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(12)

No. 05-915

In the Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF HUMAN RIGHTS ADVOCACY GROUPS AND INTERNATIONAL LAW PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a metropolitan-wide school system may voluntarily pursue a race-conscious student assignment plan to correct *de facto* segregation and promote integration?

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The **University of Minnesota Human Rights Center** is a national leader in human rights advocacy and research. The Human Rights Center was established in 1988 at the University of Minnesota. The Center's most visible educational activity is its sponsorship of the University of Minnesota Human Rights Library on the World Web, which contains over 25,000 core human rights treaties, instruments, and other documents in seven languages and is used by about 200,000 individuals from more than 150 nations each month. The Human Rights Center also does applied human rights research on such issues as corporate social responsibility, the rights of non-citizens, contemporary forms of slavery (including trafficking and child labor), human rights fact-finding, the right to a fair trial, and other subjects of current concern. Another visible project of the Human Rights Center is its sponsorship of the Upper Midwest Human Rights Fellowship Program and its cooperation with the Hubert Humphrey International Fellowship Program. The Upper Midwest Fellowship Program provides opportunities for approximately 30 students and community leaders each year to work with human rights organizations throughout the world. The Humphrey Fellowship Program is sponsored by the U.S. Department of State and provides exchange opportunities to mid-career professionals from developing countries.

The University of Minnesota Human Rights Center and its leadership have submitted amici curiae briefs in several significant U.S. cases, including *Grutter v. Bollinger*,

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[*]All parties in this case have given blanket consent to participation of *amici curiae*. *Amici* sign this memorandum on their own behalf. No counsel for a party authored this brief in whole or in part and no person, other than Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

539 U.S. 306 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Roper v. Simmons*, 543 U.S. 551(2005).

Human Rights Advocates is a non-profit California corporation founded in 1978 with national and international membership. It has Special NGO Consultative Status in the United Nations. It endeavors to ensure that the most basic protections are afforded to everyone and has submitted briefs in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue. Examples of amicus briefs that Human Rights Advocates has filed include those in the following cases: *Grutter v. Bollinger; Roper v. Simmons; Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2nd Cir. 1985); and *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

The **Midwest Coalition for Human Rights** is a network of 32 U.S.-based advocacy organizations and academic centers collaborating to promote and protect human rights both in the United States and abroad.

The **Centre on Housing Rights and Evictions (COHRE)** is a worldwide organization, headquartered in Geneva, Switzerland, but with offices in Duluth, Minnesota.

George E. Edwards is the Carl M. Gray Professor of Law and Director of the Program in International Human Rights Law and Faculty Director/Advisor, Master of Laws (LLM) Track in International Human Rights Law at Indiana University School of Law at Indianapolis, Indianapolis, Indiana.

SUMMARY OF ARGUMENT

The United States has traditionally been a leader of the international community in protecting and promoting human rights. U.S. leadership has, in large part, been due to our Constitution's power to promote and protect human rights. Numerous countries have followed the U.S. lead by citing and deferring to our human rights precepts, practices, legislation, and jurisprudence.

As a leader in promoting human rights, the United States should not interpret the Constitutional guarantee of equal protection under the law as a lesser right than those articulated in treaties which the U.S. has accepted or as a lesser right than those adopted by other nations with which the United States ordinarily compares itself. In deciding whether schools may voluntarily take action to address *de facto* segregation, international law and treaties that the United States has accepted and helped to create may provide guidance to this Court. The Fourteenth Amendment's Equal Protection guarantee, read consistently with treaties the United States has ratified as well as other international law, upholds the use of voluntary state action to correct *de facto* segregation in public schools.

Both the International Covenant on Civil and Political Rights ("Civil and Political Covenant") and the Convention on the Elimination of All Forms of Racial Discrimination ("Race Convention") permit race-based distinctions to redress past discrimination and promote the benefits of diversity. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, http://www1.umn.edu/humanrts/instree/b3ccpr.htm; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14), U.N. Doc. A/6014

(1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, http://www1.umn.edu/humanrts/ instree/d1cerd.htm.

