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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a school district may classify local neighborhoods on the basis of race to redistrict attendance zones in an effort to achieve racially balanced high schools.

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Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, public-interest legal foundation organized under the laws of the State of California. Since 1973, PLF has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

This case raises important issues of constitutional law. PLF considers this case to be of special

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

significance in that it concerns the critical issue of whether a school district may classify and target neighborhoods by race in order to create attendance zones for the purpose of racially balancing its schools. The Third Circuit said yes, and upheld a school district's use of race under a rational basis standard of review. In doing so, the court noted that this Court has yet to provide any standard requiring the application of strict scrutiny when a school district admittedly considers race, but then employs facially race-neutral methods to achieve racially balanced schools. *Student Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 529 (3d Cir. 2011).

PLF believes its public policy perspectives and litigation experience provide an additional viewpoint to assist the Court by examining whether the court below impermissibly abandoned strict scrutiny. PLF will demonstrate that a school district's use of racial classifications to assign students to schools should always be examined under strict scrutiny, and that the Third Circuit's decision is in conflict with the Fifth Circuit's decision in *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343 (5th Cir. 2011).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the level of judicial scrutiny a court should apply when reviewing a school district's attempt to racially balance its schools, an issue of extraordinary, fundamental importance in this nation. Distinctions between persons based solely upon their ancestry "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Adarand*, 515 U.S. at 214

(quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

Petitioners are nine African American students whose neighborhood was targeted by the Lower Merion School District (District) for attendance zone redistricting because of its large concentration of African American residents. *Student Doe*, 665 F.3d at 539. The District's plan involved selecting and dividing the neighborhood with the highest concentration of African American students, and busing those students to the high school farther away. Petitioners, who reside within walking distance of the nearer high school, must be bused to the more distant school.

Petitioners contend that the District's redistricting plan discriminates against them by mandating their busing and attendance at the far away high school due to their race. Students from neighborhoods without a high concentration of African American families, and who are also within walking distance to the same nearby high school as Petitioners, are not forced to attend the more distant high school. Petitioners sued the District alleging violations 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, all pursuant to 42 U.S.C. § 1983.

After a nine day bench trial, the district court agreed with the Petitioners' factual allegations. In order to achieve "racial parity" and "racial diversity," the District considered the racial composition of neighborhoods in approving a redistricting plan to equalize student attendance at its two high schools. *Student Doe*, 665 F.3d at 539. But the district court held the District's use of race was constitutional under

strict scrutiny: "the mere fact that the District considered racial demographics . . . does not render the District's adoption of [the plan] unconstitutional." *Id.* at 541 (citation omitted). The court of appeals affirmed, but held the District's classification of neighborhoods by race warranted only rational basis review. *Id.* at 530.

This Court should grant review of the Third Circuit's decision holding that the District's use of racial classifications to achieve racial balance comports with equal protection. Racial balancing for its own sake is clearly unconstitutional. *Parents Involved*, 551 U.S. at 730. However, the purportedly race-neutral manner in which the District assigns students to its high schools to achieve racial balance has not been addressed by this Court. *Student Doe*, 665 F.3d at 529. Moreover, review is needed to resolve the conflict between the Third Circuit's decision here, and the Fifth Circuit's decision in *Lewis*. There, the court reversed a district court's grant of summary judgment in favor of a school district, which just like the school district in this case, redistricted attendance zones in consideration of race without justification. *Lewis*, 662 F.3d at 349-50. The Fifth Circuit said that given the factual questions as to whether the chosen redistricting plan had both a racially discriminatory motive and disparate impact, the lower court should not have awarded summary judgment under a rational basis standard, *id.* at 352, as the Third Circuit did here.

The issue presented by this case is fundamentally different from that presented by *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, No. 11-345, 2012 U.S. LEXIS 1652 (U.S. Feb. 21, 2012). The issue presented in *Fisher* is "[w]hether this

Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger* [ ], permit the University of Texas at Austin's use of race in undergraduate admissions decisions."[2] *Fisher* involves race-conscious college admissions policies, while this case concerns the drawing of high school attendance zones. However *Fisher* is decided, the decision is unlikely to address the extent to which a school district may consider race during the redistricting process to change the racial composition of its high schools.

