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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 05-915, Meredith versus Jefferson County Board of Education.

Mr. Gordon.

ORAL ARGUMENT OF TEDDY B. GORDON

ON BEHALF OF THE PETITIONER

MR. GORDON: Mr. Chief Justice, and may it please the Court:

Crystal Meredith wanted to do what most moms and dads do all across this country. She wanted to put her son's hand in hers and walk around the corner and enroll her son in school.

But the enrollment, there was a barrier, and the pickaxe, that barrier was person satisfied as a quota. There were seats within the school. It wasn't at capacity. It wasn't near any one of the percentages or tipping percentages that the quota system in Jefferson County public schools applied. But she was not allowed in.

JUSTICE GINSBURG: Was that because she applied 4 months late? If she had applied before the deadline in March, would you be here? Would there be any issue?

1 MR. GORDON: Well, of course, Justice
2 Ginsburg, she moved into the system in August. When she
3 moved into the system, she was assigned to a school
4 called Breckenridge-Franklin, which was an all year
5 round school. Then she was -- her choice was managed
6 and she was sent an hour away from where her other
7 school is. She applied by transfer, which is the system
8 that you use.

9 JUSTICE GINSBURG: Where was she living
10 before?

11 MR. GORDON: I think she was living in
12 Florida, and she moved into Kentucky.

13 JUSTICE GINSBURG: So she -- that was --
14 August was the first opportunity she had to apply?

15 MR. GORDON: Yes. So that's across the
16 board. Anyone that moves in, they are -- there is a
17 cluster school or an attempt school, and if you are not
18 -- a majority of the time you are not allowed there
19 because of your race. In other words, they want to
20 assign children to schools that don't have the greater
21 percentages of either African-American or Caucasian. So
22 in Bloom Elementary, although it was 67-33 -- and keep
23 in mind in kindergarten, according to their own rules
24 and regulations, didn't even apply. The plan was so
25 inflexible --

1 JUSTICE GINSBURG: But she, she could
2 have -- if she had been there at the deadline, the child
3 would have been admitted to -- if she had been there in
4 March instead of August?

5 MR. GORDON: But the deadline applies to
6 that school which presumably is closest to one's
7 residence. Now, whether or not you get into that school
8 or don't get into the school still depends on the quota.

9 JUSTICE GINSBURG: Well, we're past that.
10 When she didn't get the assignment that she requested
11 for her son --

12 MR. GORDON: Sure.

13 JUSTICE GINSBURG: -- did she appeal that?

14 MR. GORDON: She filed a transfer. The
15 transfer was denied. And at that time, litigation had
16 commenced and because litigation had commenced -- and
17 routinely these appeals are denied. All of her efforts
18 were futile.

19 JUSTICE GINSBURG: How about for first
20 grade? Did she make an application for first grade?

21 MR. GORDON: My understanding is that she
22 did. That was denied, because the only time Joshua got
23 into --

24 JUSTICE GINSBURG: And that's in the record,
25 that she made an application for the first grade?

1 MR. GORDON: I believe it is. I believe it
2 is. In either event, if she didn't it would have been
3 futile because we had already made her the third amended
4 complaint on behalf of all the parties, and we had asked
5 for injunctive relief within the litigation. But Joshua
6 did not get into the school because of -- until they
7 moved. They had to move a block away. So if you live
8 in one block and you can't get into that school, your
9 choice is managed. The plan was clearly inflexibility
10 and it didn't apply to kindergarten anyhow, but it still
11 caused our Joshua to go an hour away from his home.

12 CHIEF JUSTICE ROBERTS: Do you have a claim
13 for damages as well.

14 MR. GORDON: Yes, Your Honor.

15 CHIEF JUSTICE ROBERTS: With respect to this
16 plaintiff?

17 MR. GORDON: Yes, Your Honor. I believe
18 it's the third amended complaint, the May 2nd complaint,
19 and there was a request for \$25,000 damages.

20 And within these schools, in other words,
21 this honorable Court has never applied, other than in
22 remedial, has never applied compelling interest in a K
23 through 12 setting. In fact, those rights are not
24 co-extensive. The school -- this honorable Court has
25 previously stated in, for example, the Hazelwood case,

1 which was a First Amendment right case, that that didn't
2 apply to K through 12, or should it be 1 through 12
3 setting.

4 And in the Hazelwood case, that was a basic
5 First Amendment right and of course the First Amendment
6 right was exactly what Justice Powell championed as
7 academic freedom within the Bakke case. So clearly
8 Bakke and Grutter are distinguishable. This falls into
9 Gratz, where you clearly have a quota, not less than 15
10 or greater than 50 percent, is totally inflexible as
11 applied to our --

12 JUSTICE GINSBURG: How does it compare with
13 the system that was in effect from, what was it, 1975
14 until 2000?

15 MR. GORDON: I'm sorry. It's the same
16 remedial program that -- this Court has found even in
17 Dowd that when the remedial program has achieved its
18 result we should no longer carve out that exemption
19 under the Equal Protection Clause.

20 JUSTICE GINSBURG: Do you think that there's
21 something of an anomaly there, that you have a system
22 that is forced on the school, that it doesn't want it,
23 works for 25 years, and then the school board doesn't
24 have to keep it any more, but it decides it's worked
25 rather well, so we'll keep it.

1 What's constitutionally required one day
2 gets constitutionally prohibited the next day. That's
3 very odd.

4 MR. GORDON: Well, I take issue that it
5 worked very well. In other words, did the Jefferson
6 County --

7 JUSTICE GINSBURG: The board decided it
8 liked the way things were going, so it kept it or
9 something close to it.

10 MR. GORDON: Well, of course Brown versus
11 Topeka Board of Education was time applicable. If you
12 use time applicable now for the Jefferson County Public
13 Schools --

14 JUSTICE GINSBURG: I'm talking about the
15 plan that they've had for 25 years, and they decided to
16 keep it.

17 MR. GORDON: And in the Hampton case, which
18 I won, all right, they didn't go to any race-neutral
19 alternatives at all. As Justice Kennedy pointed out --
20 I'm sorry.

21 JUSTICE SOUTER: Mr. Gordon, in responding
22 to Justice Ginsburg's question, don't you have to deal
23 with the fact that this Court said in the second Swann
24 case that the -- that a school district, particularly a
25 school district like Swann which had been in violation,

1 had been found in violation, had the same interest after
2 unitary status had been attained in maintaining the
3 unitary status as it had in reaching unitary status
4 beforehand; that if those interests are identical why
5 doesn't it follow that the means to achieve those two
6 interests, unitary status from segregation in one case,
7 preservation of unitary status in the other, are
8 reasonable if they are identical?

9 GENERAL CLEMENT: Well, Justice Souter, this
10 Court over and over again has said once a remedial plan
11 is accepted there should be race-neutral alternatives
12 under the narrow and tailored requirement. What this
13 school board did after I won --

14 JUSTICE SOUTER: Race-neutral alternatives
15 for what? To accomplish what?

16 MR. GORDON: To accomplish the same means.
17 In other words, what they could have done, as
18 Justice Kennedy pointed out, was put more magnet
19 schools, more traditional schools, have more open
20 enrollment.

