UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAMANTHA COMFORT, on behalf of her minor child and next friend, ELIZABETH NEUMYER, et al. Plaintiffs v. LYNN SCHOOL COMMITTEE, et al. Defendants and COMMONWEALTH OF MASSACHUSETTS Defendant-Intervenor	Civil Action No. 99-11811-NG
TODD and LAURIE BOLLEN, on behalf of their minor child and next friend MATTHEW BOLLEN, et al. Plaintiffs v. LYNN SCHOOL COMMITTEE, et al. Defendants	Civil Action No. 01-10365-NG

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR RELIEF FROM FINAL JUDGMENT

Defendant-Intervenor Commonwealth of Massachusetts, ("Commonwealth"), through its Attorney General Martha Coakley, and defendants Lynn School Committee, City of Lynn, and the named Lynn school and city officials (collectively, the "Lynn Defendants"), oppose the Plaintiffs' Motion for Relief from Final Judgment because the motion offers no grounds for re-opening this concluded litigation. This case was tried five years ago. After considering all of the evidence from the eleven-day trial, the District Court correctly concluded in June 2003 that the evidence "not merely justified the Lynn plan as a constitutional matter," but "celebrated the Plan and all of the changes it has brought about in Lynn." Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 400 (D. Mass. 2003). Final Judgment entered on September 5, 2003. A full panel of the United States Court of Appeals affirmed this judgment on July 15, 2005. The United States Supreme Court denied plaintiffs' petition for writ of certiorari on December 5, 2005 and further denied their petition for rehearing on July 31, 2006.

The plaintiffs' motion argues that the Supreme Court's recent decision in Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738 (2007) ("Parents Involved") requires the Court to set aside the judgment. That is not so, and the motion should be denied. Even if this case were still on direct appeal, the Supreme Court's decision would not in any way alter or disturb this Court's analysis or earlier judgment. Moreover, even if the recent decision would have had such an effect had this case still been on direct appeal, all appellate proceedings have in fact finally concluded, and plaintiffs have not demonstrated, and cannot demonstrate, that they are entitled to what would be extraordinary post-appellate relief under either Fed. R. Civ. P. 60(b)(5) or any other basis.

I. BACKGROUND

A. The Lynn Plan

Lynn is a city north of Boston that has a single school district comprising 18 elementary schools, 4 middle schools, and 3 high schools. Approximately 15,000 students attend these schools. Comfort, 283 F. Supp. 2d at 351. As the parties stipulated at trial, each of these schools is "comparable in quality, resources, and curriculum." Id. at 352.

Since 1989, Lynn has implemented "A Voluntary Plan for School Improvement and the Elimination of Racial Isolation" (the "Plan"), to integrate its schools and ensure that Lynn children receive the significant educational and citizenship benefits that flow from racially diverse, integrated schools. Id. at 333-34, 347. The Plan, which was approved by the Massachusetts Board of Education under the Massachusetts Racial Imbalance Act ("RIA"), Mass. Gen. Laws c. 71, §§ 37C, 37D and c. 15, §§ 1I, 1J, 1K, provides every school child in Lynn in grades kindergarten through twelve, regardless of race, the right to attend their neighborhood school.[1] Id. at 347. The Plan additionally allows every child to apply to transfer to a non-neighborhood school in the district. Id. A child will be permitted to transfer, space permitting, depending on whether the child has a sibling in that school, whether the transfer would ease a family hardship, and whether the transfer would exacerbate the racial isolation in a particular school. Id. at 348-49. Parents have a right to appeal denied transfer requests through a flexible appeals process. Id. at 349. Lynn applies the same school assignment rules to all students, regardless of race, and uses extensive data collection and tracking to regularly review the Plan's effectiveness and make any necessary changes thereto. Id. at 349-50.

[1] The Plan, originally adopted in 1987, was approved by the Lynn School Committee and the Massachusetts Board of Education in February 1988, and amended in September 1989, February 1990, and September 1999. Comfort, 283 F. Supp. 2d at 346-47. Under the RIA, Lynn has received financial assistance from the state to help implement the Plan. Id. at 343-44.