REASONS FOR GRANTING THE PETITION

I

THIS COURT SHOULD DECIDE THAT STRICT SCRUTINY APPLIES TO FACIALLY RACE-NEUTRAL REDISTRICTING PLANS IMPLEMENTED TO ACHIEVE RACIAL BALANCING AND DIVERSITY

The Equal Protection Clause mandates that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Decisions of the United States Supreme Court have made clear that distinctions between persons based solely upon their ancestry "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi*, 320 U.S. at 100). The core purpose of the Equal Protection

[2] Question Presented, *available at* http://www.supremecourt.gov/qp/11-00345qp.pdf (last visited Apr. 10, 2012).

Clause is to eliminate governmentally sanctioned racial distinctions. *Croson*, 488 U.S. at 495. Where the government proposes to ensure participation of "some specified percentage of a particular group merely because of its race," such a preferential purpose must be rejected as facially invalid. *Bakke*, 438 U.S. at 307 (plurality opinion). Accordingly, all racial classifications by government are "inherently suspect," *Adarand*, 515 U.S. at 223 (citation omitted), and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (citation omitted). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

Furthermore, "[c]lassifications based on race carry a danger of stigmatic harm." *Croson*, 488 U.S. at 493. And such racial classifications "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* Thus, a racial classification

> 'inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become [ ] truly irrelevant.'

Adarand, 515 U.S. at 229 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); *see also Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) ("The dangers of such classifications are clear [—] [t]hey

endorse race-based reasoning and the conception of a nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.").

The District's classification of neighborhoods by race to racially balance its high schools in the name of diversity violates equal protection.

A. The District Court's Findings Establish That the District Is Racially Balancing Its Two High Schools Based Upon the Racial Classification of Petitioners' Neighborhood

The District has two high schools: Lower Merion High School and Harriton High School. *Student Doe*, 665 F.3d at 530. Harriton is located the furthest away from the center of the student population, and fewer students choose to attend. *Id.* at 530-31. As part of its capital improvement program, the District decided to replace the two high schools by building two new schools at the old schools' existing locations. *Id.* at 530. The plan called for an equalized enrollment of 1,250 students at each school through forced busing. *Id.*

The redistricting plan that the District finally approved mandated the busing of students from Petitioners' neighborhood. Petitioners' neighborhood, known as Ardmore, has the highest concentration of African American families within the District. *Id.* at 531. Prior to redistricting, all students from Ardmore had the choice of attending either of the District's high schools. *Id.* That choice was removed in the plan approved by the District. New high school students residing in South Ardmore—where Petitioners reside—are to be bused to Harriton High

School, although many live within walking distance of Lower Merion High School.

The district court found that "racial considerations were one of several motivating factors" that resulted in the development of various redistricting plans, including the recommendation to the final plan. *Id.* at 539. This consideration of race "went above and beyond collecting or reporting general diversity data." *Id.* The evidence reflected the District's specific focus on "the African-American student population throughout the redistricting process." *Id.* In fact, the court found that Petitioners' neighborhood was "targeted" for redistricting to Harriton, in part, because of its high concentration of African American students. The District's "intent was to achieve not only overall numeric equality, but also racial parity, between the two schools." *Id.*

B. The District Has No Compelling Interest to Justify Its Race-Conscious Attendance Zones

"'Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Gratz*, 539 U.S. at 270 (quoting *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting)). In order to satisfy this searching standard of review, school districts must demonstrate that their use of racial classifications are "narrowly tailored" to achieve a "compelling" government interest." *Adarand*, 515 U.S. at 227.

In evaluating the use of racial classifications in the school context, this Court has recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past

intentional discrimination. *Parents Involved*, 551 U.S. at 720 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)). There is no suggestion from the decisions of the courts below that the District is racially balancing its high schools to remedy *de jure* segregation. *See Parents Involved*, 551 U.S. at 721 ("'[T]he Constitution is not violated by racial imbalance in the schools, without more.'") (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

The second government interest this Court has recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*, 539 U.S. at 328.[3] The specific interest found compelling in *Grutter* was student body diversity "in the context of higher education," not in elementary or secondary education. *Id.* Moreover, the diversity interest was not focused on race, or "simple ethnic diversity" alone, *id.* at 324-25, but encompassed "all factors that may contribute to student body diversity." *Id.* at 337. Such factors included whether prospective students lived or traveled widely abroad, were fluent in several languages, had overcome personal adversity and family hardship, had exceptional records of extensive community service, and had successful careers in other fields. *Id.* at 338.

Thus, what was upheld in *Grutter* was the law school's consideration of "'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important

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[3] Although after granting certiorari in *Fisher v. Univ. of Tex. at Austin*, this Court appears poised to reconsider whether, and to what extent, diversity can justify race-based college admissions policies.

element.'" *Id.* at 325 (quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)).

