Appeal No. 03-2415

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SAMANTHA J. COMFORT, et al.
Plaintiffs-Appellants,

vs.

LYNN SCHOOL COMMITTEE, et al.,
Defendants- Appellees.

On Appeal from a Judgment of the United States
District Court for the District of Massachusetts

Amicus Curiae Brief in Support of the Appellees on Behalf of Asian-American Lawyers Association of Massachusetts; Boston Bar Association; Community Change, Inc.; Fair Housing Center of Greater Boston; Jewish Alliance for Law and Social Action; New England Area Conference of the NAACP; The Greater Boston Civil Rights Coalition

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Amicus Curiae Jewish Alliance for Law and Social Action, New England Area Conference of the NAACP, The Greater Boston Civil Rights Coalition, Asian-American Lawyers Association of Massachusetts, Community Change, Inc., Fair Housing Center of Greater Boston, and Boston Bar Association, all non-profit organizations, state that they have no parent companies, subsidiaries or affiliates that have issued shares to the public.

DATED: May 28, 2004

Respectfully submitted,

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Edward J. Barshak,
Counsel for the Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE

Jewish Alliance for Law and Social Action

The Jewish Alliance for Law and Social Action ("JALSA") is a Boston based social justice organization inspired by Jewish teachings and values. JALSA members have worked for many years in the struggle for civil rights for all Americans drafting and encouraging passage of anti-discrimination laws and participating in legal and social action to obtain equal opportunity under the law for all members of the community.

New England Area Conference of the NAACP

The New England Area Conference ("NEAC") of the NAACP is the governing and coordinating entity for the NAACP branches in the States of Rhode Island, Massachusetts, New Hampshire, Maine and Vermont. NEAC remains fully committed to the concept of integrated education, including the voluntary plan of the City of Lynn. The organization believes that students who are expected to take their place in a global society must be educated with all children, regardless of their race or class.

The Greater Boston Civil Rights Coalition

The Greater Boston Civil Rights Coalition ("GBCRC") is a coalition of approximately 40 organizations and agencies representing various public, private, religious, ethnic and racial groups and neighborhoods in the greater Boston area. Founded in 1979, the mission of the GBCRC is to work for equitable, humanitarian and non-discriminatory treatment of all persons. For many years GBCRC has been actively involved in efforts to desegregate public schools and to ensure equitable educational opportunities for children of color.

Asian-American Lawyers Associations of Massachusetts ("AALAM")

The Asian-American Lawyers Association of Massachusetts ("AALAM") is a non-partisan, non-profit association of over one hundred lawyers, judges, law professors, and law students. Since its incorporation in 1984, AALAM's mission has been to promote and enhance the Asian-American legal profession by furthering and encouraging professional interaction and

exchange of ideas among its members and other individuals, groups, and organizations, and to improve and facilitate the administration of law and justice.

Community Change, Inc.

Community Change, Inc. ("CCh") is a 35 year-old Boston-based organization whose mission is to promote racial justice and equity by challenging systemic racism and acting as a catalyst for anti-racist action and learning.

Fair Housing Center of Greater Boston

The Fair Housing Center of Greater Boston ("FHC") is a non-profit organization whose mission is to promote equal housing opportunities for all people throughout the greater Boston area. FHC's studies and experiences have documented the continuing existence of housing discrimination against African American and Latino home seekers. These studies and others have also documented the ongoing racial segregation that characterizes the communities throughout the Greater Boston area.

Boston Bar Association

The mission of the Boston Bar Association (BBA), founded by John Adams in 1761, is to "advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large." The BBA, calling on the vast pool of legal expertise of its members, serves as a resource for the judiciary, as well as the legislative and executive branches of government. The interests of the BBA in this case relate most strongly to its goal of promoting diversity in the profession as well as in our communities. To that end, the Boston Bar Association has had a special relationship with the Boston Public Schools and its students through its Children and Youth Outreach Project. Since 1999, more than 1000 Boston attorneys annually help Boston students through teaching, mentoring, tutoring, and employment programs.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1989, the Lynn School Committee adopted a program designed to ameliorate within the public schools the racial tensions and related misconduct in a school system which reflected the pattern of residential racial segregation. The program ("the Plan"), which assigned all children to their neighborhood schools, also allowed transfers to other schools, upon request. However, such requests were granted only so long as they did not have a segregative effect on either the neighborhood school or the receiving school. The Plan was designed for approval by the state Board of Education in order for the Lynn School Committee to receive supplemental state funds pursuant to the statutes of the Commonwealth which were originally enacted in 1965 under the title "Racial Imbalance Act". The Act was the culmination of the Commonwealth's civil rights history, commencing with an enactment in 1855 which repudiated an earlier judicial decision which had accepted the notion of "separate but equal" in education.