By becoming a party to these treaties, the United States is obligated to take the affirmative steps necessary to guarantee all persons equal and effective protection against all forms of racial discrimination. International law and international interpretive bodies uphold and encourage state action to address both *de facto* and *de jure* segregation. Such action is appropriate whenever a law, regulation, or action has the effect, not just the intent, of race-based discrimination. Should this Court find that race-based integration measures are unconstitutional, public schools will be encouraged to re-segregate. Such re-segregation will not only violate the Equal Protection Clause, but it will also have the effect of jeopardizing the reputation of the United States as a human rights leader in the world community.

SUMMARY OF FACTS

Jefferson County, Kentucky, has a long history of *de jure* and *de facto* segregation in its neighborhoods and schools. In response to litigation over Jefferson County's segregated school system, the U.S. Court of Appeals for the Sixth Circuit directed district court Judge James Gordon to devise a student assignment plan that abolished all vestiges of state-imposed school segregation. *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 489 F.2d 925, 932 (6th Cir. 1973). Judge Gordon's direct monitoring of the plan ended in 1981. *McFarland v. Jefferson County Pub. Sch.*, 330 F.Supp.2d 834, 841 (W.D.Ky. 2004). Since 1981, Jefferson County has modified its student assignment plan to address growth while keeping its policies consistent with previous desegregation decrees.

In 1998, a group of parents challenged the student assignment plan, alleging that their children were denied

admission to a magnet high school based on race. *Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp 2d 753, 774 (W.D. Ky. 1999) ("*Hampton I*"). The district court held that Judge Gordon's original 1975 desegregation decree was still in effect. *Hampton I*, 72 F. Supp. 2d at 744. In 2000, the desegregation decree was lifted and the court held that the school board could not use racial quotas at magnet and other schools that offered unique programs not available at other schools in the district. *Hampton v. Jefferson County Bd. of Educ.*, 102 F.Supp.2d 358, 376, 381 (W.D.Ky. 2000) ("*Hampton II*").

In response to the court's ruling and in an effort to avoid undermining all the court-ordered progress in integration, Jefferson County adopted the 2001 Plan. The 2001 Plan uses a system of managed, voluntary choice to promote integration in the county's schools without using racial quotas. Enrolment decisions are based on place of residence, student choice (through a system of student preference ranking, application to magnet or traditional programs, transfer, or open enrolment), and racial guidelines. Jefferson County's 2001 Plan was found constitutional by the Western District of Kentucky and this decision was affirmed *en banc* by the Sixth Circuit. *McFarland ex rel. McFarland v. Jefferson County Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005).

The present case challenges the constitutionality of Jefferson County's continued commitment to integration. Without a voluntary race-conscious student assignment plan, neighborhood schools would be highly segregated. The 2001 Plan is necessary to prevent wide-spread re-segregation throughout the county's schools. The 2001 Plan tries to ensure that each child, regardless of their race or ethnicity, receive an education of equal quality in a diverse and productive environment.

This case has been joined with an appeal from *Parents Involved in Community Schools v. Seattle School District,*

NO.1, 426 F.3d 1162 (9th Cir. 2005). The Seattle school district, like Jefferson County, utilized a voluntary open choice student assignment plan. In an effort to address the city's historical struggle with de facto segregation, the school district used a race based tiebreaker in assigning students to oversubscribed high schools. Without a voluntary race-conscious student assignment plan, Seattle schools would also re-segregate.

ARGUMENT

I. INTERNATIONAL AND COMPARATIVE LAW ARE RELEVANT TO THE ISSUES BEFORE THIS COURT

From its earliest opinions, the Supreme Court has stated that the Constitution and relevant statutes should be read consistently with treaties and international law. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). The Constitution protects a wide range of human rights, especially under the Fifth, Eighth, and Fourteenth Amendments. Treaties and other nations' concepts of equal protection can help the United States better understand the protections available under the Fourteenth Amendment.