Here, the district court found that the District's interest in diversity focused solely on race, specifically the numbers of African American students enrolled in the District's elementary and secondary schools. *Student Doe*, 665 F.3d at 539. Thus, when the District selected Petitioners' neighborhood for redistricting, it did not use race as just one factor in a multivariable formula as "part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'" *Parents Involved*, 551 U.S. at 723 (quoting *Grutter*, 539 U.S. at 330). Rather, the District singled out Petitioners' neighborhood precisely because of its high concentration of African American students. This race-conscious redistricting discriminated against Petitioners because the plan mandated their attendance at a particular high school on the basis of their race.

1. The Constitution Prohibits Discrimination Against Groups, as Well as Individuals

Although Petitioners were not individually assigned to a school, the district court found that their race, through the racial composition of their neighborhoods, was a factor in determining their assignments. *Student Doe*, 665 F.3d at 559 (Roth, J., concurring). This Court has found that the Equal Protection Clause can be violated without taking the characteristics of specific individuals into account. *See Milliken v. Bradley*, 418 U.S. 717, 753 (1974) (Stewart, J., concurring, clarifying that the Court found a violation of the Equal Protection Clause in a school district's improper use of zoning and attendance

patterns); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 191, 201 (1973) (the manipulation of student attendance zones, school site selection, and a neighborhood school policy in order to manipulate the racial composition of schools can violate the Constitution).

District officials in this case considered the racial composition of neighborhoods when they approved the redistricting plan. *Student Doe*, 665 F.3d at 539. The District's consideration of the racial composition of individual neighborhoods to determine school assignments is "just as problematic as the consideration of the race of individual students." *Student Doe*, 665 F.3d at 559 (Roth, J., concurring).

2. Racial Balancing for Its Own Sake Is Not a Compelling Interest, But Patently Unconstitutional

This Court has repeatedly held that racial balancing is plainly unconstitutional. In *Croson*, 488 U.S. 469, this Court criticized the City of Richmond's race-conscious public contracting program, stating that it "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." 488 U.S. at 507. In *Grutter*, 539 U.S. at 330, this Court held that racial balancing is "patently unconstitutional." More recently, in *Parents Involved*, this Court held:

> Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved."

551 U.S. at 730 (quoting *Croson*, 488 U.S. at 495) (plurality opinion of O'Connor, J., quoting *Wygant*, 476 U.S. at 320 (Stevens, J , dissenting), in turn quoting *Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting); (brackets and citation omitted)).

The district court noted that "[b]y including only African-American student data in the first five Scenarios . . . the District . . . employed a 'limited notion of diversity' similar to the plans criticized and ultimately held to be unconstitutional in [*Parents Involved*]." Petition, Appendix 104a (Factual Findings). The District's "consistent intent was to achieve not only overall numeric equality, but also racial parity, between the two schools." Petition, Appendix 140a (Factual Findings). The District's efforts to achieve "racial proportionality in its own right" cannot justify its use of race. *Parents Involved*, 551 U.S. at 725 n.12.

C. The Race-Conscious Redistricting Must Be Examined Under the Narrow Tailoring Prong of Strict Scrutiny

Narrow tailoring requires courts to determine whether "lawful alternative and less restrictive means could have been used." *Wygant*, 476 U.S. at 280 n.6 (opinion of Powell, J.) (plurality opinion); *see also Parents Involved*, 551 U.S. at 796 (Kennedy, J., concurring) ("The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here."); *Croson*, 488 U.S. at 507 ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies.") (citation omitted);

Rothe Dev. Corp. v. U.S. Dep't of Def., 545 F.3d 1023, 1036 (Fed. Cir. 2008) ("[E]ven where there is a compelling interest supported by a strong basis in evidence, [the court must consider] the efficacy of alternative, race-neutral remedies.") (citation omitted). In *Adarand*, this Court specifically remanded the case because the lower court had failed to consider the availability of race-neutral alternatives. 515 U.S. at 237-38.

The requirement to exhaust race-neutral measures before resorting to race-conscious ones extends to public school admission policies. This Court rejected race-conscious school assignment plans in *Parents Involved*, because "several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration." *Parents Involved*, 551 U.S. at 735. As Justice Kennedy recognized, "measures other than differential treatment based on racial typing of individuals first must be exhausted." *Id.* at 798 (Kennedy, J., concurring).

