No. 11-

IN THE

Supreme Court of the United States

STUDENT DOE 1, BY AND THROUGH HIS PARENTS/GUARDIANS DOES 1 AND 2; STUDENT DOE 2, BY AND THROUGH HER PARENT/GUARDIAN DOE 3; STUDENT DOES 3 AND 4, BY AND THROUGH THEIR PARENT/GUARDIAN DOE 4; STUDENT DOE 5, BY AND THROUGH HIS PARENTS/GUARDIANS DOE 5; STUDENT DOE 6, BY AND THROUGH HIS PARENTS/GUARDIANS DOES 6 AND 7; STUDENT DOE 7, BY AND THROUGH HIS PARENT/GUARDIAN DOE 8; STUDENT DOES 8 AND 9, BY AND THROUGH THEIR PARENTS/GUARDIANS DOES 9 AND 10,

Petitioners,

v.

LOWER MERION SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Third Circuit improperly overturned the United States District Court for the Eastern District of Pennsylvania's factual finding that race was a factor in Lower Merion School District's, hereinafter referred to as "LMSD," student redistricting in light of the fact that LMSD did not appeal the District Court's adverse ruling, in light of the fact that the District Court's ruling was not clearly erroneous, and in light of the fact that the Court of Appeals did not conduct the type of expansive review required by this Honorable Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977)?

2. Whether LMSD's reasons for using race in its redistricting decision-making constitute compelling state interests?

3. Whether LMSD proved at trial that it used race in its redistricting decision-making to address the achievement gap and racial isolation?

4. Whether LMSD proved at trial that its race related redistricting actions were narrowly tailored to serve a compelling state interest?

5. Whether LMSD's race related redistricting actions survive strict scrutiny because they are not limited in duration?

6. Whether LMSD preserved the defense that Plan 3R would have inevitably been adopted notwithstanding its race related redistricting actions?

7. Whether LMSD proved at trial that Plan 3R would have inevitably been adopted notwithstanding its race related redistricting actions?

8. Whether the District Court properly allocated the burden of proof to Students Doe when making its determinations concerning the Lower Merion High School Walk Zone?

9. Whether 42 U.S.C. §1981 and/or Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et. seq.* prohibit LMSD's race related redistricting actions even though the Fourteenth Amendment to the United States Constitution may not?

LIST OF PARTIES

The caption in this case contains the names of all of the parties in the case. Petitioners are Student Doe 1, Student Doe 2, Student Doe 3, Student Doe 4, Student Doe 5, Student Doe 6, Student Doe 7, Student Doe 8, Student Doe 9, Parent/Guardian Doe 1, Parent/Guardian Doe 2, Parent/Guardian Doe 3, Parent/Guardian Doe 4, Parent/Guardian Doe 5, Parent/Guardian Doe 6, Parent/Guardian Doe 7, Parent/Guardian Doe 8, Parent/Guardian Doe 9, Parent/Guardian Doe 10, hereinafter referred to as "Students Doe." Respondent is LMSD. In addition, Earl M. Maltz, Esquire, an individual who lives in Lower Merion Township, filed an *Amicus Curiae* Brief in the Third Circuit on behalf of Students Doe. The United States of America, the NAACP Legal Defense & Education Fund, the Lawyers Committee for Civil Rights Under the Law, and the ACLU, filed *Amicus Curiae* Briefs in the Third Circuit on behalf of LMSD.

CORPORATE DISCLOSURE STATEMENT

Students Doe are not corporate entities. Students Doe have no parent corporation and no publicly held company owns ten percent (10%) or more of their stock.

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED

The United States Court of Appeals for the Third Circuit's decision in this matter is published, and can be found at *Student Doe 1, et. al. v. Lower Merion School District*, 665 F.3d 524 (3d Cir. 2011). The unpublished version of the decision can be found at *Student Doe 1, et. al. v. Lower Merion School District,* United States Court of Appeals for the Third Circuit No. 10-3824 (December 14, 2011). The United States District Court for the Eastern District of Pennsylvania's decisions in this matter are unpublished. The District Court's Memorandum on Factual Findings, hereinafter referred to as "Factual Findings," can be found at *Student Doe 1, et. al. v. Lower Merion School District*, United States District Court for the Eastern District of Pennsylvania Docket No. 09-2095 (May 13, 2010). The District Court's Memorandum on Conclusions of Law, hereinafter referred to as "Conclusions of Law," can be found at *Student Doe 1, et. al. v. Lower Merion School District*, United States District Court for the Eastern District of Pennsylvania Docket No. 09-2095 (June 24, 2010).

STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Third Circuit entered its decision in this matter on December 14, 2011. This Honorable Court has jurisdiction to review the Third Circuit's decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

United States Constitution Amendment 14 § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits,

> privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000d

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

LMSD is charged with the legal responsibility to provide educational services to school age children residing in Lower Merion Township and Narberth Borough, Pennsylvania. LMSD is governed by a School Board which consists of nine (9) School Directors who are chosen in at large elections. LMSD's District Administration actually runs LMSD's schools. Appendix 78a (Factual Findings).

LMSD operates six (6) elementary schools (i.e. Belmont Hills Elementary School, Cynwyd Elementary School, Gladwyne Elementary School, Merion Elementary School, Penn Valley Elementary School, and Penn Wynne Elementary School), two (2) middle schools (i.e. Bala Cynwyd Middle School and Welsh Valley Middle School), and two (2) high schools (i.e. Lower Merion High

School and Harriton High School). LMSD has never run a segregated school district. LMSD has received and does receive Federal Funding. Appendix 78a (Factual Findings).

As the final stage of its Capital Improvement Program, LMSD decided to rebuild both Lower Merion High School and Harriton High School. LMSD formed a Community Advisory Committee, hereinafter referred to as "CAC," in January 2004, to assist it in determining whether it would build one (1) high school on two (2) campuses, build two (2) high schools housing approximately the same number of students, or build two (2) high schools which would replicate the historic student populations at Lower Merion and Harriton. Prior to reconstruction, Lower Merion housed a much larger student body than Harriton. Appendix 85a-86a (Factual Findings).

