny should apply, ruling instead that "[u]nder the state of this record, we cannot determine whether the district's plan must be subjected to strict or rational basis scrutiny" and remanding the case because "[f]urther factual develop-development is required." *Id.* at 344; *see also id.* at 352 ("The standard of review, whether strict scrutiny or rational basis, turns on the factual questions of discriminatory motive and impact.").

The Fifth Circuit thus did not make any determination on the merits of plaintiffs' Equal Protection challenge—and, importantly here, the Fifth Circuit did not even decide which standard of review should apply in making that determination. It remanded for the district court to resolve those fact-intensive questions in the first instance. Thus, there is no "conflict" between the Third and Fifth Circuits (or any other circuit), much less one that warrants this Court's resolution at this time. The claimed 1-1 split is thus illusory.

Straining to manufacture a conflict, Petitioners point to handful of district court cases (including the district courts in *Lewis* and in this case) and argue that the various results reached in those cases evidence "confusion" among the lower courts in the wake of this Court's decision in *Parents Involved*, which applied strict scrutiny to invalidate two student assignment plans, which, unlike here, expressly assigned individual students on the basis of race.

Pet. 19 (citing *Hart* v. *Community Sch. Bd. of Brooklyn*, 536 F. Supp. 2d 274 (E.D.N.Y. 2008), and *Perrea* v. *Cincinnati Public Schools*, 709 F. Supp. 2d 6298 (S.D. Ohio 2010)). But the different outcomes in these district court cases, far from reflecting a genuine conflict in applying *Parents Involved*, simply reflect the different facts, circumstances, and procedural postures of the cases.

In *Hart*, for example, the district court found that school officials had complied with a remedial desegregation order entered in 1974 and granted the school district's motion to terminate the order. The parents of a child, who had been denied entry to a particular school under the remedial order, moved to intervene. The district court considered *Parents Involved* only in the course of rejecting the parents' argument that the 1974 decree was no longer lawful. (The district court ultimately held that any challenge to discriminatory practices must be pursued through separate litigation.) Even farther afield, *Perrea* did not involve a school assignment plan at all, but a district policy that allowed teachers to be removed from their positions at particular schools to enforce a racial balancing requirement explicitly set by the district.

In the absence of any genuine conflict among the lower courts, this Court's review is unwarranted. And even were Petitioners' *amicus* correct that there is a 1-1 split (which they are not), that very shallow split may resolve itself based on the more complete record that will be developed on remand in *Lewis*

and, in any event, would certainly benefit from further percolation.

II. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S CASES

Neither Petitioners nor their *amicus* contends that the decision below conflicts with *Parents Involved* or any other decision of this Court. Indeed, Petitioners' *amicus* expressly states that this Court's decision in *Parents Involved* "does not control" the outcome in this case. *Amicus* Br. 17. At most, Petitioners vaguely contend that this Court's review is needed to "protect controlling precedent." Pet. 17. But Petitioners' purported concerns are misplaced, and further review is unwarranted.

It is true enough that, as the Third Circuit acknowledged in its thorough opinion (and as Judge Roth highlighted in her concurrence), this Court has not yet squarely addressed the standard of review—whether strict scrutiny or rational basis—that should apply to school assignment plans, like the one at issue here, that neither classify students on the basis of race nor have a discriminatory purpose. As the Third Circuit emphasized, it is the *lack* of any racial classification that distinguishes this case from every other Equal Protection case decided by this Court upon which Petitioners rely. Petitioners' *amicus* does not point to any Equal Protection case decided by this Court that the Third Circuit did not consider and

distinguish below. App. 39a-40a, n.35; App. 41a, n.36.[8]

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[8] In noting that the Plan "is facially race neutral, assigning students to schools based only on the geographic areas in which they live" and "on its face, neither uses racial classification as a factor in student assignment nor distributes any burdens or benefits on the basis of racial classification," App. 39a, the Third Circuit distinguished the Plan from the following cases, all of which involved racial classifications: *Parents Involved*, 551 U.S. at 711-12, 716 (Seattle School District No. 1's assignment policy considered race as one of multiple tiebreaking factors to determine whether to assign a student to an "oversubscribed" school; Jefferson County Public Schools' plan required certain schools to maintain black student enrollment between fifteen and fifty percent of the student population); *Gratz* v. *Bollinger*, 539 U.S. 244, 253-57 (2003) (policy made university admission decisions based on points given to applicants for multiple factors, including points awarded to applicants in underrepresented ethnic or racial groups, and policy reserved "protected seats" for applicants from "protected categories," including underrepresented minorities); *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (policy admitted students based on an evaluation of all the information in each student's file, which included an essay on how the applicant would contribute to the school's diversity; reaffirmed the school's commitment to diversity with special reference to the inclusion of certain racial and ethnic groups; and stated that the school wanted to enroll a "critical mass" of underrepresented minority students); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (policy included special admissions program that considered applicants who self-identified as minority group members and admitted a prescribed number of self-identified minority students each year); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (policies permitted separate schools for black children and white children); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 638 (1950) (policy denied admission on basis of race because state statute criminalized operating, teaching, or attending an integrated school); *Sweatt* v. *Painter*, 339 U.S. 629