II

REVIEW IS NECESSARY TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND THE FIFTH CIRCUIT'S DECISION IN *LEWIS V. ASCENSION PARISH SCH. BD.*

The decision in this case by the Third Circuit conflicts with the Fifth Circuit's decision in *Lewis*, 662 F.3d 343, concerning matters of tremendous constitutional importance. This Court holds that "[r]acial classifications of any sort pose the risk of lasting harm to our society." *Shaw*, 509 U.S. at 657.

Indeed, "[p]referment by race . . . can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). "The equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring); *see also Croson*, 488 U.S. at 521 (Scalia, J., concurring) (discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society") (citation omitted).

The facts of this case are similar to those in *Lewis*. There, a school district that had been unitary since 2004 implemented a race-based redistricting plan designed to eliminate overcrowding and maintain the percentage of African American students in its schools. *Lewis*, 662 F.3d at 344 (a goal of the redistricting was to "maintain unitary status"). The father of two African American school children sued the school district alleging the redistricting violated his children's Fourteenth Amendment equal protection rights. *Id.* at 345-46. The district court refused to apply strict scrutiny and granted summary judgment in favor of the school district. The court ruled that the redistricting plan was race neutral, and the parent had not established that the district acted with discriminatory motive. *Id.* at 346. Specifically, the district court held the plan did not "explicitly employ racial classifications," but based student assignments on the students' geographic locations. *Id.* at 349.

The Fifth Circuit reversed the district court's grant of summary judgment. A redistricting student assignment plan that calculates projected enrollment data by race and ethnicity necessarily classifies individual students by race. *See id.* at 350 ("it is unclear how a student assignment plan could calculate the percentage of black students at each school *without* classifying *individual* students by race"). The Fifth Circuit criticized the district court's assumption that school districts could use racially based decisions for the "benign" purpose of maintaining post-unitary "racial balance" among the schools in the system. *Id.* at 349. The court found that reasoning was foreclosed by *Parents Involved*, which held that preserving a school district's unitary status by means of racially based assignments, albeit a "benign" racial motive, was nevertheless constitutionally impermissible. *Id.* (citing *Parents Involved*, 551 U.S. at 721). If the school district used geographic lines as a proxy for racial balancing to "'maintain unitary status,' the plan is explicitly race-based, and the [school district's] actions fly in the face of *Parents Involved* and require strict scrutiny review." *Id.* at 355 (Jones, J., concurring).

In the present case, the District generated racial and ethnic data for each redistricting scenario. *Student Doe*, 665 F.3d at 533. This data was used by the District with the "intent . . . to achieve not only overall numeric equality, but also racial parity, between the two schools." *Student Doe*, 665 F.3d at 539. Under *Lewis*, these findings establish the use of racial classifications for an unconstitutional purpose. However, in *Student Doe*, the Third Circuit found no racial classification: "The first alternative by which intentional discrimination can be shown—racial

classification—is inapposite to Plan 3R and the facts of this case. Strict scrutiny analysis is not appropriate on this basis." *Student Doe*, 665 F.3d at 548. Under *Lewis*, redistricting attendance zones by considering the racial composition of neighborhoods would be held to be the use of geographic lines as a proxy for racial balancing and contrary to this Court's decisions. *Lewis*, 662 F.3d at 354 (Jones, J., concurring) (citing *Bush v. Vera*, 517 U.S. 952, 968 (1996); *Hunt v. Cromartie*, 526 U.S. 541 (1999)). However in *Student Doe*, although the District specifically "targeted" Petitioners' neighborhood because of its high concentration of African American students, the Third Circuit held the District assigned students to schools "based only on the geographical areas in which they live." *Student Doe*, 665 F.3d at 545.

Thus, review by this Court is necessary to (1) resolve the conflict between the circuits; (2) reverse the decision of the Third Circuit; and (3) hold that courts must apply strict scrutiny to school districts that redistrict attendance zones in order to achieve racial balancing and diversity.