Supreme Court decisions have consistently acknowledged human rights treaties and used them to better understand U.S. human rights obligations. Justice Ginsburg's concurrence in *Grutter v. Bollinger* noted that international human rights treaties approve affirmative action by states to alleviate discrimination and segregation. 539 U.S. 306, 344 (2003). Justice Ginsburg stated:

> The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms". But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for

> different racial groups after the objectives for which they were taken have been achieved.

Grutter, 539 U.S. at 344 (citations omitted). Justice Ginsburg also noted that the Convention on the Elimination of All Forms of Discrimination Against Women[1] authorizes "temporary special measures aimed at accelerating *de facto* equality [that] shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." *Id.*

Similarly, in *Roper v. Simmons*, Justice Kennedy's majority opinion referred to the Civil and Political Covenant to gauge consensus on the prohibition of juvenile execution and ultimately determine whether or not juvenile execution was constitutional. 543 U.S. 551, 567 (2005). Further, in *Thompson v. Oklahoma*, Justice Stevens observed that the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War explicitly prohibit juvenile death penalties. 487 U.S. 815, 831 n.34 (1988). The same Justices also referred to the Civil and Political Covenant, the American Convention on Human Rights, and the Geneva Convention in their constitutional analysis of whether juvenile execution was constitutional. *Stanford v. Kentucky*, 492 U.S. 361, 389 (1989).

It has been established for more than one hundred years by U.S. Supreme Court precedent that international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as

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[1] Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp.

questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). In addition to looking at treaties and customary international law obligations, courts have also found non-binding international and foreign law persuasive authority in constitutional interpretation. Throughout history, the Court has given persuasive weight to international standards in its Constitutional analysis[2]

In *Trop v. Dulles*, 356 U.S. 86, 102 (1958), the plurality explored international consensus on the death penalty in relation to U.S. law. Writing for the Court in *Roper v. Simmons*, Justice Kennedy stressed the importance of international law as persuasive authority in constitutional analysis when he stated that, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of

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[2] *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J.) (stating that detention of aliens accords with international views. The Court also referenced the U.N. Working Group Report on Arbitrary Detention and the U.N. High Commissioner for Refugees' Guidelines on Detention of Asylum-Seekers); *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J.) (citing case law of Canada, Great Britain, India, Zimbabwe, and the Universal Declaration of Human Rights to support the conclusion that lengthy delay in administering lawful death penalties may be unusually cruel); *Washington v. Glucksberg*, 521 U.S. 702, 785-87 (1997) (Souter, J.) (examining Dutch constitutional practice of physician-assisted suicide); *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (O'Connor, J.) (stating that it is a frequently reiterated principle that federal common law is necessarily informed by international law); *Enmund v. Florida*, 458 U.S. 782, 796-797 n.22 (1982) (O'Connor, J.) (noting elimination or restriction of felony murder in Canada, England, India, and a "number of other Commonwealth countries"); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (White, J.) (noting that only three out of sixty major nations in the world use the death penalty as a punishment for rape); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J.) (defining privacy in the home by looking to "common understanding throughout the English-speaking world").

those same rights within our own heritage of freedom." 543 U.S. 551, 578. In *Atkins v Virginia*, the 6-3 majority noted national and international consensus against the execution of a mentally retarded individual. 536 U.S. 304, 316 n.21 (2002). The Court found the practice unconstitutional, observing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is universally disapproved." *Id.* Similarly, in *Lawrence v. Texas*, the majority of the Court referred to a decision by the European Court of Human Rights and noted that the right the petitioners sought had been accepted as an integral part of human freedom in many other countries. 539 U.S. 558, 573 (2003). This attention to foreign law recognizes international law as a useful source or context for constitutional interpretation.