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Indeed, the Plan starkly differs from the Seattle, Washington and Jefferson County, Kentucky policies before this Court most recently in *Parents Involved*, which involved the use of explicit racial classifications of individual students to determine whether to assign students to "oversubscribed" schools, in the former instance, or to maintain black student enrollment between 15 and 50 percent, in the latter. *Parents Involved*, 551 U.S. at 711-12, 716-17. Petitioners' *amicus* strains to suggest a conflict by framing the issue in terms of impermissible racial balancing, but that attempt to justify review fares no better. As the district court correctly recognized, "pure 'racial balancing' at the high school level, standing alone, would be improper, but * * * considering racial demographics alongside numerous race-neutral, valid educational interests has never been held unconstitutional" and does not constitute impermissible racial balancing. App. 155a.[9]

(1950) (policy restricted enrollment to white students, in accordance with state law, and rejected an application solely because of applicant's race); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 213 (1995) (policy employed race-based rebuttable presumption in some contractor certification decisions); *Richmond* v. *Croson*, 488 U.S. 469, 477 (1989) (policy required certain contractors to whom the city awarded construction contracts to subcontract at least thirty percent of the dollar amount of the contract to a minority business); and *Plessy* v. *Ferguson*, 163 U.S. 537, 540 (1896) (statute required that railway companies provide separate accommodations for passengers based on race).

[9] Petitioners repeatedly and mistakenly frame the issue presented as involving the Third Circuit's "reversal" of the district court's factual finding that "race was a factor" in the

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If anything, this case presents precisely the circumstances mentioned with approval by Justice Kennedy in his *Parents Involved* concurrence. Contrary to the argument by Petitioners and their *amicus* that strict scrutiny should apply to all race-conscious decisionmaking by school districts, Justice Kennedy expressly distinguished the individualized racial classifications used by the school plans at issue in *Parents Involved* from "mechanisms [that] 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." 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment). Of particular relevance here, Justice Kennedy specifically referenced as an example of the latter "drawing attendance zones with general recognition of the demographics of neighborhoods." *Ibid.*[10]

District's redistricting process. Contrary to Petitioners' assertion, the Third Circuit did not overturn any of the district court's factual findings. It accepted those facts as true and evaluated them against the well-established Equal Protection precedents of this Court. The court did, however, correct certain misinterpretations of the law by the district court—specifically, its improper conflation of consideration of neighborhood demographics as one factor in a school districting process, on the one hand, with racial classifications of individual students or a racially discriminatory purpose, on the other. App. 42a-43a.

[10] The other examples given by Justice Kennedy are: (1) "strategic site selection of new schools," (2) "allocating resources for special programs," (3) "recruiting students and faculty in a targeted fashion," and (4) "tracking enrollments, performance, and other statistics by race." *Ibid.*

Justice Kennedy thought it "unlikely" that drawing attendance zones with general recognition of neighborhood racial demographics, or any of the other examples of race-conscious mechanisms that he listed, "would demand strict scrutiny to be found permissible." *Ibid*. Instead, they would warrant what amounts to a presumption of validity:

> If 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 a different fashion solely on the basis of a systematic, individual typing by race.

Id. at 788-89. In contrast, "[a]ssigning to each student a personal designation according to a crude system of individual racial classifications"—as did the plans in *Parents Involved*—"is quite a different matter; and the legal analysis changes accordingly." *Id.* at 789. Because of the "presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals," strict scrutiny automatically applies. *Id.* at 793. But where, as here, a plan does *not* use "racial classifications to differentiate its treatment of individuals," it need not be subjected to strict scrutiny to be upheld.