21 JUSTICE SCALIA: Mr. Gordon, isn't it the
22 case that once you've achieved unitary status, which
23 means that the effects of past intentional
24 discrimination have been eliminated, the only way you
25 can lose unitary status is to discriminate

1 intentionally? Isn't that right?

2 MR. GORDON: Certainly. That's the Dow
3 case, that says you no longer --

4 JUSTICE SOUTER: And isn't there a
5 distinction between unitary status and unitary
6 condition? Unitary condition is a descriptive
7 situation. It describes a district in which there is,
8 in fact, enough of a racial mix so that there is no
9 credible claim either that there is de facto or de jure
10 segregation; isn't that correct? There is such a thing
11 as unitary, a unitary condition?

12 MR. GORDON: Certainly.

13 JUSTICE SOUTER: And is the preservation of
14 a unitary condition a legitimate or indeed a compelling
15 governmental objective?

16 MR. GORDON: In Hampton, this -- our Court
17 found that it was unitary status as opposed to unitary
18 condition.

19 JUSTICE SOUTER: Uh-huh.

20 MR. GORDON: If you want to go with unitary
21 condition, then I still think you go back to Brown and
22 you say has it worked. In other words, let's make it
23 time applicable. Does this honorable Court --

24 JUSTICE SOUTER: What do you mean, it
25 doesn't work? I don't understand.

1 MR. GORDON: It hasn't worked. It just
2 absolutely hasn't worked. So we've decided --

3 JUSTICE SOUTER: I don't understand what it
4 is that hasn't worked.

5 MR. GORDON: Why do we have to choose
6 between diversity and educational outcome? I thought it
7 was supposed to be both. Why can't we have diverse --
8 why can't we have them both. It's not diversity or
9 educational outcome. It's diversity and educational
10 outcome. For 30 years in this country --

11 JUSTICE SOUTER: I think that's what your
12 friends on the other side are arguing.

13 MR. GORDON: No. The friends on the other
14 side are arguing that there's some type of improvement
15 in educational outcome solely because you sit black
16 children next to white children.

17 JUSTICE BREYER: Not an improvement exactly,
18 but maybe from the Constitution's point of view. That
19 Constitution wanted, as they said in the Slaughterhouse
20 cases, to take people who had formerly been slaves and
21 their children and make them full members of American
22 society. And part of that was that the State couldn't
23 insist that they go to separate schools.

24 Now, the question from a constitutional
25 point of view that you're being asked is how could that

1 Constitution which says that this is intolerable, that
2 segregated school, and insist that the school boards in
3 Swann and elsewhere take the black children and white
4 children and integrate them? How could the Constitution
5 the day that that decree is removed tell the school
6 board it cannot make that effort any more, it can't do
7 what it's been doing, and we'll send the children back
8 to their black schools and their white schools?

9 That I take it is why the Court in Swann
10 said explicitly that you could use race as a factor in
11 the public schools when the school board so chooses.
12 Now, that's the general question that I think
13 Justice Ginsburg began and Justice Souter was following
14 it up. And I would appreciate your response.

15 MR. GORDON: My response is that you have
16 those series of cases that say once you've achieved the
17 unitary status, you know longer get to carve out that
18 exemption to the Fourteenth Amendment, and if we're
19 going to carve out these exemptions to the Fourteenth
20 Amendment, if we're going to say we're going to not
21 apply Gratz where it's a quota system and we are solely,
22 without any type of individual holistic review applied
23 to these kids, then there should be some improvement in
24 --

25 JUSTICE GINSBURG: How would you apply a

1 holistic review to a kindergartner?

2 MR. GORDON: Well, of course this system
3 didn't apply to kindergarten anyhow. But the answer is
4 it's not. You have to decide.

5 JUSTICE GINSBURG: I can understand an
6 approach to an applicant for an elite school and so you
7 judge it on all these merit factors and other factors.
8 But for a child entering the first grade, I don't
9 understand this individualized holistic approach. What
10 else is there other than that the child is of a certain
11 age and therefore will enter a certain grade?

12 MR. GORDON: That it would violate your
13 ruling in Gratz --

14 JUSTICE GINSBURG: I want to know -- you
15 said that there are alternate, alternative means, so I'm
16 asking what they are.

17 MR. GORDON: Out of Hampton, there was no
18 race-neutral -- race alternative means used. For me, I
19 would use all these millions of dollars. I would reduce
20 teacher-student ratio. I would -- I would give
21 incentive pay to the better teachers. I would more
22 magnet schools, more traditional schools. We presuppose
23 that we're going to have bad schools and good schools in
24 this country. I don't think we can no longer, longer
25 accept that.

1 We can no longer accept an achievement gap
2 of 25 to 30 points by the majority of African American
3 kids in Jefferson County, Kentucky, and throughout this
4 country by the fourth grade. Educational outcome is the
5 only key, the only key to unlock the chains of poverty.

6 JUSTICE GINSBURG: And it's not that white
7 children and black children are no longer sitting
8 together on the same school benches?

9 MR. GORDON: Then let's make sure they go to
10 the better schools. In Jefferson County, Kentucky,
11 racial politics is involved when we had so much white
12 flight. African Americans in Jefferson County,
13 Kentucky, the largest percent go to the worst performing
14 schools. The lowest percent go to the better performing
15 schools. That can't be constitutional. That can't be
16 discriminatory, and that can't be an exemption under the
17 Fourteenth Amendment and Equal Protection.

18 I'd like to save a little bit, the remainder
19 of my time, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 General Clement.

22 ORAL ARGUMENT OF PAUL D. CLEMENT
23 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
24 SUPPORTING THE PETITIONER

25 GENERAL CLEMENT: Mr. Chief Justice, and may

1 it please the Court:

2 Petitioner's son was denied the opportunity
3 to transfer from Young Elementary School to Bloom
4 Elementary School solely on the basis of his race.

5 JUSTICE STEVENS: General Clement, can I ask
6 you a question that's prompted really by your argument
7 in the last case. I wonder about the purity of the
8 motive that's required. Supposing you had a city like
9 Chicago with a neighborhood school system and in one
10 neighborhood there was a school that was 100 percent
11 African American, both student body and faculty, and up
12 on the North Side there's a school that's 100 percent
13 white, both students and faculty. Would it be
14 permissible for the school board to decide that it would
15 be healthy for both schools to have five African
16 American schools in the North Side school and five white
17 teachers in the South Side school?

18 GENERAL CLEMENT: Justice Stevens --

19 JUSTICE STEVENS: And then order that, hire
20 teachers to do that?

21 GENERAL CLEMENT: I think I'd have to -- I
22 mean, I think it would depend --

23 JUSTICE STEVENS: The only purpose is racial
24 integration.

25 GENERAL CLEMENT: I think if you build into

1 the hypo that the only purpose was race and then it was
2 done in a way that made it express that the teachers
3 were going to be moved, that you were basically going to
4 have five and five, you were going to have a quota at
5 the two schools on the basis of race, I would say that
6 that would be unconstitutional.