A number of Supreme Court Justices have been vocal in their support of international law as a valuable resource for interpreting U.S. law. Justice Souter, speaking for the majority in *Sosa v. Alvarez-Machain*, said that the First Congress

> assumed that federal courts could properly identify some international norms as enforceable [under the law it wrote.] It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

542 U.S. 692, 730 (2004). More specifically, Justice Ginsburg has said that "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups." Ruth Bader Ginsburg and Deborah Jones Merritt, *Lecture: Fifty-First*

Cardozo Memorial Lecture - Affirmative Action: An International Human Rights Dialogue, 21 CARDOZO L. REV. 253, 282 (1999). Justice Breyer has explained that comparative use of international law will not lead courts blindly to follow foreign law, but will aid Constitutional interpretation by casting an empirical light on relevant problems. Stephen Breyer, *The Supreme Court and the New International Law*, Keynote Address to the American Society of International Law (Apr. 4, 2003), 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003).

This understanding that the U.S. Constitution should be interpreted consistently with international law is held by an increasing number of courts. The Constitutional guarantee of equal rights under the law has helped drive the United States' role as a leader in international human rights. The U.S commitment to equality has been relied upon by many nations and international organizations. The United States should not interpret the right to equal protection under the law as a lesser right than those adopted by other nations. In deciding whether schools may voluntarily take action to address *de facto* segregation, the Court should look to the international law and treaties the United States has helped create and ratify.

There is a national consensus on eradicating all forms of discrimination. The Constitution guarantees equal protection under the laws. This Court has ruled that "segregation is a denial of the equal protection of the laws." *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). The Race Convention and the Civil and Political Covenant reflect this national commitment and promote affirmative action as a permissible means of addressing *de facto* segregation. That the President of the United States has signed and the United States Senate has agreed by a two-thirds majority to ratification of these treaties, demonstrates the United State's commitment to these principles. The use of voluntary measures to address *de facto* discrimination by many

educational institutions indicates a collective understanding of these rights under the Equal Protection Clause.

There is also international consensus on eradicating discrimination and on the importance of voluntary measures in eliminating *de facto* discrimination. The overwhelming majority of nations have ratified the Race Convention and the Civil and Political Covenant.[3] Looking to other countries' interpretations of these documents further confirms that our own understanding of these principles is correct.

This commitment to abolish all forms of discrimination is so implicit in our concept of ordered liberty that it occupies a place in our Constitution. *See Thompson*, 487 U.S. 815, 868-69 n.4 (Scalia, J. dissenting) (stating that the practices of other nations are relevant only if there is a settled consensus among Americans and the practice is so implicit in the concept of ordered liberty that it occupies a place in our Constitution). Further, the use of voluntary measures to eradicate all forms of discrimination has occupied a place in our jurisprudence, in our history, and in learning institutions throughout the country. The fact that it occupies a place in the global consciousness only strengthens our own commitment.

The United States Constitution through the Fourteenth Amendment has endowed the states with the authority and the obligation to take action to ensure that all persons are treated equally under the law. When read in conjunction with the Race Convention and the Civil and Political Covenant, it is clear that equal protection under the law cannot be secured if states do not address both *de jure* discrimination and policies and practices that have discriminatory effects. Jefferson County's 2001 Plan meets these requirements and is an important tool in helping to eradicate all forms of discrimination.

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[3] There are 171 State parties to the Race Convention and 159 State parties to the Civil and Political Covenant.

II. TREATY OBLIGATIONS SUPPORT A FINDING THAT THE U.S. INTEREST IN CONSIDERING RACE AS A FACTOR IN SCHOOL ASSIGNMENT IS COMPELLING

A. The Race Convention

The Race Convention is the definitive treaty-based international standard on racial discrimination. As of October 1, 2006, there were 171 State parties to the Race Convention. *See* United Nations treaty database, http://untreaty.un.org /ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty2.asp President Johnson signed the Race Convention in 1966, and it was ratified after the Senate gave its advice and consent in 1994. The Race Convention addresses purposeful discrimination as well as actions that have discriminatory effects. Discrimination is defined as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise, *on equal footing*, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Race Convention, art. 1, http://www1.umn.edu/humanrts/instree/d1cerd.htm (emphasis added).