Indeed, the Chief Justice's plurality opinion in *Parents Involved* did not definitively rule out the

approach proposed by Justice Kennedy in the specific circumstances at issue in this case. *See id.* at 738-39 (plurality opinion). Responding to the dissents' arguments against applying strict scrutiny, the Chief Justice focused on the same distinction that Justice Kennedy drew between individualized racial classifications and "race-consciousness in drawing school attendance boundaries"—and characterized the latter as an issue "well beyond the scope of the question presented" in *Parents Involved*. *Id.* at 738. And the Chief Justice distinguished two cases in which state courts had applied rational basis review to uphold "race-consciousness in drawing school attendance boundaries." *Id.* at 738-39 (citing *Tometz* v. *Board of Education*, 237 N.E.2d 498, 499, 502-03 (Ill. 1968), and *Citizens for Better Education* v. *Goose Creek Consolidated Independent School District*, 719 S.W.2d 350, 352 (Tex. App. 1986)); cf. Transcript of Oral Argument 54, *Ricci* v. *DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) (Roberts, C.J.) ("[B]oth the plurality and the concurrence in *Parents Involved* accepted the fact that race conscious action such as school siting or drawing district lines * * * is okay, but discriminating in particular assignments is not.").

Tellingly, the petition makes no mention of Justice Kennedy's concurring opinion in *Parents Involved*. The omission is revealing. As Justice Kennedy explained, "[e]xecutive and legislative branches," including the District here, "for generations now have considered" the types of "policies and procedures" employed by the District in this case, and

"should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races." 551 U.S. at 789.

At a minimum, as the Third Circuit noted in correctly upholding the Plan, "[t]here is no precedent in this Court or the Supreme Court holding that we apply strict scrutiny in equal protection challenges alleging racial discrimination in education admissions or assignments because decisionmakers were cognizant of the racial demographics of neighborhoods when they selected the assignment plan." App. 59a.

Nor do this Court's electoral redistricting precedents suggest that strict scrutiny should apply in this context. As the Third Circuit noted, in Equal Protection challenges to electoral redistricting, this Court has held that strict scrutiny does not apply to facially race-neutral legislation merely because "redistricting is performed with consciousness of race" or because there was an "intentional creation of majority-minority districts." App. 60a (quoting *Bush* v. *Vera*, 517 U.S. 952, 958 (1996)). Rather, for strict scrutiny to apply to facially race-neutral electoral redistricting legislation, the plaintiff must prove that (1) the legislation, although race-neutral, is unexplainable on grounds other than race; or (2) legitimate redistricting principles were subordinated to race such that race must be the predominant factor motivating the legislature's redistricting decision. *Id.*

(citing *Shaw I*, 509 U.S. at 643; *Vera*, 517 U.S. at 958-59) (quotations omitted). Applying these factors to the Plan at issue, the Third Circuit rightly concluded that strict scrutiny did not apply, as the undisputed primary objectives motivating the Plan included equalizing the overall student enrollments between the two high schools, minimizing travel time and transportation costs, maximizing educational continuity, and fostering walkability.

Similarly, and contrary to Petitioners' suggestion, this Court's decision in *Arlington Heights* does not require the application of strict scrutiny to the Plan. Indeed, the Third Circuit's decision is entirely consistent with *Arlington Heights*, which held that "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision, * * * judicial deference is no longer justified." 429 U.S. at 265-66 (emphasis added). In *Arlington Heights*, this Court outlined how courts should determine whether a discriminatory purpose is a motivating factor, requiring courts to conduct a "sensitive inquiry" into the available circumstantial and direct evidence of intent, including: (1) whether the official action has a racially disproportionate impact; (2) the historical background of the decision; and (3) the legislative or administrative history of the decision. 429 U.S. at 266-68.

Applying each of these factors in analyzing the Plan, the Third Circuit correctly concluded that Petitioners could not establish that the Plan was motivated by a racially discriminatory purpose.

First, the Third Circuit concluded that the Plan had no discriminatory impact (as the Plan treated similarly situated individuals in the same manner, regardless of race), but even if it did, the District had plausibly explained any such impact on neutral grounds, including its goals of equalizing the overall number of students between Harriton and Lower Merion, not increasing the number of buses required, allowing students who walked to school to continue to do so, minimizing travel time for bused students, and developing a 3-1-1 feeder pattern. App. 53a.

Second, the Third Circuit concluded that there was nothing in the historical background of the decision to redistrict and adopt the Plan that sparked suspicion of discriminatory intent. App. 54a.

And third, while Petitioners focused on statements made by Board members and racial demographic information included in or omitted from reports and presentations, the court of appeals concluded that awareness or omission of such data and the statements upon which Petitioners relied—although perhaps indicating an awareness or consciousness of race—do not constitute discriminatory intent, *i.e.*, that the Plan was developed or selected because it would assign benefits or burdens on the basis of race. App. 55a-56a.

These conclusions, as the Third Circuit noted, are in accord with the outcome of *Arlington Heights*. 429 U.S. at 270 (concluding that a zoning decision that bore more heavily on minorities was nonetheless not

adopted due to discriminatory intent because the majority of the statements by the decisionmakers focused on neutral factors, and the zoning policy had been applied consistently).