7 I would think, though, that there are many
8 ways you can accomplish similar objectives without
9 making it so explicit. And I do think that in this
10 context, I mean, there is an independent constitutional
11 value in not having these kind of express racial
12 classifications drawn.

13 JUSTICE KENNEDY: I understand, and I'm just
14 wondering whether in your view that independent value
15 could ever be trumped by the obvious countervailing
16 value of having some African Americans see some white
17 teachers and vice versa?

18 GENERAL CLEMENT: Oh, but I think that's the
19 point, which is that is an important objective, but I
20 have little doubt that that can be accomplished without
21 the kind of five by five quotas.

22 JUSTICE BREYER: You have doubt -- you have
23 little doubt. Are you an educational expert? I mean,
24 the -- it seems to me from what I read, that there is a
25 terrible problem in the country. The problem is that

1 there are lots and lots of school districts that are
2 becoming more and more segregated in fact, and that
3 school boards all over are struggling with this problem.
4 And if they knew an easy way, they'd do it.

5 So I don't know whether this is exactly the
6 only way to do it or not. I do know courts are not very
7 good at figuring that out. And I guess that's why the
8 Court previously has said it is primarily up to the
9 school district. What's your response?

10 CHIEF JUSTICE ROBERTS: Whatever it takes.

11 GENERAL CLEMENT: Justice Breyer, if I could
12 be clear, though, what I was saying in response to
13 Justice Stevens' question was really focused not on the
14 broader problem, but specifically with respect to
15 faculties. And I think that one is a little easier in
16 the sense that I don't know of any school districts that
17 have tried to maintain the kind of express quotas in
18 teaching that he was indicating. I'm not here to tell
19 you that this problem is simple to solve. I'm here to
20 tell you, though, that I think the Constitution provides
21 an answer.

22 JUSTICE STEVENS: Just say some. We want
23 to -- we're going to make a decision there will be some
24 white teachers and some African-American teachers in the
25 other. And we're going to do it no matter -- if the

1 Constitution permits it. And that's our only motive.

2 GENERAL CLEMENT: Well, Justice Stevens, let
3 me tell you what I certainly think they could do, which
4 is to say, look, you know, we don't have any balance in
5 these two faculties. What we're going to do is we're
6 going to mix some of them up, we're going to do it in a
7 way that looks at a variety of factors, including who is
8 good with young kids, who is good with older kids.

9 JUSTICE STEVENS: My example is 100 percent
10 motive to avoid 100 percent segregation.

11 GENERAL CLEMENT: And I think if what they
12 end up doing at the end is not only a hundred percent
13 motive, but a racial classification, then I think runs
14 afoul of the Constitution.

15 JUSTICE STEVENS: Just some, any without
16 violating the Constitution.

17 GENERAL CLEMENT: Just to be clear, our
18 answer to the hypothetical a hundred percent motivation,
19 no racial classification, is that it is still okay.
20 Now, some members of the Court may disagree with us on
21 that. But what I would say is it probably doesn't have
22 that great an import in practice, because although it is
23 easy to come up with the hypothetical that race is the
24 absolute and sole motivating factor, I think in this
25 context in particular, I mean, nobody -- you know,

1 nobody is trying to do this solely for a race-based
2 motive. In this context, they also have an educational
3 goal.

4 CHIEF JUSTICE ROBERTS: General Clement, do
5 you know how Joshua would have been assigned prior to
6 the establishment of unitary status in this case?

7 GENERAL CLEMENT: He would clearly have been
8 assigned to one school, and one set of schools on the
9 basis of his race.

10 CHIEF JUSTICE ROBERTS: You don't know
11 whether that would have been the magnet or the so-called
12 resides school or somewhere else?

13 GENERAL CLEMENT: No, I guess I don't. And
14 maybe I'm missing something. But I think that -- you
15 know, the dual school system predated the court ordered
16 decree, which is part of where we have gotten to with
17 resides schools and the like. If I can come back to the
18 facts of this case, I think it's important to recognize
19 that he was denied transfer to Bloom, even though there
20 were empty seats available at Bloom school.

21 So if he had been an African-American, he
22 would have been allowed to transfer to Bloom. Instead,
23 he was prevented. And there was an empty seat sitting
24 there in that school. And that's why I think this case
25 does prevent a very stark racial quota.

1 JUSTICE SOUTER: May I ask you this, and I
2 think this applies to the case we have got, as well as
3 to Justice Stevens' hypothetical. You said in
4 Justice Stevens' -- in answer to Justice Stevens'
5 hypothetical, that they could achieve a result,
6 legitimately achieve a result of racial mixture within
7 the respective faculties of these schools if they took
8 other things in addition to race into consideration.
9 You mentioned ability as teachers and so on.

10 But at the end of the day, the object of
11 doing this, which Justice Stevens' hypo assumed, and I
12 think the object of doing it which your answer assumed,
13 was the achievement of racial mixture in the faculties.

14 My question is: Why do they have to hide the
15 ball by saying, oh, we're going to consider these other
16 things, ability to teach, educational credits, whatever
17 you could come up with when at the beginning and at the
18 end, the objective is to achieve a racial mix?

19 Why can't they do that candidly and employ a
20 criterion that candidly addresses that objective?

21 GENERAL CLEMENT: Well, Justice Souter,
22 there are several responses. One is that the
23 Constitution puts a particular premium on avoiding
24 express racial classifications.

25 JUSTICE SOUTER: And it has developed that

1 concern in cases in which the obvious use of race was to
2 hurt or to stigmatize. Here, there is stigmatization
3 going on as between black and white, when we say there
4 is a value in mixing them up.

5 Therefore, why should that same concern
6 about referring to race at all be applied in this case.

7 GENERAL CLEMENT: Well, Justice Souter, you
8 may have developed that jurisprudence in cases where it
9 was clear there was stigma going on, but you have
10 extended it in Croson and in Adarand across the board.
11 And I have to say --

12 JUSTICE SOUTER: We have extended it in
13 cases in which benefits were being denied. In
14 Justice Stevens' hypothetical, and so far as I know in
15 the kindergarten system in these cases, no educational
16 benefit was being denied.

17 GENERAL CLEMENT: I think --

18 JUSTICE SOUTER: Nothing was being rationed.

19 GENERAL CLEMENT: Well, I think choices were
20 being denied. And I think you made the distinction
21 earlier between an educational -- guarantee of some
22 educational opportunity and a choice. But --

23 JUSTICE SOUTER: But that is simply another
24 way -- when you say it is the choice that's being
25 denied, and that has to be the focus of the analysis,

1 that is simply another way of saying you may never use
2 the means of race-conscious distribution to achieve the
3 educational objective. You're saying the same thing in
4 a different way.