The Act was also a significant turn in the nation's long history of racial injustice, which was fomented by the constitutional compromises of 1789. It followed in the path of *Brown v. The Board of Education* and the federal civil rights acts of 1965.

At the trial below, it was shown by extensive evidence that the Plan produced highly beneficial results, both for the schools and the children, both children of color and white children. The Plan was attacked by the plaintiffs in the court below, and now in their appeal here, primarily on the ground that the evidence of the beneficial results should not be credited, and therefore the Plan did not serve important governmental interests. It is attacked by the plaintiffs' *amicus* on the assumption that it provided preferential benefits for non-whites, an assumption which is contrary to the facts of the case.

It is the position and argument of the present *amici* that the Massachusetts statutes, and the Plan formulated under them, constitute efforts that are not merely allowable under the 14th Amendment to the United States Constitution and the Declaration of Rights of the Commonwealth. Rather, they constitute efforts which were badly needed and beneficial, in fact, and significantly symbolic as the fulfillment of the promise of equal protection of the law for all persons.

I. THE LYNN PLAN AND ITS RESULTS

In the decision below, (at pages 342 to 358 of 283 Fed. Supp. 2d), the Court fully described the troublesome conditions in the Lynn schools resulting from the increasing pattern of racial segregation in the city.

"Between 1980 and 2000 racial and ethnic minorities moved into Lynn in considerable numbers, transforming a city that was 93% white to 63% white." (p. 345). Residential neighborhoods became increasingly racially segregated. By 1987, 11 of the 17 elementary schools either were overwhelmingly white or had concentrations of minority students severely out of proportion to the overall minority student population. (pp. 345-346). "The school system was troubled, with high absentee rates, racial tension and conflict, and chronically low test scores." (p. 346).

The extensive evidence in the trial below, including testimony by school administrators, students and highly credentialed experts, delineated a remarkable success story for the Plan. Educational achievement increased throughout the school system. The Lynn students performed on the MCAS tests favorably compared to students from comparable communities. There was a measurable reduction in racial tensions. Attendance and test scores increased. The suspensions of students declined. There was a marked decrease in self-segregation by race among the students. They learned to conduct discussions across racial and ethnic lines, to feel that they are prepared to live and work in interracial communities and prepared to be employed under the supervision of persons of different racial groups. (pp. 353-358). Even the plaintiffs eventually came to stipulate to the

improvements in the Lynn school system. (p. 358). Their position simply was that the Plan did not produce them. The Court, however, concluded that the plaintiffs' attempt, through an expert, to rebut the extensive evidence which substantially attributed the remarkable improvements to the implementation of the Plan "was not credible" (p. 359).

The stated objectives ("compelling interests"), which the school committee attributed to the Plan, included the prevention and reduction of racial isolation for students, the promotion of harmonious racial and ethnic diversity among them, the improvement in the quality of education provided to them, the insuring of their physical safety and the fulfillment of the clarion call of *Brown v. Board of Education*.

II. THE MASSACHUSETTS RACIAL IMBALANCE ACT DOES NOT VIOLATE MASSACHUSETTS CONSTITUTIONAL PROVISIONS

Even on the unwarranted assumptions that the facial validity of the Massachusetts Racial Imbalance Act is properly brought into question by this case, and that it is a proper question for a federal court, there is no merit to the plaintiffs' destructive effort.