The Plan also provides other race-neutral measures. These include staff training and development on issues of diversity; programming designed to foster and enhance interactions among students, school personnel, and parents from different racial and ethnic groups; the construction of new schools to ensure sufficient space for transfers; curriculum development and standardization; and the development of measures to improve school attendance. See id. at 349.

B. The Litigation

In August 1999, parents of five students attending public elementary schools in Lynn filed Comfort v. Lynn School Committee, Civ. No. 99-11811-NG, claiming that the Plan and the RIA violated the equal protection clause of the federal Constitution, as well as various federal civil rights statutes. Comfort, 283 F. Supp. 2d at 333. The Commonwealth intervened under 28 U.S.C. § 2403(b) as a party defendant to defend the constitutionality of the RIA. Id. at 336 n. 10. The Comfort plaintiffs sought a preliminary injunction to enjoin use of the Plan, which the Court denied. Comfort v. Lynn Sch. Comm., 100 F. Supp. 2d 57 (D. Mass. 2000). The Court subsequently dismissed plaintiffs' federal statutory civil rights claims against the Commonwealth on Eleventh Amendment and other grounds. Comfort v. Lynn Sch. Comm., 131 F. Supp. 2d 253, 256 (D. Mass. 2001).

After the Court allowed, in large part, defendants' motion to dismiss the remaining portions of the Comfort case, Comfort v. Lynn Sch. Comm., 150 F. Supp. 2d 285, 288-89 (D. Mass. 2001), parents of six other Lynn school children filed a separate suit (the "Bollen" case) making a similar challenge to the Plan and the RIA under state and federal constitutional and statutory provisions.[2] The Bollen plaintiffs originally sought a preliminary injunction, but then withdrew their motion

[2] In Bollen v. Lynn School Committee, Civ. No. 01-10365, plaintiffs alleged violations of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1981, 42 U.S.C. § 1983, 42 U.S.C. § 2000d (Title VI), Article 111 of the Massachusetts Declaration of Rights, and G.L. c. 12, § 11I. They also named members of the Massachusetts Board of Education as defendants.

after defendants permitted all of the plaintiffs to attend their school of choice pending the outcome of the trial of this matter. See Comfort, 283 F. Supp. 2d at 338 n. 15. The Court then consolidated the Comfort and Bollen actions. Id. at 338 n. 13.

Prior to trial, four of the five Comfort plaintiffs and two of the six Bollen plaintiffs voluntarily dismissed their claims, because their children had been placed in schools of their choice and no longer wished to transfer to another school. See id. at 337 n.12, 338 n.15, 362. At the time of trial, only one Comfort plaintiff and four Bollen plaintiffs remained in the case. Id. at 337, 361-63. Defendants agreed to allow all of the plaintiff-children to attend their school of choice pending trial on the merits of their claims. Id. at 337, n.15. As the Court noted, "[r]emarkably, only one of the plaintiffs [] took full advantage of the agreement to place her child [] into a school that was not otherwise available to her under Lynn's transfer policy." Id.

In June 2002, the Court held an 11-day bench trial, during which the Court heard testimony from 12 witnesses, including Lynn school administrators and teachers, students and parents of children in the Lynn school system, and 6 experts in the fields of education and equal educational opportunity, developmental and educational psychology, social psychology, and housing and demographics. Comfort, 283 F. Supp. 2d at 338.

On June 6, 2003, the Court issued a Memorandum and Order, later amended by a lengthy and detailed Amended Memorandum and Order on September 5, 2003, in which it found for defendants on all claims. In upholding the constitutionality of the Plan, the Court found that it is "a critical part of a comprehensive, district wide plan to improve the quality of education for all Lynn's children," and described "defendants' commendable efforts to run a thriving, multiracial, and successful school system":

> [T]he Lynn Plan played an important part in creating a thriving, diverse and integrated urban school system, successful on all fronts

> and by all measures – where race relations are positive and racial and ethnic tensions are absent; where students from diverse backgrounds maintain friendships and are well represented in student government and extracurricular activities; where student attendance rates are uniformly high and test results reflect substantial gains, particularly in the schools located in Lynn's urban center; and where there are extraordinarily low levels of student conflict, crime, and violence.