5 GENERAL CLEMENT: That may be,
6 Justice Souter. But what I guess I would say is the
7 logic of your argument would certainly require
8 reconsideration of the Gratz case. And this Court in
9 that context thought that individualized consideration
10 even if it was going to be very difficult in the context
11 of the University of Michigan's 25,000 admissions to the
12 undergraduate program, this Court said individualized
13 consideration was part of the constitutional guarantee.

14 JUSTICE SOUTER: In Gratz, the
15 characteristics of individuals that could be considered
16 were arguably relevant to a distribution decision.
17 Here, the sole point is not to achieve a quota by
18 relaxing other standards. The whole point is to achieve
19 a value which comes from mixing the races, from
20 distribution.

21 And, therefore, why is it appropriate to
22 look to other things as opposed to looking at that
23 candidly, if that is a legitimate objective?

24 GENERAL CLEMENT: Because I think,
25 Justice Souter, if you think it is an important value to

1 have a degree of integration in the schools, well, I
2 think you can take race neutral means that will get you
3 a degree of integration in the schools. What I think is
4 troubling, and what happens in cases like this --

5 JUSTICE SOUTER: But you may use those race
6 neutral means only for the purpose of achieving that
7 mixture. I take it that's the assumption of your
8 answer.

9 GENERAL CLEMENT: That's right.

10 JUSTICE SOUTER: The objective is fine. The
11 important thing is simply to hide the ball.

12 GENERAL CLEMENT: But if you decide that
13 candor is an affirmative good in the use -- in the race
14 area, I think what you get is necessarily what you have
15 here, which is strict racial bands. 50, 15 percent.
16 That's not a degree of integration. It is a clear
17 effort to try to get the individual schools to mimic the
18 overall demographics --

19 JUSTICE BREYER: Why is -- I'm trying to
20 find out -- I understand what you think of Gratz. We
21 can agree or disagree about that. But the overall view
22 of the Constitution, that interpretation that you have
23 in your mind, if it really forbids it, no use of race, I
24 mean, basically -- all right? Think -- go back to
25 Cooper versus Aaron. Go back to the case where this

1 Court with paratroopers had to use tremendous means to
2 get those children into the school. That's because the
3 society was divided.

4 Here we have a society, black and white, who
5 elect school board members who together have voted to
6 have this form of integration. Why, given that change
7 in society -- which is a good one -- what -- how can the
8 Constitution be interpreted in a way that would require
9 us, the judges, to go in and make them take the black
10 children out of the school?

11 See, my objection to your approach to the
12 Constitution is primarily a practical one.

13 GENERAL CLEMENT: Well, I understand that,
14 Justice Breyer. But I think the answer to that is that
15 the lesson of history in this area is that racial
16 classifications are not ones where we should just let
17 local school board officials do what they think is
18 right.

19 JUSTICE BREYER: Are you prepared to just
20 say, all right, they can do it some, just be careful
21 about it? How far will you go with that?

22 GENERAL CLEMENT: I think everybody concedes
23 that strict scrutiny is going to apply here.

24 JUSTICE BREYER: All right. So you're
25 saying we'll do it some, just be careful about it?

1 GENERAL CLEMENT: No, we would -- you know,
2 I think we would have to look at the details of the
3 plan. That's what narrow tailoring meant. And I think
4 that's what -- you know, Justice Kennedy made the point
5 in his opinion in Grutter that the problem with
6 approving the first blunderbuss opportunity that you see
7 to use race in a context is that then you deprive the
8 courts of any role trying to refine matters, and seeing,
9 maybe the racial situation would be narrowly tailored,
10 but it is sure not these 50-15 bands.

11 JUSTICE STEVENS: Judge Kozinski thought the
12 real problem here was we should not deify strict
13 scrutiny. That's what's caused all the problems.

14 GENERAL CLEMENT: And Justice Stevens, he
15 probably could have cited two of your opinions for that
16 proposition. But you know, the rest of us do have to
17 work with --

18 JUSTICE STEVENS: It is often true that
19 sometimes doctrines do have unintended consequences when
20 you push the logic of extremes. There is no doubt about
21 that.

22 GENERAL CLEMENT: There's no doubt about
23 that, but the rest of us do have to work with this
24 Court's precedents --

25 JUSTICE KENNEDY: And they also have

1 unintended consequences when this Court ignores them.

2 GENERAL CLEMENT: Absolutely. And it also
3 has some real world consequences when we decides we're
4 not going to apply the normal scrutiny we would to
5 racial classifications just because we've made some -- I
6 don't know based on what judgment that in this case, it
7 is benign, so we can trust the local school officials.

8 JUSTICE STEVENS: Well, it isn't that we've
9 made a judgment, the local school board has made a
10 judgment which has a lot of experience under both
11 systems.

12 GENERAL CLEMENT: There's a lot of
13 experience in Brown, too, and those were local school
14 boards, too. And I think the lesson is --

15 JUSTICE SCALIA: Do we know the race of the
16 school board here? I mean, that was not -- how do we
17 know these are benign school boards? Is it stipulated
18 that they are benign school boards?

19 GENERAL CLEMENT: I missed that in the joint
20 stipulation, Justice Scalia. I would like to say one --
21 if I could make one point here, which is, I really do
22 think that it's worth looking at how this operates in
23 practice. And the fact that it leaves seats effectively
24 fallow in schools. Because that really marks it as a
25 quota. And it's interesting, when that same district

1 court judge --

2 JUSTICE GINSBURG: Was that how it worked
3 under the plan that was forced on the school district?
4 I thought it was roughly the same plan?

5 GENERAL CLEMENT: It was, Justice Ginsburg.
6 But I think there's a difference when you move past
7 unitary status. It's interesting. In the very case
8 where the court, Hampton II, where the same district
9 court found unitary status, he then because the Equal
10 Protection Clause was not shielded by the decree, had to
11 apply it to the use of these same racial bands in the
12 context of magnet schools.

13 And what did this same district court judge
14 find there? He found they operated, quote, as a hard
15 racial quota. Because the effect of these 50-15 bands
16 was to keep hundreds of seats at Central High School, a
17 popular magnet school empty, and away from
18 African-American students because the district wanted to
19 maintain its predetermined racial balance.

20 JUSTICE GINSBURG: Am I right in thinking
21 that the government in 2000 opposed terminating this --
22 the compulsory plan?

23 GENERAL CLEMENT: You mean the United States
24 government?

25 JUSTICE GINSBURG: Yes.

1 GENERAL CLEMENT: Or the school board? They
2 actually both opposed, which is something -- shows you
3 something of the anomalies that you can get from this
4 situation, which is the school board wanting to continue
5 its practice of using these racial guidelines actually
6 opposed the finding of unitary status. I would say,
7 though --

8 JUSTICE GINSBURG: I thought it was the
9 United States?

10 GENERAL CLEMENT: Yeah, we had some specific
11 objections in which we thought that two of the green
12 factors were not satisfied. That argument was rejected
13 by the district court.