In its report dated May 24, 2004, the CAC recommended that Lower Merion High School, and Harriton High School be rebuilt to house approximately the same number of students. The School Board adopted the CAC's recommendation in 2004. The School Board's adoption of CAC's recommendation to equalize high school enrollments set the stage for the current case because a large number of students had to be redistricted away from Lower Merion to Harriton. Appendix 85a-88a (Factual Findings).

Students Doe, nine (9) African American Students who live in the Lower Merion School District, reside in a section of Ardmore bounded by Athens Avenue, Wynnewood Road, County Line Road, and Cricket Avenue. This area has been referred to throughout the

litigation as the "Affected Area" or "South Ardmore." The Affected Area and the adjoining region north of Cricket Avenue is the larger of two (2) areas in the district that have a significant African American population. Appendix 82a-85a (Factual Findings).

This adjoining region has been referred to during the litigation as "North Ardmore," and is bounded by Cricket Avenue, East Lancaster Avenue, County Line Road, and College Avenue. Appendix 82a-85a (Factual Findings). The only other area in the district that has a concentrated African American population is a small neighborhood located in Bryn Mawr. Appendix 82a-83a (Factual Findings).

Prior to redistricting, the following students were districted to Lower Merion High School, but had the option to attend either Lower Merion or Harriton High School: all students in the Cynwyd Elementary School feeder pattern; all students in the Merion Elementary School feeder pattern; all students in the Penn Wynne Elementary School feeder pattern; all students in the Belmont Hills Elementary School feeder pattern who lived in Narberth Borough; and all students in the Penn Valley Elementary School feeder pattern who lived in the Affected Area or who lived in the Lower Merion High School Walk Zone. Appendix 87a-89a (Factual Findings).

The Lower Merion High School Walk Zone is an area surrounding Lower Merion that under LMSD's Policy is supposed to extend one (1) mile in all directions. In contravention of the policy, the Walk Zone does not extend one (1) mile into the Affected Area; instead, the Walk Zone ends at Athens Avenue which is well short of one (1) mile.

If the Walk Zone extended one (1) mile into the Affected Area as it should, three (3) of the Students Doe would live within the Walk Zone, and three (3) others may live within the Walk Zone. Appendix 84a-85a (Factual Findings). Under each of the redistricting plans proposed, and under the redistricting plan adopted, students living in the Walk Zone always received the option to attend either Lower Merion or Harriton.

Prior to redistricting, the following students were districted to Harriton High School: all students in the Gladwyne Elementary School feeder pattern; all students in the Penn Valley Elementary School feeder pattern who did not live in the Affected Area, or who did not live in the Lower Merion High School Walk Zone; and all students in the Belmont Hills Elementary School feeder pattern who did not live in Narberth Borough. Students districted to Harriton did not have choice to attend Lower Merion.

Both prior to and following redistricting, Harriton High School had an International Baccalaureate Program, a specialized academic program with a limited number of spots which were assigned on a selective basis. This program has never been available at Lower Merion High School, and has been used to draw students districted to Lower Merion to choose to attend Harriton. Appendix 87a-89a (Factual Findings).

Prior to redistricting, all students in the Affected Area as well as all students in North Ardmore had choice to attend either Lower Merion High School or Harriton High School. The African American students in Bryn Mawr were districted to attend Harriton both before and after redistricting. Appendix 87a-89a (Factual Findings).

LMSD started the redistricting process in the Spring of 2008. LMSD apparently conducted initial, non-public meetings about redistricting early in April of 2008. At its April 28, 2008, meeting, the School Board adopted guidelines which it termed "non-negotiables." These non-negotiables were: (1). The enrollment of the two (2) high schools and two (2) middle schools would be equalized; (2). Elementary students would be assigned so that the schools would be at or under school capacity; (3). The plan would not increase the number of buses required; (4). At a minimum, the class of 2010 would have choice to either follow the redistricting plan or stay at the high school of their previous year; 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. The School Board took the position that any redistricting plan presented and/or adopted would have to comply with these guidelines.

In addition to "non-negotiable" Number 4, a broader grandfathering provision was actually followed, i.e. students who started attending a high school before the redistricting plan was adopted, would not have to change high schools. Appendix 89a-91a (Factual Findings). Therefore, the full impact of redistricting in Lower Merion will not be felt until the 2012-2013 School Year.

LMSD then sought to engage the community at large in redistricting by conducting focus group meetings during May and June of 2008. The purpose of these meetings was to identify "community values" that would assist in the formation of a final redistricting plan. Five (5) focus group meetings were conducted under the direction of Dr. Harris Sokolov and Ms. Ellen Petersen. In addition,

feedback was also collected from the community via an online survey. Appendix 91a-93a (Factual Findings).

Dr. Sokolov and Ms. Petersen prepared a report detailing their findings, and presented their report to the School Board on July 11, 2008. According to the Sokolov/Petersen Report, the following values were important to the community in formulating redistricting plans: (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 where they are comfortable-socially as well as physically; and (5). Explore and cultivate whatever diversity-ethnic, social, economic, religious, and racial-there is in Lower Merion. The School Board unanimously voted to accept the Sokolov/Petersen Report on July 11, 2008. Appendix 91a-93a (Factual Findings).

LMSD hired a consultant, Ross Haber, Ed.D., in June of 2008 to assist in identifying demographic trends that would be used in drafting a redistricting plan, and to assist in drafting redistricting plans. Throughout the redistricting process, Dr. Haber worked with LMSD's Administration to generate potential redistricting plans which were termed "Scenarios". LMSD's Administration picked from these potential Scenarios when recommending Proposed Redistricting Plans to the School Board and the general public. Appendix 94a-95a (Factual Findings).

Using the information acquired from the Sokolov/Petersen Report, the non-negotiables from the School

Board, and demographic information from Dr. Haber, LMSD and Dr. Haber went to work in the Summer of 2008 to formulate LMSD's redistricting plan. During meetings conducted in the Summer of 2008, Dr. Haber produced, and LMSD's Administration considered, Scenarios 1 through 5. Some School Directors were present during some of these meetings. Regarding ethnicity, Scenarios 1 through 5 only reported numbers concerning African American students. Charts were also prepared during this time period highlighting African American data. Appendix 91a-105a (Factual Findings).