Chapter 641 of the statutes of 1965 created what is now Mass. General Laws c. 71, §§37C and §37B and c. 15, §1I. There have been several amendments since the original enactment. It assigned roles to the

State Board of Education and to school committees to carry out the legislative purpose which was described as follows in §1 of Chapter 641:

> It is hereby declared to be the policy of the Commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines, establishing of grade levels and the selection of new school sites."[1]

In the jargon of its times, it was designed to deal with what was commonly called "*de facto* segregation". The statutory progenitor of the Act was enacted in 1855 as Chapter 156 of the Acts of 1855, which stated: "In determining the qualifications of scholars to be admitted into any public school or any district school in the Commonwealth, no distinctions shall be made on account of the race, color, or religious opinions of the applicant or scholar."

That earlier statute, in turn, was the legislature's repudiation of the "separate but equal" doctrine which had been upheld in *Roberts v. Boston*, 59 Mass. 198 (1849).

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[1] While the choice of the words "racial imbalance" may not be linguistically significant, it is quite revealing. "Imbalance," by itself, conveys a sense of disarray. It also evokes the popular image of justice as a scale, which is recognized as being out of balance. In brief, it connotes a felt sense of injustice.

The more immediate events and circumstances which precipitated the enactment of the Racial Imbalance Act can be succinctly summarized. Protests by NAACP, CORE and the Urban League in Boston and Springfield, violence committed upon "freedom riders" from Massachusetts and elsewhere, the enactment of federal civil rights laws in 1964 and 1965, the appointment by the governor of a distinguished group called the "Kiernan Committee" to study the problems of *de facto* segregation, the devoted lobbying activities of many civil rights and other religious or socially active groups and the statesmanship of legislative leaders in both houses, combined with active participation by Governor John Volpe and Lt. Governor Elliot Richardson, resulted in the enactment of the Racial Imbalance Law. It was a time of moral commitment and hope for the future. For a detailed history, *see* "A Study of Massachusetts Racial Imbalance Act," Center for Law and Education, Harvard University, Publication No. 6019 (1972).

Another significant background event was the decision of Chief Judge Sweeney of the United States District Court for the District of Massachusetts in *Barksdale v. Springfield School Committee*, 237 F. Supp. 543, which ordered the School Committee to eliminate de facto segregation in the elementary and junior high schools of Springfield. Because the Springfield

School Committee had voted prior to the suit to do substantially what the court's order subsequently called for, the order was reversed in *Springfield School Committee v. Barksdale*, 348 F.2d 261 (1ST Cir. 1965). A dictum of the court, per Chief Justice Aldrich, is peculiarly prescient with respect to the case presently before the Court. He said at page 266:

> One question remains. Dismissal of the complaint without prejudice because of the existence of the defendant's September 19, 1963 vote makes it desirable, if not imperative, to consider whether we are relying on a vote which is itself unconstitutional. It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendants' proposed action does not concern race except insofar as race correlates with proven deprivation of educational opportunity. This evil satisfies whatever 'heavier burden of justification' there may be.

The attack by the plaintiffs and their *amicus* upon the Racial Imbalance Act is an ironic misadventure. This was noted by Chief Justice Wilkins when an earlier attack was made upon the Act in *School Committee of Boston v. Board of Education*, 352 Mass. 693 (1967). The Court stated at page 698:

> It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.

The plaintiffs' attempt to use Article 111 of the amendments to the Massachusetts Declaration of Rights, the "anti-busing amendment", to invalidate the Plan has no basis in the language of the amendment. It also ignores the well known history of the enactment of the amendment. Article 111 was approved by the voters in 1978. Its relevant language provides that: "No student shall be assigned to or denied admittance to a public school on the basis of race, color, national origin or creed." The legislative bills which became Article 111 were filed on behalf of the Massachusetts Citizens Against Forced Busing. The description of the proposed amendment provided to the voters stated that its purpose was to give parents and guardians a right to education for their children "free from any arbitrary assignment by school authorities to schools outside the school district." The understanding of the public and the press that the object was to prevent forced busing is described fully by the lower court at p. 395.

The modest Plan, which has as its foundation the assignment of students to the neighborhood school, is totally devoid of the promotion of busing "to schools outside the school district." The purpose of Article 111 would be totally subverted if it were found applicable to the Plan. It should be noted, also, that the Racial Imbalance Act and Article 111 have peacefully co-existed since 1978.