Furthermore, the Race Convention requires State parties to: "take effective measures to review governmental, national, and local policies and to amend, rescind, or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination wherever it exists." *Id.*, art. 2(1)(c). In addition, State parties are required to take specific

action to guarantee human rights, which include the right to education. *Id.* art. 2(2). These remedial measures should not in any way be considered discrimination. Article 1(4) of the Race Convention states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms *shall not be deemed racial discrimination* . . ..

(emphasis added).

The Race Convention established the Committee on the Elimination of Racial Discrimination (Race Committee) to monitor state parties' implementation of and compliance with treaty obligations. The Race Committee is composed of independent experts who are nationals of State parties. *Id.* art. 8(1). State parties must submit periodic reports on their implementation of the rights enshrined in the Race Convention. *Id.* art 9. The Race Committee is authorized to review country reports, hear individual and interstate complaints, and make recommendations to State parties with regard to treaty implementation. Additionally, the Race Committee interprets the content of the human rights provisions in the Race Convention in its General Recommendations.

The Race Committee has consistently held that *de facto* discrimination violates the Race Convention. In *L.R. v. Slovakia*, the Committee held the State party responsible for actions that have discriminatory effects, regardless of whether they were committed with discriminatory intent. L.R. et al. v. Slovakia, Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/ 2003 (2005), http://www1.umn.edu/

humanrts/country/decisions/31-2003.html. Specifically addressing the treatment of Roma people, the Race Committee found that Slovakia had failed its treaty obligation to "[n]ullify any laws or regulations which have the effect of creating or perpetrating racial discrimination." *Id.* The Committee reiterated that discrimination, as defined in Article 1(1) of the Race Convention, extends beyond explicitly discriminatory measures to reach those which are also discriminatory in fact and effect. Article 5 states that the right to equality in education is especially important. Race Convention, Article 5(e)(v), http://www1.umn.edu/humanrts/instree/d1cerd.htm.

The Race Committee has specifically addressed *de facto* discrimination in the United States. In response to the United States' most recent report, the Race Committee stated:

> The Committee draws the attention of the State party to its obligations under the Convention, and in particular to article 1 paragraph 1, and General Recommendation No. XIV, to undertake to prohibit and to eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect. The Committee recommends the State party to take all appropriate measures to review . . . local policies to ensure the effective protection against any form of racial discrimination and any unjustifiable disparate impact.

Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (2001); *see* http://www1.umn.edu/humanrts/usdocs/conclcomments-usa.html. These findings, which emphasize the duty of the United States to prohibit and eliminate racial discrimination, are

consistent with the Constitutional prohibition of discrimination under the Equal Protection Clause. The Committee's conclusions underscore the global consensus on the necessity of eradicating the pernicious effects of *de facto* segregation.[4] *See* Theodore Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 288 (1985).

The Race Convention satisfies the constitutional requirements of equal protection. The goal of the Race Convention is to eliminate all forms of racial discrimination, including *de facto* segregation. The Court stated in *Brown*, that the government has a compelling interest in abolishing discrimination, especially in school segregation. 347 U.S. 483. The 2001 Plan does not maintain separate or unequal rights for any group; each student is assigned to a school that is, by design, the equal of any other school in the area. The 2001 Plan addresses discriminatory housing practices such as racial steering, location of low income housing, and racial preferences by voluntarily using a race-conscious plan to