Two of the Scenarios generated, i.e. Scenarios 1 and 4A, were eliminated due to race. Scenarios 1 and 4A were the only Scenarios produced during the entire redistricting process which kept students in the Affected Area and North Ardmore together for high school. Ultimately, LMSD's Administration chose Scenario 3 to be the First Proposed Redistricting Plan. Appendix 104a-105a (Factual Findings).

The First Proposed Redistricting Plan was presented at the School Board Meeting on September 8, 2008. In the First Proposed Plan, all students who lived in the Penn Wynne Elementary School feeder pattern were redistricted from Lower Merion High School to Harriton High School. Students districted to Lower Merion retained the option to attend Harriton for the International Baccalaureate Program. Appendix 108a-109a (Factual Findings).

Although the First Proposed Redistricting Plan did not change the existing school placements for Students Doe, it drastically changed the racial make-up of Lower

Merion High School and Harriton High School in that it decreased the number of African American students at Lower Merion, and increased the number of African American students at Harriton. Harriton's enrollment became more diversified because the African American students located in North Ardmore were redistricted to attend Harriton, instead of Lower Merion. Appendix 108a-109a (Factual Findings).

LMSD prominently displayed its "diverse" high school populations during the course of its slide show presentation on its First Proposed Redistricting Plan. Under the First Proposed Redistricting Plan, the African American student populations at Lower Merion High School and Harriton High School would have been almost equal, and the percentage of African American students in each school would have closely mirrored the overall percentage of African American high school students in the district. Appendix 109a (Factual Findings).

Public comment was then taken on the First Proposed Redistricting Plan. Among the public comments to the Plan was the accusation that LMSD was redistricting based upon race. Dr. Haber and LMSD's Administration thereafter went back to work on the redistricting project, and generated the 7 series of Scenarios. LMSD's Administration ultimately chose Scenario 7C-5 to be the Second Proposed Redistricting Plan. Appendix 113a-116a (Factual Findings).

The Second Proposed Redistricting Plan was presented at the School Board Meeting on October 20, 2008. In the Second Proposed Redistricting Plan, LMSD redistricted the following students from Lower Merion High School to Harriton High School: some students

who lived in the Penn Wynne Elementary School feeder pattern, including students who lived in North Ardmore; some students who lived in the Penn Valley Elementary School feeder pattern, but not students who lived in the Affected Area or who lived in the Lower Merion High School Walk Zone; and some students who lived in the Belmont Hills Elementary School feeder pattern. Students districted to Lower Merion once again retained the option to attend Harriton for the International Baccalaureate Program. Appendix 116a-117a (Factual Findings).

Although the Second Proposed Redistricting Plan also did not change the existing school placements for Students Doe, it again drastically changed the racial make-up of Lower Merion High School and Harriton High School in that it decreased the number of African American students at Lower Merion, and increased the number of African American students at Harriton. Harriton's enrollment once again became more diversified because the African American students living in North Ardmore were redistricted to attend Harriton, instead of Lower Merion. Appendix 116a-117a (Factual Findings).

LMSD once again prominently displayed its "diverse" high school populations during the course of its slide show presentation on its Second Proposed Redistricting Plan. Under the Second Proposed Redistricting Plan, the African American student populations at Lower Merion High School and Harriton High School would have been closer to equal than before redistricting, and the percentage of African American students in each school would have come closer to mirroring the overall percentage of African American high school students in the district before redistricting. Appendix 116a-117a (Factual Findings).

Public comment was then taken on the Second Proposed Redistricting Plan. Once again, among the public comments to the Plan was the accusation that LMSD was redistricting based upon race. Dr. Haber and LMSD's Administration thereafter went back to work on the redistricting project, and generated Scenario 8 which LMSD's Administration chose to be the Third Proposed Redistricting Plan. Appendix 116a-118a (Factual Findings).

The Third Proposed Redistricting Plan was presented at the School Board Meeting on November 24, 2008. The Third Proposed Redistricting Plan was known as a "3-1-1 Plan" in that three (3) defined elementary schools fed into one (1) middle school which in turn fed into one (1) high school. Under the Third Proposed Redistricting Plan, the following students were districted to Bala Cynwyd Middle School and then onto Lower Merion High School: all students in the Cynwyd Elementary School feeder pattern; all students in the Merion Elementary School feeder pattern; and all students in the Penn Wynne Elementary School feeder pattern. The following students were districted to Welsh Valley Middle School and then onto Harriton High School under the Third Proposed Redistricting Plan: all students in the Gladwyne Elementary School feeder pattern; all students in the Belmont Hills Elementary School feeder pattern; and all students in the Penn Valley Elementary School feeder pattern who did not live in the redrawn/smaller Lower Merion High School Walk Zone. Students who lived in the Penn Valley Elementary School feeder pattern, and who also lived in the redrawn/smaller Lower Merion High School Walk Zone, retained choice to attend either Lower Merion or Harriton. Students districted to Lower

Merion once again retained the option to attend Harriton for the International Baccalaureate Program. Appendix 122a-124a (Factual Findings).

Unlike its two (2) predecessors, the Third Proposed Redistricting Plan did change the existing school placements for Students Doe in that they no longer had choice to attend Lower Merion High School or Harriton High School. Instead, Students Doe now had to attend Harriton. However, like its predecessors, the Third Proposed Redistricting Plan drastically changed the racial make-up of Lower Merion and Harriton in that it decreased the number of African American students at Lower Merion, and increased the number of African American students at Harriton. Harriton's enrollment once again became more diversified because the African American students in the Affected Area were redistricted to attend Harriton, instead of Lower Merion. Appendix 122a-125a (Factual Findings).

LMSD once again prominently displayed its "diverse" high school populations during the course of its slide show presentation on its Third Proposed Redistricting Plan. Under the Third Proposed Redistricting Plan, the African American student populations at Lower Merion High School and Harriton High School would have been almost equal, and the percentage of African American students in each school would have closely mirrored the overall percentage of African American high school students in the district. Appendix 124a (Factual Findings).