There is thus no conflict with this Court's cases to resolve. And as demonstrated below, to the extent this Court's guidance is needed with regard to the review of race-conscious but facially neutral school assignment plans more generally, this case is a poor vehicle for providing any such guidance.

III. THE UNUSUAL CONTEXT OF THIS "NOVEL" CASE MAKES IT A POOR VEHICLE

Even if a conflict or confusion existed, the petition should still be denied because this case is a poor vehicle for resolving or dispelling it. If the Court is inclined to address the issue whether strict scrutiny or rational basis review should apply to race-conscious but facially neutral school assignment plans, it should wait for a more suitable vehicle (such as the *Lewis* case) to do so.

As the district court expressly recognized, this case is "novel" in several respects. For one thing, no other court of appeals has decided whether race-conscious but facially neutral school assignment plans should receive strict scrutiny or rational basis review. For another thing, this case arises in an unusual factual context in which there is no allegation

that one school provides a different or lower quality of education than the other.

Indeed, there is no claim that Harriton, to which Petitioners were assigned, has any educational shortcomings at all. Compare *Lewis*, 662 F.3d at 346 (plaintiffs allege that the school assignment plan placed a disproportionate number of "at-risk" students in one high school's feeder zone, thereby ensuring that the non-white minority students at that high school and in its feeder system would not be afforded educational opportunities equal to those available to students at the district's other high schools), and *Spurlock* v. *Fox*, No. 3:09-cv-00756, 2012 WL 1514886, at *1, 2 (M.D. Tenn. Apr. 30, 2012) (denying school system's motions for summary judgment—without determining whether strict scrutiny applied—based on fact questions as to discriminatory effect and purpose, where plaintiffs allege that re-zoning plan assigned students on the basis of race "to exacerbate racial segregation" and "deprive African-American students of equal education opportunities" by pushing them out of racially diverse schools and "forc[ing] them to choose among academically inferior, racially homogeneous schools.").[11]

[11] The district court found that the Administration's recommendation to include the Affected Area in the geographic areas to be redistricted to Harriton was based, in part, on a desire for what the district court termed "racial parity" between the high schools. App. 140a. The District argued before the court of appeals that there was insufficient support for that

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IV. THIS COURT'S REVIEW OF THIS CASE AND RESOLUTION OF ANY PURPORTED CONFLICT IS UNLIKELY TO CHANGE THE OUTCOME

The petition should also be denied because this Court's review is unlikely to make a difference in the outcome of this case. For one thing, the Court would likely affirm the Third Circuit's conclusion that strict scrutiny does not apply. In reaching the fact-intensive conclusion that strict scrutiny should not apply because the record disclosed insufficient evidence of a discriminatory purpose, the Third Circuit painstakingly tested the Plan against this Court's well-established Equal Protection precedents. In conducting that analysis, the court of appeals correctly determined that neither its own precedent (*Pryor*) nor that of this Court (*Arlington Heights*) "stands for the proposition that strict scrutiny must be applied when race, *but not a discriminatory purpose*, was a motivating factor." App. 43a (emphasis added).

In upholding the Plan, the Third Circuit discussed at length the factual background of the redistricting process, reviewing each instance where race

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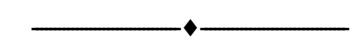
finding (among others), but also contended that such findings did not alter the ultimate conclusion, *i.e.*, that the Plan is constitutional. The district court later clarified, however, that its finding was not about "pure 'racial balancing' at the high school level," which, "standing alone, would be improper," but described the redistricting process as one in which "racial demographics" were merely "consider[ed] alongside numerous race-neutral, valid educational interests." App. 155a.

was so much as referenced, mentioned or discussed. It then proceeded to carefully analyze whether Petitioners could prove the element critical to their claims—racially discriminatory intent. After considering every alternative by which Petitioners could possibly show intentional discrimination, the Third Circuit ultimately concluded that none was available to Petitioners and that strict scrutiny did not apply. That conclusion is correct and should not be disturbed.

Moreover, this Court's resolution of any purported conflict as to which standard of review should apply to a race-conscious but facially neutral student assignment plan would not be outcome-determinative in this case. Even if the Third Circuit erred in applying the rational basis test (which it did not), the district court below concluded—as did Judge Roth in her concurring opinion—that the Plan would withstand strict scrutiny. App. 70a (applying strict scrutiny and concluding that "when dealing with race-neutral compelling interests, the concurrent consideration of racial diversity (which of course must be race-based) does not invalidate a plan"). Were this Court to conclude that strict scrutiny is the applicable standard of review in this case, it likely would reach the same conclusion.



CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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