14 If I can go back to the judge's finding
15 about the magnet schools, what is so interesting is the
16 same judge finds the same guidelines to be a hard racial
17 quota as to the magnet schools, but not as to the
18 neighborhood schools. Why does he make that
19 distinction? Because he finds that the neighborhood
20 schools are basically equal, and therefore, denying a
21 student an opportunity to attend to one rather than
22 another was not an injury of constitutional magnitude.

23 But I would have thought it is far too late
24 in the day, and the Chief Justice suggested this as
25 well, to say that just because two schools are basically

1 equal, you can deny a student the right to attend one,
2 and assigns one and only one based on his race. Thank
3 you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 General Clement.

6 Mr. Mellen?

7 ORAL ARGUMENT OF FRANCIS J. MELLEN, JR.

8 ON BEHALF OF THE RESPONDENTS

9 MR. MELLEN: Mr. Chief Justice, and may it
10 please the Court:

11 This case presents a story of a community
12 that once maintained racially segregated schools, that
13 desegregated those schools only when a court ordered it,
14 and that today maintains racially integrated schools
15 with broad community support.

16 This case presents a story of a board of
17 education that replaced a desegregation decree with a
18 student assignment plan that works, that stopped the
19 white flight that was the result of the desegregation
20 decree and has stabilized enrollment in our public
21 schools. This case presents a success story and it's a
22 success that was achieved in compliance with this
23 Court's strict scrutiny test.

24 JUSTICE KENNEDY: Does this case present the
25 story where the meaning of Brown versus Board of

1 Education is you can never take race out of politics?

2 MR. MELLEEN: I think, Your Honor, that Brown
3 is very much distinguishable. In Brown, the Topeka
4 board maintained two systems of schools. And admission
5 to those schools, admission, not assignment, was based
6 solely on race. That stigmatized the black children.
7 It sent the message that the white race was dominant and
8 superior and that the black race was inferior. That
9 caused great harm to those black students and this Court
10 properly remediated it.

11 JUSTICE SCALIA: And this doesn't? I mean,
12 this which is somehow based on the notion that a school
13 that is predominantly black or overwhelmingly black
14 cannot be as good as a school that is predominantly
15 white or overwhelmingly white? That doesn't send any
16 message?

17 MR. MELLEEN: The plan, Your Honor, is not
18 based solely on that supposition. This plan is based on
19 the supposition that a school that is racially
20 identifiable, and that would include a white racially
21 identifiable school, does not provide to the students in
22 that school the compelling benefits that our board
23 believes are presented by racial integration.

24 The compelling benefits, some of which are
25 the benefits that this Court identified in Grutter, from

1 the racial diversity that was a byproduct --

2 JUSTICE SCALIA: You're talking about white
3 flight, you're not talking about black flight. And
4 what's going on here is makes sure that there are a
5 certain number of white students or as high a proportion
6 as you can get. In schools that would be otherwise be
7 overwhelmingly black. And it seems to me if you are
8 appealing to stigmatization, that -- that is based on an
9 assumption that it seems to me is stigmatizing.

10 MR. MELLEN: This plan -- and the Federal
11 courts have held for years school districts do have an
12 interest in avoiding white flight. And As I said, this
13 plan has prevented -- has stopped white flight and has
14 stabilized enrollment in our schools.

15 But this -- this plan was adopted, Your
16 Honor, for the purpose of providing the compelling
17 benefits of racial integration, some of which this Court
18 identified in Grutter, some of which the District Court
19 found were not present in the University of Michigan Law
20 School case, but are present in an elementary and
21 secondary system of schools. For example, the District
22 Court found that this plan makes our public schools more
23 competitive and attractive and results in broader
24 community support for those schools.

25 JUSTICE KENNEDY: I, I think that's probably

1 true. I think it is also probably true that the people
2 in your community and the people on your school board
3 are acting in the utmost good faith. And that what they
4 have done is going to help the education of many
5 students.

6 The question is whether or not we can say
7 that an insincere school board, people that want to play
8 the race card, who want to play the race trip, the --
9 the race chip, that want a system in which they can use
10 race for political advantage, can do this based on the
11 color of the individual child's skin. That's what's
12 involved here.

13 MR. MELLEEN: I don't think that's what is
14 involved in this case, Your Honor, because the District
15 Court found that the board's motives were indeed
16 legitimate and that there was no basis --

17 JUSTICE KENNEDY: I'm conceding that. The
18 Constitution assumes that this might not always be the
19 case. Are we going to look at the sincerity of the
20 school boards, school by school board, school board
21 member by school board member?

22 MR. MELLEEN: I don't think that would be
23 proper for the courts to do that, Your Honor, but the
24 other issue that's presented by these cases is whether
25 the use of race is narrowly tailored. And the District

1 Court found in this case that it was, was for a variety
2 of reasons. So I think that this case does not, Your
3 Honor, present the hypothetical that you suggested and
4 in other cases with different factors --

5 JUSTICE KENNEDY: But it, but it presents
6 the principle that this Court is confronted with. If we
7 for the first time say that a system that has achieved
8 unitary status. So that the courts no longer have the
9 authority or the need to supervise them, can then turn
10 around and use individual skin color as a basis for
11 assignment, we've never said that. And that takes us on
12 a very perilous course.

13 MR. MELLEEN: You've never said it, Your
14 Honor and the question has never been presented. A
15 similar question was presented in the University of
16 Michigan Law School case. And this Court held the use
17 of a racial classification to satisfy a compelling
18 interest and in a narrowly tailored manner --

19 JUSTICE KENNEDY: In the university cases
20 this Court ran as far away as it could from using racial
21 quotas. It talked about the fact that there was an
22 individualized assessment. At, at issue was a
23 university student who could understand the reasons for
24 being rejected on, on the grounds of race, race being
25 one criteria. That isn't this case.

1 MR. MELLEN: That's not this case, Your
2 Honor, because our board asserts a different compelling
3 interest. The compelling interest asserted by the
4 Michigan Law School was viewpoint diversity. A
5 different kind of -- it's a byproduct of that.

6 This Court asserts an interest in -- this
7 board, I'm sorry, asserts an interest in racial
8 integration and we believe that there are compelling
9 benefits from racial integration and that this board
10 provides them to all students, both black and white.

11 JUSTICE KENNEDY: Once again, once again,
12 one of the rationales for the law school cases was a
13 First Amendment rationale. And you, and I think
14 properly so, say that this is, this is not your
15 interest. I agree with you. But that means that that
16 case is completely inapplicable to help you.

17 MR. MELLEN: I don't think it's completely
18 inapplicable, Your Honor, because this case presents the
19 same basic doctrinal question that was presented in
20 Grutter, whether a Government agency can use race as a
21 classification with a compelling interest with narrow
22 tailoring. This Court in Grutter identified several
23 benefits of racial diversity. Some of those benefits
24 are presented in the elementary and secondary school
25 context. And we have additional benefits that are

1 presented by racial integration.

2 JUSTICE SOUTER: Mr. Mellen, here is a
3 question I should have asked friends on the other side.
4 But I think it is raised by Justice Kennedy's question,
5 so let me put it out.