Public comment was then taken on the Third Proposed Redistricting Plan. Once again, among the public comments to the Plan was the accusation that LMSD

was redistricting based upon race. Appendix 124a-125a (Factual Findings).

LMSD then presented its Third Proposed Redistricting Plan Revised at the School Board Meeting on December 15, 2008. The only differences between the Third Proposed Redistricting Plan, and the Revised Plan, was that the Third Proposed Redistricting Plan Revised restored the pre-redistricting Lower Merion High School Walk Zone, and restored choice to students districted to Lower Merion High School, i.e. students districted to Lower Merion could attend either Lower Merion or Harriton. Although LMSD still sought to draw students districted to Lower Merion to Harriton through the International Baccalaureate Program, it also added a Penn State Dual Enrollment Program at Harriton as a further incentive to draw students districted to Lower Merion to Harriton. Appendix 125a-128a (Factual Findings).

Like all of the proposed plans before it, the Third Proposed Redistricting Plan Revised drastically changed the racial make-up of Lower Merion High School and Harriton High School in that it decreased the number of African American students at Lower Merion, and increased the number of African American students at Harriton. Harriton 's enrollment once again became more diversified because the African American students in the Affected Area were redistricted to attend Harriton, instead of Lower Merion. However, unlike its previous public slide show presentations on Proposed Redistricting Plans, LMSD did not display a slide regarding its diversified high school populations during the course of its slide show presentation on its Third Proposed Redistricting Plan Revised. Public comment was then

taken on the Third Proposed Redistricting Plan Revised. Once again, among the public comments to the Plan was the accusation that LMSD was redistricting based upon race. Appendix 129a-131a.

At a public meeting held on January 12, 2009, the School Board deliberated on the Third Proposed Redistricting Plan Revised, and then voted to accept said plan. School Directors Diane DiBonaventuro and David Ebby voted against the plan. Appendix 132a (Factual Findings).

On May 14, 2009, Students Doe 1 through 9, by and through their Parents/Guardians, filed a Three Count Complaint in the United States District Court for the Eastern District of Pennsylvania seeking to enjoin, both preliminarily and permanently, LMSD's redistricting plan pursuant to the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1981, and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et. seq.* The District Court had jurisdiction over the case pursuant to 28 U.S.C. § 1331.

Students Doe contended in their Complaint that LMSD's redistricting plan improperly used race as a factor in order to send them to a non-neighborhood school, Harriton High School, instead of allowing them to continue to voluntarily choose to attend their neighborhood high school, Lower Merion High School, or Harriton. Shortly after filing their Complaint, Students Doe filed a Motion for Preliminary Injunction, but Students Doe later withdrew said Motion prior to the Preliminary Injunction Hearing.

The District Court conducted a nine (9) day Federal Bench Trial. Following the Bench Trial, the District Court issued its Memorandum on Findings of Fact on May 13, 2010. In its Memorandum, the District Court concluded that race was a factor in LMSD's redistricting of Students Doe. Appendix 73a-147a (Factual Findings). In its subsequent Memorandum on Conclusion of Law issued on June 24, 2010, the District Court concluded that Students Doe were not entitled to relief because LMSD's actions did not violate the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1981, and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et. seq.* Appendix 150a-191a (Conclusions of Law). Students Doe thereafter filed a timely Motion for a New Trial pursuant to Rule 59 of the Federal Rules of Civil Procedure which the District Court denied. Appendix 192a-196a.

Students Doe then filed an appeal to the United States Court of Appeals for the Third Circuit. The Third Circuit heard oral argument on the case on April 28, 2011. On December 14, 2011 the Third Circuit affirmed the District Court's order. However, the Third Circuit overturned the District Court's finding that race was a factor in LMSD's redistricting of Students Doe. In light of this finding, the Third Circuit applied the "rational basis" test when reviewing the case, instead of the "strict scrutiny" test applied by the District Court. Appendix 33a-65a.

The Honorable Jane Roth concurred in the result reached by the Third Circuit majority. However, Judge Roth concluded that the "strict scrutiny" test applied, not the "rational basis" test, because race was a factor in LMSD's redistricting of Students Doe. Appendix 67a-70a.

ARGUMENT

After over half a century of litigation, the issue of race based decision-making has returned to this Honorable Court in the same context it was originally presented in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, African American students sought relief from this Honorable Court because they were assigned to schools based upon their race. In the present case, Students Doe, African American students, confirmed in their belief that *Brown* is under attack in Lower Merion, but that *Brown* nevertheless remains both good and controlling law, once again ask this Honorable Court to determine whether school districts can use race as a factor when assigning students to school.

LMSD has never operated a segregated school system. However, on January 12, 2009, LMSD adopted a school redistricting plan that assigned Students Doe to Harriton High School, a high school which had a small African American enrollment prior to redistricting, and removed their option to choose schools, like their peers in other neighborhoods, because they were African American.

I. A WRIT OF CERTIORARI SHOULD BE GRANTED IN ORDER TO ADDRESS CONFUSION IN THE APPLICATION OF CONTROLLING LAW, TO ADDRESS A PRESSING NATIONAL CONCERN, AND TO PROTECT CONTROLLING PRECEDENT.

This Honorable Court has struggled with race based decision-making for over a century. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the United States Supreme Court

adopted into law the proposition that people of different races could be accommodated in separate, but equal facilities. In his famous dissent in *Plessy*, Justice Harlan adamantly stated, "***Our Constitution is color-blind***, and neither knows nor tolerates classes among citizens. ***In respect of civil rights, all citizens are equal before the law***." *Id.* at 559 (emphasis added).

In May of 1954, this Honorable Court heeded Justice Harlan's advice, and rectified this embarrassing chapter in our country's Civil Rights Jurisprudence by overruling *Plessy* in *Brown v. Board of Education*, 347 U.S. 483. This Honorable Court stated in *Brown* that "Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 495.