III

THE ISSUES PRESENTED BY THE DISTRICT'S RACE-CONSCIOUS ATTENDANCE ZONES ARE DIFFERENT THAN THE ISSUES PRESENTED IN *PARENTS INVOLVED* AND *FISHER V. UNIV. OF TEX. AT AUSTIN*, AND THUS SEPARATE REVIEW IS WARRANTED

A. This Court's Decision in *Parents Involved* Does Not Resolve the District's Use of Neighborhood Racial Classifications to Achieve Racially Balanced High Schools

Review is needed, because *Parents Involved* does not control the District's admitted use of race to make school assignments. *Student Doe*, 665 F.3d at 539. *Parents Involved* pertained only to plans that expressly use the race of the individual student to determine which school that student will attend. The plurality opinion made clear that the plans the Court examined used "explicit racial classifications" and that "other means for achieving greater racial diversity in schools . . . implicate different considerations." 551 U.S. at 745. Here, under rational basis review, the Third Circuit allowed the District to essentially racially gerrymander high school attendance zones in the name of diversity. The court recognized that redistricting plans to achieve student diversity may be unconstitutional, because it may be impossible to "compute the difference between racial diversity and racial balance." *Student Doe*, 665 F.3d at 559 (Roth, J., concurring). However the court did not feel obligated to examine the redistricting under strict scrutiny, because it believed the racial classifications were based

on neighborhoods, not individual students. *Id.* at 529. Therefore, the court did not feel that this Court's decision in *Parents Involved* was controlling: "The Supreme Court . . . ha[s] yet to set forth any standard requiring the application of strict scrutiny when decisionmakers have discussed race, but the school assignment plan neither classifies on the basis of race nor has a discriminatory purpose." *Student Doe*, 665 F.3d at 529; *see also id.* at 559 ("[W]hen dealing with race-neutral compelling interests, the concurrent consideration of racial diversity (which of course must be race-based) does not invalidate a plan—but we need further guidance from the Supreme Court on this issue.").

The Fifth Circuit on the other hand, when faced with similar facts in *Lewis*, reversed the district court for approving a school assignment plan under rational basis review. *Lewis*, 662 F.3d at 352. However, the court did not rely upon *Parents Involved* for its decision. *See id.* at 349 (stating "[w]e need not parse *Parents Involved*," and finding a school district's attempt to maintain racial balance is a discriminatory purpose). The issue of whether a school district may assign students to schools based upon the geographic boundaries of the neighborhoods it classified by race, all to achieve racial balancing, was not settled by this Court in *Parents Involved*. *See Parents Involved*, 551 U.S. at 709-11 (describing how the school assignment plans classified individual students by race).

B. Fisher Concerns Diversity in Higher Education, Not High School Attendance Zones

The issues in this case are fundamentally different from those presented in *Fisher* such that separate review is warranted. The question in *Fisher* does not concern school attendance zones at all. The issue is "[w]hether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger* [ ], permit the University of Texas at Austin's use of race in undergraduate admissions decisions."[4] In *Fisher*, this Court must examine the Fifth Circuit's strict scrutiny analysis, which held that under *Grutter*, universities have an abstract compelling interest to pursue racial diversity which justifies the use of racially discriminatory admissions policies. *Fisher*, 631 F.3d at 220. Of particular importance will be determining whether the Fifth Circuit substituted a good faith process-oriented review standard for the strict scrutiny that is constitutionally required when governments resort to the use of racial preferences. *See id.* at 234 ("[W]e apply strict scrutiny to race-conscious admissions policies in higher education, mindful of a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body.") In *Student Doe*, the Third Circuit failed to apply strict scrutiny at all.

The particular factual circumstances in *Fisher* are not present here. In *Fisher*, the Court will examine if racial and ethnic backgrounds play an influential role in producing the diversity of views and perspectives

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[4] *Supra* note 2.

which are paramount to a university's educational mission. *Fisher*, 631 F.3d at 236-37. No such interest is claimed by the District in *Student Doe* for grades K-12. In *Fisher*, the university claimed underrepresented minorities would add to unique perspectives that were otherwise absent from its college classrooms. *Fisher*, 631 U.S. at 237. No such claim has been made by the District in *Student Doe* regarding its two high schools.

Fisher presents this Court with the Texas "Top Ten Percent" rule and the concept of "critical mass." The Top Ten Percent rule mandates that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university. *Id.* at 224. Critical mass is the number of minority students which would result in increased minority engagement in the classroom and enhanced minority contributions to the character of the university. *Id.* at 218-19. Thus, an issue in *Fisher* is whether the Top Ten Percent rule achieves critical mass at the University of Texas at Austin. These important considerations are of course all absent in *Student Doe*.

Whether this Court upholds or reverses the Fifth Circuit in *Fisher*, it is likely this Court's decision will not address high school neighborhoods classified by race, or K-12 attendance zones.

CONCLUSION

For the foregoing reasons, Amicus Curiae Pacific Legal Foundation respectfully requests that this Court grant the petition for writ of certiorari.

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