6 Are there circumstances under which there is
7 reason to suspect the motivation of school districts
8 when they come up with a plan in effect to require a
9 mixing of the races in the schools that is more or less
10 tailored to the relative percentages in the communities?
11 Is -- are there circumstances in which that would be
12 done for malign as opposed to benign purposes?

13 MR. MELLEN: I think it could be, Your
14 Honor. And this Court has said --

15 JUSTICE SOUTER: And what -- give me some,
16 or give me or an example.

17 MR. MELLEN: Your Honor, I'm not sure I can
18 think of one because I come from a community with a long
19 history of, of not doing that.

20 JUSTICE SCALIA: Easy. Easy. Take a school
21 district that is overwhelmingly minority. And --
22 overwhelmingly black, if you will. And a school board
23 that reflects that. And in which by reason of
24 residential patterns, the white schools, despite the
25 same expenditure of money, same level of teaching and

1 everything else, the white schools are better schools.

2 And the school board could decide we would
3 like our race to get into those better white schools.
4 Not because we want mixing. We just want, want them to
5 get into those schools.

6 Wouldn't that be a situation in which the
7 board could then come up with a -- you know, these good
8 schools ought to have 80 percent blacks in them? I
9 would not consider that a benign objective.

10 MR. MELLEEN: There might be, Your Honor,
11 under those circumstances a compelling interest in doing
12 that. The question would be whether it is narrowly
13 tailored. But --

14 JUSTICE SCALIA: I don't think there's a
15 compelling interest in doing it at all. They're doing
16 it for a racially selfish reason. They want their
17 constituency, they want the 80 percent of black
18 students, to be in the better schools. You consider
19 that a valid interest, and a non-racial interest?

20 MR. MELLEEN: No. No, Your Honor. Of course
21 with that explanation, I do not.

22 JUSTICE SOUTER: Do you think the school
23 board in that case would use the clumsy means of racial
24 integrational mixing as opposed simply to devoting more
25 money to the black schools?

1 MR. MELLEEN: I would certainly think, Your
2 Honor, that a wise school board would use other methods
3 to achieve that result. Yes.

4 JUSTICE SOUTER: I would think so, too.

5 JUSTICE BREYER: Why did you say -- in
6 truth, maybe I missed it. In your response to
7 Justice Kennedy, I think you said, when he asked, that
8 this Court has never said that the explicit use of race
9 by a K through 12 school board was constitutional, and I
10 thought the Court had explicitly said that in Swann.

11 MR. MELLEEN: I, I --

12 JUSTICE BREYER: I thought that, that
13 Justice Powell explicitly said it. I that Chief Justice
14 Rehnquist had explicitly said it. I thought if you went
15 back in sense to the slaughterhouse cases, you'll find
16 in 1872, this Court thought that the primary objective,
17 the primary objective of that Fourteenth Amendment was
18 to take people who had been formerly slaves and to bring
19 them into this society, and that all of phrases of that
20 amendment should be interpreted with that objective in
21 mind. I mean, it didn't say that explicitly there, but
22 it seems explicitly and implicitly this Court has said
23 that.

24 MR. MELLEEN: Well, I agree, Justice Breyer.
25 And I misspoke, I used one word incorrectly. I said --

1 I should have said this Court has not held. I agree
2 with General Clement that Swann was dictum, but a very
3 strong dictum. And we do think it applies here.
4 Dictum.

5 JUSTICE KENNEDY: Well, I think -- I think
6 we were communicating. Swann was a case where there was
7 de jure discrimination. Bakke was a university case.
8 This is a different case.

9 MR. MELLEEN: It is indeed a different case,
10 Your Honor. We do not --

11 JUSTICE KENNEDY: And it's, and it's a
12 troubling case.

13 MR. MELLEEN: We do not contend, Your Honor,
14 that the purpose of this plan is to remediate past
15 discrimination against black students. This plan is
16 intended to provide benefits to both black and white
17 students.

18 CHIEF JUSTICE ROBERTS: So your arguments do
19 not depend in any way on the prior de jure segregation?

20 MR. MELLEEN: They do not, Your Honor. We
21 would agree that we stand on the same footing as the
22 Seattle district, as a unitary district this case needs
23 to be measured against whether a board has a compelling
24 interest and -- or board feels quite strongly that there
25 is compelling interest for the racial classification

1 that's employed in --

2 JUSTICE BREYER: What about the other part?
3 Because I think the Solicitor General -- I hope, I don't
4 want to put words in his mouth -- but I think he agrees
5 that Brown held out the promise of an equal education,
6 that the country worked for 35 or 40 years to try to get
7 a degree of integration, and that maintaining it is
8 important. I think the Government agrees with that.
9 They think this case goes too far. And in that I think
10 he's referring to narrow tailoring. It isn't narrowly
11 tailored enough. So I would appreciate knowing why you
12 think it is.

13 MR. MELLEN: We think it is, Your Honor, for
14 the very reasons that the District Court held it is.
15 The District Court addressed each of these points
16 regarding narrow tailoring which this Court identified
17 in Grutter, looked at them very carefully and concluded
18 that it is narrowly tailored. One of that issues that's
19 already been discussed this morning is individual
20 consideration. We agree with the position that the
21 Circuit Court took in the Ninth Circuit that in a
22 situation in which the compelling interest is racial
23 integration, that it makes no sense to take into account
24 other background characteristics of students other than
25 their race.

1 JUSTICE KENNEDY: If it were to become
2 relevant, would this record show -- this is the school
3 district -- and this would be in the regime of the
4 Court-ordered desegregation plan, because you are just
5 recently emerged from that -- that the school district
6 has tried means other than race conscious, of race
7 classification in order to obtain the diversity benefits
8 you seek?

9 MR. MELLEEN: The school district has, Your
10 Honor. In fact this plan uses those --

11 JUSTICE KENNEDY: And were those magnet
12 schools? And could you tell me about that?

13 MR. MELLEEN: Magnet schools, Your Honor.
14 And with respect to history, Your Honor, it is somewhat
15 complex, because although the Court ruled in the Hampton
16 case in 2000 that the decree was dissolved then, the
17 board honestly felt beginning in 1981 that the decree
18 had been dissolved. And so the board in 1984, 1991,
19 1996 made what it thought were voluntary modifications
20 to the plan.

21 Beginning in the late 1980s, the board began
22 to introduce more choice into the system including
23 magnet schools, magnet programs. The board uses race
24 neutral lotteries to determine enrollment in some
25 schools. But the board feels and it feels very strongly

1 based on conversations that board members and staff
2 people have had with other school districts that have
3 tried race-neutral measures including Charlotte
4 Mecklenburg, Wake county and San Francisco -- that
5 race-neutral measures alone will not do the job and the
6 experience in those districts indicates that they will
7 not do the job.

8 JUSTICE GINSBURG: But your starting place
9 was the plan that was compulsory, that was forced on the
10 school district in 1975? That is basically the same
11 kind of plan?