Since *Brown*, this Honorable Court has addressed on numerous occasions the propriety of student assignments based upon race. *See United States v. Fordice*, 505 U.S. 717, 721 (1992) ("Since these decisions [*Brown I* and *Brown II*], the Court has had many occasions to evaluate whether a public school district has met its affirmative obligation to dismantle its prior *de jure* segregated system in elementary and secondary schools." *Id.*). In *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), this Honorable Court explicitly directed laggard and malfeasant school districts to promptly comply with the dictates of *Brown*. Just three (3) years later, this Honorable Court reviewed in detail what tools District Courts could employ in order to integrate segregated

school systems. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

During subsequent years, this Honorable Court further defined the scope of what could be done to rectify *de jure* segregation, *see e.g. Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982), *Washington v. Seattle School District No.* 1, 458 U.S. 457 (1982), *Milliken v. Bradley*, 418 U.S. 717 (1974), and what standards should be utilized to determine when school districts had become unitary, *see Freeman v. Pitts*, 503 U.S. 467 (1992); *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991).

However, despite over a half century of Supreme Court litigation, the issue of whether a school district who was ***not*** operating a segregated school system, or who had ***never*** operated a segregated school system, could use race as a factor when assigning students to schools in order to build diverse student bodies has never been definitively decided. This Honorable Court expressly reserved deciding this question in *Washington v. Seattle School District No. 1*, 458 U.S. at 472n.15, and finally tried to resolve the issue in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (hereinafter referred to as "*Seattle*").

However, because *Seattle* was such a fractured opinion, Districts Courts and Courts of Appeals have been left wondering exactly what standards they are to apply when school districts, without Court intervention, seek to use race as a factor in student assignment plans in order to create diversity.

Although some Courts may look to *Grutter v. Bollinger*, 539 U.S. 306 (2003), for direction, said guidance would be entirely misplaced. This Honorable Court expressly stated in *Seattle* that *Grutter* only applies to colleges and universities, not grade schools or high schools. *Seattle*, 551 U.S. at 725. Moreover, the status of *Grutter* is now unclear in light of this Honorable Court's grant of certiorari in *Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 2012 U.S. LEXIS 1652 (February 21, 2012).

The confusion that persists following *Seattle* can only be appreciated when one reviews post-*Seattle* Court rulings regarding student assignment plans. The District Court herein concluded that *Seattle* did not mandate the imposition of the "strict scrutiny" test, indicated *Seattle* undermined existing Third Circuit precedent, and held that creating diversity was a compelling state interest. Appendix 150a-189a (Conclusions of Law). The District Court also remarked, "… understanding *Seattle* is challenging for judges and lawyers, let alone for a professional educator." Appendix 107a n.12 (Factual Findings).

The Third Circuit disagreed with the District Court's analysis of *Seattle* in its entirety. Appendix 36a n.32. However, Judge Roth stated in her concurrence that creating diversity was a compelling state interest. Appendix 68a. Judge Roth further noted, "… 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 – ***but we need further guidance from the Supreme Court on this issue.***" Appendix 70a (emphasis added).

The United States District Court for the Eastern District of New York concluded, as did the District Court and Judge Roth herein, that creating diversity in schools was a compelling state interest. *Hart v. The Community School Board of Brooklyn*, 536 F. Supp.2d 274 (E.D.N.Y. 2008). The United States District Court for the Middle District of Louisiana concluded, as did the District Court herein, that the "rational basis" test could be used to review potentially race based redistricting decision-making; however, the Fifth Circuit reversed and remanded the case citing *Seattle*. *Lewis v. Ascension Parish School Board*, 662 F.3d 343 (5th Cir. 2011).

In a analogous situation concerning faculty assignments, the United States District Court for the Southern District of Ohio held in *Perrea v. Cincinnati Public Schools*, 709 F. Supp.2d 628 (S.D. Ohio 2010), that Cincinnati's teacher surplusing plan was unconstitutional because of its racial balancing provisions. *Id.* at 642-644. The District Court in *Perrea*, unlike the District Court herein, held that *Seattle* compelled the imposition of the "strict scrutiny" test, and that *Seattle* barred consideration of diversity as a compelling state interest at the primary school and high school levels. *Id.*

While it remains unclear whether a school district may unilaterally undertake remedial action to diversify their schools, and exactly what they may do, it is beyond dispute that these matters have to be resolved now. Virtually every school district in this country has a vested interest in knowing exactly what it can do, and what it must not do, when assigning students. The lack of clear guidance spurs litigation which will insure the squandering of scarce educational and judicial resources that parents,

school districts, and Courts cannot afford. Historically, when there has been confusion regarding this Honorable Court's rulings, this Honorable Court has rectified the situation in a later opinion. *See e.g. Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1.

Moreover, as the present case demonstrates, the lack of adequate guidance, results in lower court decision-making which creates confusion concerning the application of existing precedent. The District Court found in the present case that LMSD engaged in race based decision-making; therefore, based on existing precedent the "strict scrutiny" test should have been applied. *See e.g. Johnson v. California,* 543 U.S. 499, 506 (2005) ("We therefore apply strict scrutiny to ***all*** racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* (emphasis added) (internal citation and quotation omitted)); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that ***all*** racial classifications, imposed by ***whatever*** federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* (emphasis added)); *Gratz v. Bollinger,* 539 U.S. 244, 270 (2003) ("It is by now well established that ***all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized***." *Id.* (emphasis added) (internal citations and quotations omitted)).

To defeat a strict scrutiny challenge, LMSD had to demonstrate that its use of racial classifications were "narrowly tailored" to achieve a "compelling" government interest. *Seattle*, 551 U.S. at 720. Inexplicably, LMSD survived the "strict scrutiny" test at trial even though it

never identified any compelling state interest related to its race based decision-making.

Rather than admit that they engaged in race based decision-making, and then defend their actions in accordance with the "strict scrutiny" test, when called to testify at trial, LMSD's Administration repeatedly denied under oath, in vain, that they used race as a factor in formulating, selecting, and recommending redistricting plans. Specifically, Dr. Christopher McGinley, LMSD's School Superintendent, denied at least a dozen times during his testimony that race played any part in his actions. The only time Dr. McGinley reluctantly admitted that race played a role in his consideration was when he was questioned why Scenario 1, a potential candidate to become the First Proposed Redistricting Plan, was rejected in July of 2008.