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[4] Several other states have implemented racial guidelines to eliminate *de facto* segregation in education. Brazil recently introduced race-conscious guidelines for University admissions to afford Afro-Brazilians equal access to post-secondary education. Italo Ramos, *Affirmative Action in Brazil, The Day of the Lambs*, THE BLACK COMMENTATOR (Feb. 23, 2006), http://www.blackcommentator.com/172/172_guest_ramos_brazil_affirmative_action.html; Rodrigo Davies, *Brazil Takes Affirmative Action in Higher Education*, THE GUARDIAN, August 4, 2003, http://www.education.gaurdian.co.uk/higher/worldwide/story/0,9959,1012157,00.html. India has adopted numerous racial guidelines in education. Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 275-76 (1999). South Africa expressly condones racial guidelines to achieve equal protection in Article 9(2) of its constitution. *See* CONST. S. AFR. (Act 108 of 1996) ch.2 (Bill of Rights), 9(2), http://www.info.gov.za/ docusments/constitution/1996/1996/96cons2/htm#9.

ensure that students have substantially similar educational experiences. Jefferson County students should not bear a badge of inferiority based on where they attend school. All students should be able to attain the benefits of a diverse educational environment.

The Race Convention also states that remedial measures should be narrowly tailored in that the measures "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." Race Convention art. 2(2). The race-conscious measures included in the 2001 Plan are not permanent, nor are they the only measures used in determining student assignments. These race-conscious measures will no longer be necessary when the county has achieved desegregation in its housing patterns. Jefferson County's 2001 Plan should be upheld under the Constitution and under U.S. treaty obligations because it is based on a compelling government interest,[5] and it is narrowly tailored.

B. The Civil and Political Covenant

The Civil and Political Covenant is the leading treaty addressing fundamental civil rights and political freedoms. President Carter signed the Civil and Political Covenant in 1977, and the United States ratified it in 1992 during the Presidency of George H.W. Bush. *See* United Nations Treaty Database, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp; ICCPR, 138 Cong. Rec. S4781-84 (Apr. 2 1992). The United States is one of 159 State parties to the Civil and Political Covenant. *See Id.*

[5] Treaty obligations themselves can constitute a compelling state interest to justify the establishment of such programs. *See* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 CINN. L. REV. 423, 468 (1997).

Article 26 of the Civil and Political Covenant, requires the United States to "guarantee to all persons equal and *effective* protection against discrimination on any ground such as race . . . ." International Covenant on Civil and Political Rights, art. 26 (emphasis added). Furthermore, Article 2(2) places an affirmative duty on State parties to: "take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." *Id.* art. 2(2).

The Civil and Political Covenant established the Human Rights Committee to monitor State parties' compliance. The Human Rights Committee reviews State parties' reports, issues authoritative adjudicative decisions on individual complaints, and interprets the Covenant's provisions in its General Comments. The Human Rights Committee is composed of eighteen independent experts who are nationals of State parties. *Id.* Art. 28(2). State parties are obligated to submit periodic reports to the Committee for its review. *Id.* Art. 40(1). The Human Rights Committee's definition of discrimination is consistent with the definition found in the Race Convention. General Comment 18 ¶ 7, http://www1.umn.edu/humanrts/gencomm/hrcom18.htm. The Civil and Political Covenant defines discrimination as "any distinction, exclusion, or preference . . . which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment, or exercise by all persons, *on equal footing*, of all rights and freedoms. *Id.* (emphasis added).

On October 25, 2005, the United States submitted its second and third periodic reports to the Human Rights Committee. Full report available at: http://www.state.gov/g/drl/rls/55504.htm. After reviewing the U.S. reports and questioning the United States representative in July 2006, the Human Rights Committee noted its concern about *de facto* segregation in U.S. schools.

The Committee noted the failure of the United States to eliminate racial discrimination, as evidenced by the wide disparities in the quality of education available to different groups of students. Specifically, the Committee expressed concern about:

> reports of de facto racial segregation in public schools, reportedly caused by discrepancies between racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated. The Committee is concerned that the State party, despite measures adopted, has not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students.

Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee: United States, U.N. Doc. CCPR/C/USA/CO/3 (July 28, 2006), ¶ 23, http://www1.umn.edu/humanrts/usdocs/ hrucomments2.html.