12 MR. MELLEN: Well, Your Honor, I would say
13 that the starting point was that plan. The board has
14 modified it considerably since then to make assignments
15 more stable and predictable, to make the use of race
16 more narrowly tailored. It is in concept the same plan,
17 because it has some of the features, but the board has
18 added many features that that plan did not have.

19 The 1975 desegregation decree was really
20 quite a blunt instrument and that's why it was so
21 controversial in the community. That's why there was
22 massive white flight. This plan, this board has very
23 wisely modified that plan to make it much more
24 acceptable to the community so that we stopped the white
25 flight. We stabilized our enrollment. We have a

1 community now that very broadly, the public opinion
2 surveys show, that supports racial integration whereas
3 in 1975, they were opposed to it, sometimes violently.

4 This is as I said at the outset a success
5 story.

6 JUSTICE GINSBURG: What would happen if you
7 couldn't use this system?

8 MR. MELLEN: And that would depend, Your
9 Honor, on what this Court said we could not use.

10 We do know that four of our schools, magnet
11 schools are now not subject to racial guidelines because
12 of the District Court's decision in the Hampton 2 case.
13 One of those schools, Central High School, is far
14 outside the racial guidelines. It has a black
15 enrollment of about 83 percent. At two of those other
16 magnet schools black enrollment has declined. It's
17 declined by about by about a third in two of those
18 schools. And that is only in the space of a few years.

19 Our school board staff has conducted some
20 hypothetical scenarios as to what would happen without
21 the racial guidelines. Some hypothetical scenarios
22 involve choice. Some involve purely neighborhood
23 schools. All of those scenarios show substantial
24 resegregation, particularly in elementary schools.

25 JUSTICE KENNEDY: Do any of those study the

1 possibilities of the system in which you elect to go
2 into a system where race counts?

3 MR. MELLEEN: Some of those scenarios, Your
4 Honor, did have some degree of choice.

5 JUSTICE KENNEDY: Are they written out
6 anywhere we can see them? Or are there articles on
7 this?

8 MR. MELLEEN: They are not in the record in
9 this case, Your Honor. They were in the record in the
10 Hampton case, so if you read the Hampton 2 opinion you
11 will see that the district court included a lengthy
12 footnote in which he basically summarized those
13 scenarios.

14 JUSTICE SCALIA: If you say your plan has
15 the overwhelming support of the community, does
16 "community" mean those parent who have children in
17 the schools?

18 MR. MELLEEN: Some of the --

19 JUSTICE SCALIA: It seems to me that ought
20 to be the really -- the people who are the objects of
21 this experiment. Do they think it's doing --

22 MR. MELLEEN: They do indeed, Your Honor.
23 Those surveys were surveys by the University of Kentucky
24 Research Center of parents.

25 JUSTICE SCALIA: And did the parents'

1 satisfaction with it break out along racial lines? Or
2 was it evenly divided?

3 MR. MELLEEN: It was fairly evenly divided,
4 Your Honor. One of our expert witnesses said that --
5 well, both of them said that they were quite surprised
6 that the findings were so positive. One of the expert
7 witnesses said that unquestionably this is a community
8 that values diversity.

9 JUSTICE SCALIA: Where is that?

10 MR. MELLEEN: That's the testimony of Edward
11 Kiefer, Your Honor, from the university of Kentucky. He
12 was responsible for the survey --

13 JUSTICE SCALIA: And he's talking about the
14 parents of students in the school?

15 MR. MELLEEN: That's correct, Your Honor.
16 That's -- there are some other surveys, I believe, that
17 include the entire community. But I think you'll see in
18 the record some that are parents only.

19 I would like, Your Honor, Justice Ginsburg,
20 to respond very briefly to some of the facts concerning
21 Joshua, because you asked about that. There is nothing
22 in the record that says that Ms. Meredith moved into the
23 district in Florida just when she showed up at
24 Breckenridge-Franklin. With respect to her appeal, in
25 fact the litigation had not commenced when she would

1 have had an opportunity to file an appeal. The
2 stipulation of facts says that she did not apply for
3 Joshua for the first grade.

4 Now, Ms. Bloom -- excuse me. Ms. Meredith
5 -- and this is not in the record because it took place
6 after the record was closed -- but Ms. Meredith
7 reapplied for a transfer after Joshua finished the first
8 grade. That transfer was initially denied. She
9 appealed. The transfer was granted and Joshua does now
10 attend Bloom. I think that's relevant because the
11 Solicitor General made an argument in his brief that
12 this plan allows the student to be trapped in a school.
13 We would certainly not agree that an assignment to any
14 one of our fine schools could be a trap. But in any
15 event, students can reapply each year and that has
16 happened. It happened here in the case of Joshua --

17 JUSTICE KENNEDY: Can you tell me, how is
18 race used? Do the administrators have discretion in the
19 weight they will give to it on a case by case basis?

20 MR. MELLEN: I don't think exactly, Your
21 Honor. Race is used, as the district court found,
22 really as the final factor, a tipping factor. Residence
23 comes into play. Choice comes into play. Lotteries in
24 some schools come into play.

25 JUSTICE KENNEDY: I'm not sure how to ask

1 the question: Is it used fairly evenly across the board
2 when it is the tiebreaker?

3 MR. MELLEEN: We don't used the word
4 "tiebreaker," Your Honor. The record indicates --

5 JUSTICE KENNEDY: To tip the tipping point,
6 whatever.

7 MR. MELLEEN: The record indicates that race
8 would be the dispositive factor in no more than 2 to 3
9 percent of the choice applications.

10 JUSTICE KENNEDY: That means -- that leads
11 to the question of why do they need it?

12 MR. MELLEEN: I think they need it, Your
13 Honor, because it sets a boundary. It defines what
14 racial integration means. If staff had come to this
15 board with a plan that said, our goal is racial
16 integration --

17 JUSTICE KENNEDY: So it's symbolic that race
18 counts?

19 MR. MELLEEN: I don't think so, Your Honor.
20 I think it simply sets the outer limits within which our
21 process of choice and other methods of assignment works.
22 Without that boundary, it could be transgressed one
23 student at a time.

24 The guidelines I think are very much like
25 the little boy in the Dutch story who put his finger in

1 the dike because a few drops of water were coming out.
2 He knew it would become a flood eventually if he didn't
3 do that. We think that is exactly the case here, that
4 without these guidelines one student at a time could
5 transgress them and ultimately we would have a
6 resegregated school system.

7 JUSTICE SCALIA: Mr. Mellen, I've been
8 looking at Dr. Kiefer's testimony. Is this what you're
9 referring to: "There was remarkable agreement among
10 every group in Jefferson County Public Schools about how
11 desirable having diversity in the schools was"?

12 MR. MELLEN: That's correct, Your Honor.

13 JUSTICE SCALIA: I have no double about
14 that. I mean, if you're going to ask anybody, you know,
15 do you prefer integrated schools or would you prefer
16 lily-white schools, nobody is going to say give me a
17 lily-white school. Of course nobody's going to say
18 that.