Even more concerning is what were found to be "compelling" state interests. According to the District Court, LMSD articulated the following interests it sought to pursue in redistricting: equal sized high schools; minimizing travel times and transportation costs; maintaining educational continuity; and fostering walkability. Appendix 176a (Conclusions of Law). The District Court also inferred that LMSD's actions were taken to address the achievement gap, i.e. the disparity in academic progress African American students make in comparison to their non-minority counterparts, and racial isolation. Appendix 186a-188a (Conclusions of Law). None of these interests bear any relationship to the race based decision-making at issue in this case as required under the "strict scrutiny" test. *See Seattle*, 551 U.S. at 720.

Moreover, even if the aforementioned "interests" had some relationship to the race based redistricting at issue, none of the interests identified are "compelling" under controlling law. This Honorable Court stated in *Seattle*, that there are only two (2) instances when race based student assignment plans survived the strict scrutiny test. One was when a school district used racial classifications in order to remedy the effects of its own past segregationist policies. *See Id.* at 720. The second was when an institution of higher learning, i.e. one above the high school level, sought to use race in conjunction with a number of other factors in order to truly diversify its student body. *See Id.* at 722. Neither instance is applicable in this case.

Furthermore, LMSD's "interests" are not "compelling" when analyzed in light of this Honorable Court's rulings. For instance, taking action to remedy past societal discrimination is ***not*** a "compelling" state interest, *Seattle*, 551 U.S. at 731 (citing *Shaw v. Hunt,* 517 U.S. 899, 909-910 (1996) and other cases), nor is taking action to remedy generalized instances of societal discrimination. *Seattle*, 551 U.S. at 731.

Justice Scalia's remarks in his concurring opinion in *Richmond v. Croson,* 488 U.S. 469 (1989), lend appropriate context to, and inform the aforementioned discussion,

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb--for example, a prison race riot, requiring temporary segregation of inmates...can justify an exception to the principle embodied in the

> Fourteenth Amendment that our Constitution is colorblind, and neither knows nor tolerates classes among citizens.

Id. at 521 (internal citations and quotations omitted).

Finally no Court to date in this case has addressed the durational requirement that this Honorable Court has held the "strict scrutiny" test demands despite the fact that the issue has been repeatedly raised. Programs that use race as a factor in their development must be limited in duration. *See Grutter,* 539 U.S. at 341-342 ("This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands…. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point." *Id.* at 342.).

The trial record establishes that LMSD's redistricting plan at issue has no "sunset" provision; therefore, it will stay unconstitutionally in place for an undetermined time into the future, i.e. it has ***no*** "logical end point."

II. THE SUPERVISORY AUTHORITY OF THIS HONORABLE COURT SHOULD BE EXERCISED IN ORDER TO CORRECT THE ERRANT RULINGS OF THE THIRD CIRCUIT AND THE DISTRICT COURT.

The District Court found after a nine (9) day bench trial during which twenty six (26) witnesses testified, and numerous Exhibits were introduced into the trial record

that LMSD used race as a factor in its redistricting plan. The Third Circuit subsequently overturned the District Court's factual finding on appeal. The Third Circuit's actions were improper because: (1). LMSD never appealed the aforementioned factual findings; (2). The District Court's factual findings were properly supported by the trial record; and (3). The Third Circuit improperly limited its review of LMSD's decision-making process.

Students Doe specifically alerted the Third Circuit to the waiver issue in its Reply Brief which was filed on January 24, 2011. Students Doe timely filed their Joint Notice of Appeal on September 16, 2010. LMSD never filed a cross-appeal with the Third Circuit as required by Rule 4(a)(3) of the Rules of Appellate Procedure; therefore, the Third Circuit did not have jurisdiction to hear any of the District Court's adverse rulings against LMSD including its adverse factual ruling that LMSD used race as a factor in redistricting. *See Interstate Commerce Commission v. American Railway Express Company*, 265 U.S. 425, 435-436 (1924); *EF Operating Corporation v. American Buildings*, 993 F.2d 1046, 1048-1049 (3d Cir. 1993); *R.G. Speaks v. Trikora*, 838 F.2d 1436, 1439 (5th Cir. 1988).

Even if the waiver issue is ignored, the District Court's factual findings regarding the impact of race on LMSD's decision-making were proper based upon the testimony, and Exhibits presented at trial. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, this Honorable Court held that in order to violate the Fourteenth Amendment, race had to be a factor in the government decision-making. In order to determine whether race was in fact a factor in the

decision, this Honorable Court stated that the fact-finder was required to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266.

The District Court's *Arlington Heights* review in the present case revealed, despite LMSD's repeated contentions to the contrary, that race was a factor in its redistricting. Several of the District Court's findings on this point are worthy of note.

When considering evidence introduced about potential Scenarios, the District Court noted,

> The inclusion and consideration of African-American student data, to the exclusion of other types of diversity data (e.g. other races and ethnicities, socio-economics, or disability), reflect a specific concern about the African-American student population that started with Scenario 1 and continued throughout the redistricting process, even though subsequent Scenarios and Plans included broader diversity information. By including only African-American student data in the first five Scenarios considered during redistricting, the District, by way of Dr. Haber and the Administration, employed a "limited notion of diversity" similar to the plans criticized and ultimately held to be unconstitutional in *Seattle*.

Appendix 104a (Factual Findings).

The District Court went on to note,

> Accordingly, two of the Scenarios, Scenarios 1 and 4A, were eliminated due to race. When this finding is coupled with the fact that the Administration had given and considered only African-American student projections for Scenarios 1 through 5, there is ample evidence indicating that racial balance, and in particular, the number of African-Americans projected to enroll at each high school, were taken into account by the Administration in selecting Proposed Plan 1.

Appendix 105a (Factual Findings).

The District Court made the following comment concerning an e-mail exchange that took place in the Summer of 2008 between Dr. McGinley and Dr. Haber,

> Nonetheless, the emails that followed demonstrate that Dr. McGinley was mindful that splitting Ardmore effectively redistricted a significant number of African-American students, and that the *Seattle* decision might have implications on the District's redistricting process. In addition, the emails show that Dr. Haber considered redistricting plans that split Ardmore to not be "color-blind," and that the Administration did not consider plans he viewed as being "color-blind," which support an inference that race was considered.