Voluntary race-conscious plans, such as the Jefferson County 2001 Plan, were expressly considered when the U.S. ratified the Civil and Political Covenant. Statement by Conrad K. Harper to the Human Rights Committee, USUN Press Release #49-(95), at 3 (Mar. 29, 1995), http://www.state.gov/s/l/65762.htm. The U.S. entered an understanding upon ratification, which effectively stated that the United States could make distinctions based upon race if they are rationally related to a legitimate government objective. U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), http://www1.umn.edu/humanrts/usdocs/civilres.html.

C. Affirmative Action, as Supported by National and International Law, is Necessary to Assure Equality

The state government has a legitimate objective in addressing the *de facto* discrimination that exists in Jefferson County, like those in many large U.S. cities.[6] This discrimination is largely a remnant of *de jure* segregation and underlying racial hostilities and preferences that carry over into school systems. Without race-conscious plans to counteract *de facto* segregation, both black and white students are deprived of the opportunity to interact across racial barriers, establish friendships with those of a different background, and receive an education similar to that of their peers across town. Diversity benefits students throughout their education and in the workforce. *See Grutter v. Bolinger*, 539 U.S. 306 at 313, 323-24. Jefferson County's 2001 Plan is a voluntary race-conscious student assignment plan that addresses *de facto* discrimination by promoting equality and diversity throughout the county's schools. Should the Court find the Plan unconstitutional, schools will be severely hampered in their ability to address *de facto* discrimination, and the United States will have greater difficulty meeting its treaty obligations.

The widespread repercussions of prohibiting schools from addressing *de facto* segregation would undermine good faith actions which implement provisions of the Race Convention and the Civil and Political Covenant. The

[6] Housing in Jefferson County is still highly segregated. Forty-seven percent of all blacks live on blocks that are 80 percent or more black. Among whites, 86.9 percent live on blocks that are 80 percent or more white. *See* Lois M. Quinn and John Pawasarat, *Racial Integration in Urban America: A Block Level Analysis of African American and White Housing Patterns*, Employment and Training Institute, School of Continuing Education, University of Wisconsin-Milwaukee, 18, 21 (2003), http://www.uwm.edu/Dept/ETI/integration/integration.pdf.

discriminatory effects of re-segregation would violate article 2(2) of the Race Convention and Articles 2 and 26 of the Civil and Political Covenant. *See* Race Convention, art. 2; Civil and Political Covenant, art. 2, 26. The U.S. will be obligated to report re-segregation when it reports again to the Race Committee and the Human Rights Committee.

As this Court stated almost a century ago, "[T]reaties are to be executed in the utmost good faith, with a view to make effective the purposes of the high contracting parties." *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921). Treaties to which the U.S. is a party, authoritative interpretations of those treaties, and constitutional courts of other States recognize that policies with discriminatory effects violate equal protection. Recognition of discriminatory effects is essential to achieving equal protection under the law because policy makers rarely, if ever, express their intent to discriminate. *See e.g. Washington v. Davis*, 426 U.S. 229, 254 (Stevens, J. concurring) ("My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not as critical, as the reader of the Court's opinion might assume."). Jefferson County's 2001 Plan, like that of many other school systems nation-wide, is based on the recognition that discrimination did not die with *de jure* segregation. Addressing *de facto* segregation is necessary to ensure all students equal protection under the law.

CONCLUSION

State action is appropriate and necessary whenever a law, regulation, or practice has the effect, not just the intent, of race-based discrimination. If states do not take action, public schools will continue to re-segregate. Such re-segregation violates the Equal Protection Clause as well as U.S. treaty obligations. The United States committed itself to undertake the steps necessary to guarantee all persons equal and effective protection against all forms of racial discrimination by ratifying the Race Convention and Civil and Political Covenant.

The Race Convention and the Civil and Political Covenant embody U.S. standards as well as international standards. Voluntary, race-conscious programs, like Jefferson County's 2001 Plan, are implicit in the United States' concept of equality. Affirming the judgment of the district court will further the Constitutional guarantee of equal protection in addition to promoting U.S. obligations under international law.

Based on the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 9, 2006

Respectfully submitted,

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