19 I was asking whether the parents whose kids
20 can't go to the schools they want to go to, including
21 the neighborhood schools, do they like this particular
22 system of achieving the racial diversity? Is there any
23 testimony about that?

24 MR. MELLEN: The great majority do, Your
25 Honor. And I think if you look at the University of --

1 JUSTICE SCALIA: Black and white alike?

2 MR. MELLEEN: Black and white alike, in large
3 numbers. No plan, Your Honor, can be --

4 JUSTICE SCALIA: How do we know that?

5 MR. MELLEEN: Again, Your Honor, the
6 University of Kentucky survey, which is in the record --

7 JUSTICE SCALIA: It is in the record?

8 MR. MELLEEN: -- broke it down by race among
9 parents. It asked whether guidelines were proper. It
10 asked whether assignment on socioeconomic status would
11 be preferred. There are a lot of questions in that
12 survey and I think you might find --

13 JUSTICE SCALIA: It's not in your joint
14 appendix here?

15 MR. MELLEEN: It's not in the joint appendix.
16 It's an exhibit, I believe, to the stipulation of facts,
17 Your Honor.

18 CHIEF JUSTICE ROBERTS: There were questions
19 earlier about the status of the particular plaintiff.
20 You're not challenging standing or raising mootness, are
21 you?

22 MR. MELLEEN: No, we're not, Your Honor.
23 We're not challenging standing. We're simply saying
24 that Ms. Meredith did not suffer undue harm within the
25 meaning of this Court's decisions and that parents as a

1 whole and students as a whole do not suffer undue harm.

2 There have questions in the first case about
3 an end point. I might address that briefly. We believe
4 that the use of race in this plan is self-limiting in
5 several respects. If racially segregated housing in
6 Jefferson County continues to decline, which it has
7 somewhat since the 1970s, and the board has reason to
8 believe that the presence of racially integrated schools
9 during that period contributed to that -- there are
10 several amicus briefs that were filed in this case that
11 set forth research that supports that conclusion. If
12 racially segregated housing continues to decline and if
13 this plan meets its purpose of diminishing racial
14 stereotypes and promoting better cross-racial
15 understanding throughout the community, we can foresee a
16 time when this board will not see a reason to use this
17 plan or may modify it further to make it even less
18 restrictive.

19 CHIEF JUSTICE ROBERTS: In a time horizon
20 longer or shorter than the 25-year time horizon that was
21 discussed in Grutter?

22 MR. MELLEN: I can't predict the future,
23 Your Honor. I can say it could be shorter for another
24 reason. That is that this plan is inherently subject to
25 democratic review by elected school board and by the

1 voters. It could end sooner than that if the board and
2 the voters change their minds. I can't predict whether
3 it might end longer than that. I can only say that this
4 board has a long history of modifying the plan. As I
5 said, they modified it in 1984, 1991, 1996, 2001. It's
6 in the very nature of how a board of education works
7 that they continue to tinker with things.

8 JUSTICE GINSBURG: If the attitude is the
9 one that this board has taken, then the same reasons
10 would exist for the plan as long as there is segregation
11 in housing.

12 MR. MELLEEN: I wouldn't limit that, limit it
13 to that, Your Honor. I think that an important factor
14 are racial attitudes in the community. I think that
15 this board feels that the plan does serve to ameliorate
16 racial stereotypes, promote cross-racial understanding.
17 Our community still has a long way to go in that
18 respect. We do have some racial issues in Jefferson
19 County. But we believe this plan helps them. And in
20 the future a board may look at our community, may look
21 at how racial relations work in our community, and may
22 well decide that, even though housing is still somewhat
23 segregated, we can do without this plan or again we can
24 modify it to make it less restrictive, which in fact the
25 history of this plan shows that this board has done.

1 JUSTICE ALITO: Well, what would this board
2 have to have in order for it not to be temporally
3 limited in your opinion? Any plan can be changed in the
4 future. So why does the fact that this can be changed
5 in the future make it a plan that has a temporal
6 limitation?

7 MR. MELLEN: Well, Your Honor, it does not
8 have fixed temporal limitation of 25 years or 10 years.
9 As I said, that's not how school boards operate. But it
10 is inherently subject to review on a temporal basis
11 because each time we have a school board election the
12 plan potentially is in play, and it could be modified at
13 any time in that sense.

14 I see that my time is almost up. If there
15 are no further --

16 JUSTICE STEVENS: May I just. Was there a
17 petition for a rehearing en banc in this case?

18 MR. MELLEN: There was, Your Honor, in the
19 Sixth Circuit, and it was denied.

20 JUSTICE STEVENS: Were there any votes in
21 favor of the en banc rehearing?

22 MR. MELLEN: Your Honor, as I recall the
23 Sixth Circuit's order, it said that no judge asked for a
24 rehearing en banc.

25 CHIEF JUSTICE ROBERTS: THE COURT: Thank

1 you, Mr. Mellen.

2 Mr. Gordon, you have 2 minutes remaining.

3 REBUTTAL ARGUMENT OF TEDDY B. GORDON

4 ON BEHALF OF THE PETITIONER

5 MR. GORDON: Thank you, Mr. Chief Justice.

6 First of all, to respond to one of the
7 questions that was asked, it's very important that it is
8 equally consistent in the 1992 plan to effectuate or to
9 prevent white flight that the plan itself was changed to
10 subjugate African American kids to the worse performing
11 schools. If you find that equally consistent, then you
12 have a question of whether or not illegitimate notions
13 of racial inferiority applied or racial politics applied
14 --

15 JUSTICE KENNEDY: Excuse me. I didn't
16 understand it.

17 MR. GORDON: Well, in the '92 plan and from
18 that point on, which I showed, which was held in the
19 Hampton plan, in the Hampton case -- in other words, in
20 the Hampton case I proved, or the facts proved or the
21 plaintiff proved, that African American kids were denied
22 entrance into the better schools solely because of race.

23 Within the vacuum of that case, there was
24 also proof that showed the largest percent of African
25 American kids were sent or denigrated or subjugated to

1 the worse performing schools rather than the best
2 performing schools. That becomes the question of racial
3 politics and racial animus, and that's what the '92 plan
4 did. And what it did to attract -- or prevent white
5 flight, was have less African American kids go to the
6 better performing schools on the entire K through 12
7 setting.

8 That can't be what this Court wants to carve
9 out as an exemption to the Equal Protection Clause. The
10 Equal Protection Clause, that's on neutral parchment
11 with black ink. There's no percents. There's no box to
12 check. We can't have this in our school system, to have
13 another 25 or 30 years in our school system, which will
14 perpetuate racial isolationism because it does nothing
15 to stop the achievement gap. There were race-neutral
16 alternative tracks.

17 All I can say is that, may this day be the
18 embryonic beginning of Dr. King's dream, as paraphrased,
19 that all children are now judged by the content of their
20 character and their education, not by the color of their
21 skin.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 12:01 p.m., the case in the
25 above-entitled matter was submitted.)

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