Appendix 107a-108a (Factual Findings).

Even more disconcerting are the District Court's findings regarding Dr. McGinley's handling of redistricting information. The District Court found,

> Dr. McGinley's two decisions to purge public information respecting redistricting of references to the racial diversity data provided to the Administration is troubling, because it suggests that the Administration either did not want the public to be fully informed about the diversity information the District had at its disposal, or did not want to mention the role that racial diversity data played in the redistricting process, or both.

Appendix 112a (Factual Findings).

Equally disconcerting is an email exchange on November 20, 2008, between Dr. McGinley and School Director Lisa Pliskin, the President of the LMSD School Board at the time the redistricting plan at issue was passed. Dr. McGinley wrote to School Director Pliskin, "I wish there was a way to extend the option area into the [Affected Area] but doing so would not only mean another hundred at [Lower Merion High School] but many fewer A[frican] A[merican] kids at [Harriton High School]." School Director Pliskin ends her reply to Dr. McGinley's email with the statement, "... and what happened to no racial isolation?"

The District Court commented on the exchange stating,

> Although Dr. McGinley and Pliskin were credible witnesses, there is no indication that

> they by any means intended to discriminate against African-American students, and they in fact had legitimate, educational goals, the comments described above nonetheless persuade the Court that Dr. McGinley and various Board members also had an intent to increase the African-American population at Harriton.

Appendix 121a (Factual Findings).

When commenting on the entire body of evidence presented at trial, the District Court stated,

> The Court gives significant weight to the Administration's examination of African-American-specific data for many of the early Scenarios, and candid elimination of at least two Scenarios on the basis of race. The Court also considers persuasive Dr. Haber's testimony that race was considered during the entire redistricting process, because although he was only a consultant, and not an employee of the District, he attended numerous Board and Administration meetings, worked closely with the Administration to come up with Scenarios, and remained an outside observer to the redistricting process.

Appendix 138a (Factual Findings).

The District Court then held,

> The circumstantial evidence leads inevitably to a factual conclusion that the Administration

> plainly allowed racial considerations to influence what neighborhoods would be assigned to attend Harriton High School, without the choice to attend Lower Merion High School ...Thus, under each Proposed Plan students in either North Ardmore or the Affected Area-the two geographic areas with the highest concentrations of African-American students-had no choice of high school. **There are too many e-mails and conversations that consider the inclusion of these areas because they were heavily concentrated with African-American residents, to allow any other conclusion.**

Appendix 139a (Factual Findings)(emphasis added). The District Court went on to find, "This conclusion follows: The Administration's consistent intent was to achieve not only overall numeric equality, but also racial parity, between the two schools." Appendix 140a (Factual Findings).

The District Court further concluded,

> In particular, Dr. McGinley and others in the Administration, to whom the Board gave the responsibility of coming up with plans, and making recommendations regarding the educational benefits each proposed plan provided, as well as individual Board Members, made numerous race and racial diversity-related comments. These race-related comments indicate that the Board and Administration remained cognizant of the effects that a given redistricting proposal would have on the African-American students living in North Ardmore and the Affected Area. These

> comments went above and beyond collecting or reporting general diversity data...the evidence shows that the data was relied upon by the Administration in the development of the various plans and in the adopting of Plan 3R.

Appendix 141a-142a (Factual Findings).

The Third Circuit's reversal of the District Court's finding of race based decision-making based on the contention that the District Court "conflated" the impact of the evidence that it heard and the Trial Exhibits it reviewed, as well as the Third Circuit's view that a potential alternative interpretation of the aforementioned testimony and Trial Exhibits was possible, Appendix 33a-59a, is improper under the Federal Rules of Civil Procedure, and this Honorable Court's controlling decisions.

Rule 52 of the Federal Rules of Civil Procedure specifically provides that "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed.R.Civ.P. 52(a)(6). When discussing this standard in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), this Honorable Court noted,

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.... If the district court's account of the evidence is plausible in light of the record viewed in its

> entirety, the court of appeals may not reverse it … Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-574 (citations omitted).

This Honorable Court further stated in *Anderson*,

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Id. at 575 (citations omitted). This Honorable Court further clarified in *Amadeo v. Zant*, 486 U.S. 214 (1988), that "[T]he clearly-erroneous standard of review is a deferential one…." *Id.* at 223.

Moreover, while the District Court remained faithful to this Honorable Court's direction in *Arlington Heights* by conducting an exhaustive review of the available direct and circumstantial evidence, the Third Circuit ignored this requirement, and improperly focused its review on only LMSD's activities just before the adoption of Plan 3R. Dr. Haber unequivocally testified at trial that by the time LMSD got to Plan 3R, race had already been factored into the decision-making. *See* Appendix 130a (Factual Findings).

The Third Circuit's conclusion that Students Doe failed to prove that LMSD's race based decision-making

resulted in an adverse impact on African American students deserves an additional comment because it improperly ignores the District Court's factual findings, and the evidence presented at trial. Under any of the redistricting plans that LMSD's Administration proposed to the School Board, and the redistricting plan that was adopted, African American student population at Harriton High School increased almost one hundred percent (100%), and the African American student population at Lower Merion High School correspondingly would decrease. The fact that the post-redistricting African American student population at both Harriton and Lower Merion essentially mirrored the district wide African American high school population presents an astounding development with only one explanation. Appendix 109a, 116a-117a, 124a, and 130a (Factual Findings). Moreover, the fact that LMSD's Administration outrightly rejected potential scenarios that did not increase diversity at Harriton further confirms that LMSD's actions were not "color blind" in the least. Appendix 105a (Factual Findings).

Furthermore, the Third Circuit's analysis on this point entirely ignores the fact that in a school district where only approximately ten percent (10%) of the high school student population is African American, over twenty five percent (25%) of the high schools students moved during the first year of redistricting were African American. Appendix 136a-137a (Factual Findings).