III. UNDER EVEN THE STRICEST LEVEL OF JUDICIAL REVIEW, THE PLAN IS CONSTITUTIONAL

The Plan does not confer a benefit upon non-white students which is denied to others. It does not confer a benefit upon white students which is denied to others. Unlike the situation in *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998), the Plan does not provide for preferential access by race to a unique institution. The record below is clear, and in this respect not contested, that the educational opportunities provided in each of the Lynn elementary schools are substantially the same.

So long as the Plan is "substantially related" to the governmental interests of the school committee, it is constitutionally protected. The appropriate level of judicial scrutiny is referred to as "intermediate scrutiny". It is the applicable level of judicial scrutiny here because there are no special benefits doled out by racial classification. The precedents for intermediate scrutiny are overwhelmingly relevant here. See *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264; *Kromnik v. School District*, 739 F.2d 894 (3d. Cir. 1984); *Jacobson v. Cincinnati Board of Education*, 961 F.2d 100 (6th Cir. 1992).

The court below, nonetheless, examined the Plan under the more rigorous judicial standard of strict scrutiny, requiring that it be a plan which is "narrowly tailored" to accomplish "compelling" governmental interests.

That, of course, is the same standard which the Supreme Court of the United States recently applied in *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003) and *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003), concerning the admission policies of the University of Michigan Law School and the University's undergraduate school.

In both cases, the Supreme Court held that diversity of the student body was a compelling interest. The Court found that diversity among the young adults, among other virtues, was significant for their futures in a diverse society after they completed their education. The present *amici* submit that it is common knowledge that those futures are even more fundamentally shaped by experiences in the formative years of elementary school. It was precisely that common knowledge which was validated by the plentitude of evidence analyzed and accepted by the court below. Even though the lower court's decision was rendered prior to *Grutter* and *Gratz*, its use of strict scrutiny analysis fits comfortably within the reasoning of the two Supreme Court cases. The relevance of those Supreme Court decisions to the present case was described in a statement of distinguished constitutional law scholars as follows:

> Although the Court's deference to academic freedom might suggest that higher education provides a unique context for ruling that diversity

> is a compelling interest, the Court's clear language supporting the value of diversity throughout the educational system and in other sectors of American life implies that the Court's ruling may have broader application. For example, the *Grutter* opinion states: "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." Quoting *Brown v. Board of Education*, the *Grutter* opinion affirms that ''education … is the very foundation of good citizenship'' and therefore "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity." (Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases", The Civil Rights Project, Harvard University (July 2003).)

The court below fully explored the question whether the Plan was "narrowly tailored" to the attainment of compelling interests. However, the plaintiffs' approach to the question is strangely oblique. They recognize, even trumpet as alleged defects, the modesty of the Plan. As they seem to recognize, the goals of the Plan are strikingly moderate. It seeks only to avoid extreme isolation or undue concentration of students by race. Its only method is to decline requested transfers out of a student's neighborhood school if the effect would be to increase either the degree of racial isolation or of racial concentration at either the neighborhood school or the proposed

transferee school. It is difficult to envision a more modest plan. The plaintiffs have not suggested one. Indeed, their attack upon the Plan at the trial was that it had no effect, that the beneficial results found by the court below were (inexplicably) self generated. In effect, their complaint, while labeled as a conclusion of unconstitutional overbreadth, is that the tailoring of the Plan was so sparsely stitched that it hardly reached its goals.

The educational need for the Plan, which prompted the Lynn School Committee to adopt it, is not limited to the City of Lynn. Indeed, the current educational problems of racial segregation in urban areas in the Commonwealth are well documented. *See* "Racial Segregation and Educational Outcomes in Metropolitan Boston", The Civil Rights Project, Harvard University (April, 2004). The acute need for providing a more diverse educational environment in urban elementary schools is described fully in "Race and the Metropolitan Origins of Post Secondary Access to Four Year Colleges: The Case of Greater Boston", The Civil Rights Project, Harvard University (April, 2004).

This Court should clearly and strongly uphold the Lynn Plan as a constitutionally valid approach to an important educational and civic problem.

Respectfully submitted,

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