Notwithstanding the foregoing, the Third Circuit's analysis further ignores the fact that LMSD's redistricting plan is far more pernicious than either the Seattle or Louisville plans struck down in *Seattle*. The constitutionally offensive provisions of the Seattle and

Louisville plans were expressly contingent on high schools being oversubscribed in Seattle, or on non-magnet schools being over or under subscribed by African Americans in Louisville. Due to the contingent nature of their application, these constitutionally offensive provisions could have lain dormant for years, or may have never been used again. However, LMSD's redistricting plan mechanically changes school attendance patterns based in part on race without fail every single school year.

Moreover, on a percentage basis, the magnitude of LMSD's redistricting plan is much more far reaching than Seattle's unconstitutional plan. According to the District Court, a total of forty four (44) freshmen were redistricted for the 2009-2010 school year, the first year of the redistricting plan, and over twenty five percent (25%) of this cohort were African American. Appendix 136a-137a (Factual Findings). According to Dr. McGinley's January 12, 2009, e-mail to the School Board, forty five (45) African American children will be redistricted by the 2012-2013 school year, i.e. the first school year every high school age student in the school district is subject to the Redistricting Plan at issue because all applicable "grandfathering" would stop.

By comparison, despite the fact that Seattle has five (5) times as many high schools as LMSD according to this Honorable Court's decision in *Seattle*, "the district could identify only 52 students who were ultimately affected adversely by the racial tiebreaker …. " *Seattle*, 551 U.S. at 733-734.

The Third Circuit allowed LMSD to get away with playing with a stacked deck. School Directors never had to make an overt public decision to adopt a redistricting

plan that used race to increase diversity at Harriton High School because LMSD's Administration, i.e. the individuals who picked the plans to be presented, screened out any plan for consideration that did not substantially increase the African American student body at Harriton. In short, LMSD presented a "loaded game," exactly the situation this Honorable Court warned lower courts about in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 28.

The District Court also made a reversible error when it concluded that Students Doe were not entitled to relief because LMSD established that Plan 3R would have been adopted even if race was not a factor in its selection citing *Arlington Heights,* 429 U.S. at 270 n.21. The District Court's legal conclusions were improper for two (2) distinct reasons.

Initially, LMSD waived its right to assert an inevitability defense in this case; therefore, said defense cannot be cited as a basis for denying Students Doe's claims. The "inevitably" defense recognized by this Honorable Court in *Arlington Heights* is an affirmative defense under the Federal Rules of Civil Procedure because it requires a defendant to prove that a certain outcome would have inevitably come about even if the defendant acted as plaintiff claimed. *Id.* This is a textbook example of an affirmative defense. *See* S. Backer-McKee, W. Janssen, J. Corr, *Federal Civil Rules Handbook 2010* page 341 ("An affirmative defense is an assertion by the defendant of new facts or arguments that, if true, would defeat plaintiff's claim, even if all [of plaintiff's] allegations were presumed correct." *Id.*) Under Rule 8(c) of the Federal Rules of Civil Procedure, a defendant has

to plead in its Answer all of its affirmative defenses; any defense not plead is waived. *See* F.R.Civ.P. 8.

LMSD, despite a clear obligation to do so, never plead an "inevitability" defense in its Answer and Separate Defenses to Plaintiff's Complaint filed on July 6, 2009. LMSD thereafter never moved to amend its Answer to include the defense. Moreover, LMSD makes no reference to the defense in any of its filings with the District Court, i.e. its Summary Judgment filings, its Trial Brief, its Memorandum of Law on Proposed Conclusions of Law, its Proposed Findings of Fact, its Proposed Conclusions of Law, or in its Amended Proposed Findings of Fact.

Secondly, even if the defense was not waived, it is respectfully submitted that the District Court improperly came to the legal conclusion that LMSD proved the defense at trial. The legal conclusion that the defense could ever be proven in this case is at best speculative. The entire record in this case proves, if nothing else, that the redistricting process in Lower Merion was dynamic, very contentious, and highly controversial. LMSD's Administration chose what the School Directors and public were allowed to see and vote on, and race was a factor in that selection process. LMSD's redistricting consultant, Dr. Ross Haber, admitted at trial that he discarded potential redistricting plans without showing them to anyone because of racial considerations. The District Court properly found that LMSD's Administration purged information to hide its race related actions from the public. Appendix 112a (Factual Findings).

Concluding that a school district who "rigged" the plan selection process, and who hid this fact from the public,

would have arrived at the same outcome if it had engaged in an open, fair, and untainted process like it was supposed to, is truly surprising. If this were in fact possible, one would have to ask why a school district would even bother to "rig" the plan selection process, and hide its actions from the public in the first place.

Moreover, the legal conclusion that the inevitably defense bars relief ignores the importance of the Lower Merion High School Walk Zone issue. The District Court correctly found that the Walk Zone does not extend one (1) mile into Students Doe's neighborhood. The District Court also correctly found that LMSD's reduction of the walk zone in Students Doe's neighborhood is ***inconsistent*** with its own Transportation Policy. Appendix 127a (Factual Findings). Additionally, the District Court correctly found that Students Doe's neighborhood had been targeted due to its racial composition. Appendix 153a (Conclusions of Law).

Mike Andre, LMSD's Director of Transportation, admitted during his testimony at trial that if the walk zone extended one (1) mile into Students Doe's neighborhood as it should, Students Doe 7, 8, and 9 would definitely live within the walk zone, and Students Doe, 1, 3, and 4 may live within the walk zone. Appendix 84a-85a (Factual Findings). When these facts are considered in conjunction with Dr. McGinley's e-mail to School Director Pliskin of November 20, 2008, it would appear that the adoption of LMSD's Redistricting Plan was not inevitable if the process had truly been "color blind." Dr. McGinley states in the aforementioned e-mail, "I wish there was a way to extend the option area into the [Affected Area] but doing so would not only mean another hundred at [Lower Merion

High School] ***but many fewer [African American] kids at [Harriton High School].***" (emphasis added)

CONCLUSION

For all the aforementioned reasons, this Honorable Court should grant Students Doe's request for a Writ of Certiorari.

Respectfully submitted,

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