Id. at 334, 335, 400. As the Court determined, "The picture [that defendants] painted not merely justified the Lynn plan as a constitutional matter. It celebrated the Plan and all the changes it has brought about in Lynn." Id. at 400. The same day, the Court entered final judgment for defendants on all claims and terminated the civil case. Id. at 333.[3]

On October 6, 2003, plaintiffs appealed the Judgment to the U.S. Court of Appeals for the First Circuit. On October 28, 2004, a First Circuit panel reversed the decision, but on July 16, 2005, after rehearing en banc, Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005), the en banc Court overruled the panel decision and affirmed the Judgment. On September 14, 2005, plaintiffs petitioned the Court for certiorari, asking it to vacate the Judgment. On December 5, 2005, the Supreme Court denied plaintiffs' petition and let the Judgment stand. Comfort v. Lynn Sch. Comm., 126 S.Ct. 798 (2005).

On June 5, 2006, the Supreme Court granted certiorari in two cases involving challenges to voluntary K-12 student assignment plans in Seattle, Washington, and Jefferson County, Kentucky, Parents Involved In Community Schools v. Seattle School District No. 1 and Meredith, Custodial Parent and Next Friend of McDonald v. Jefferson County Bd. of Ed. et al. The Seattle and Jefferson County plans had been found constitutional by district and appeals courts of the Ninth and Sixth Circuits, respectively. On June 9, 2006, after the Supreme Court had granted certiorari in the

[3] The final judgment entered by the District Court on September 5, 2003 (the "Judgment") is the subject of plaintiffs' present motion.

Seattle and Jefferson County cases, plaintiffs petitioned it for a rehearing. On July 31, 2006, the Supreme Court denied plaintiffs' request. Comfort v. Lynn Sch. Comm., 127 S.Ct. 19 (2006).

C. The Supreme Court's Decision in Seattle and Jefferson County

On June 28, 2007, the Supreme Court issued its decision in Parents Involved. In a 5-4 opinion, authored by Chief Justice Roberts, the Supreme Court ruled that the voluntary student assignment plans used by the school districts in Seattle and Jefferson County were unconstitutional. Parts of Chief Justice Roberts' opinion did not win a majority, as Justice Kennedy filed a separate opinion that concurred in part and concurred in the judgment. Justice Thomas filed a concurring opinion. Justice Stevens and Justice Breyer, joined by Justices Stevens, Ginsburg and Souter, filed dissenting opinions.

The majority opinion held that the Seattle and Jefferson County plans, which both used race-based classifications, were subject to strict scrutiny review and required the schools to "demonstrate that the use of individual racial classifications in the assignment plans … is 'narrowly tailored' to achieve a 'compelling government interest.'" Parents Involved, 127 S.Ct. at 2752 quoting from Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995). "Narrow tailoring requires 'serious good faith consideration of workable race-neutral alternatives,'" and districts must show that they considered methods "other than explicit racial classifications to achieve their stated goals." Id. at 2760 quoting from Grutter v. Bollinger, 539 U.S. 306, 339 (2003). Based on its review of the record presented, the Supreme Court found that the Seattle and Jefferson County plans were not "narrowly tailored to the goal of achieving educational and social benefits asserted to flow from racial diversity." Id. at 2755.

Chief Justice Roberts, in a portion not part of the majority opinion, commented that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Id. at

2767. Justice Kennedy rejected that portion of Chief Justice Roberts' opinion, as well as other parts that "imply an all-too-unyielding insistence that race cannot be a factor" or that the Constitution "requires school districts to ignore the problem of *de facto* resegregation in schooling." Id. at 2791 (Kennedy, J., concurring in part). Instead, as Justice Kennedy stated, "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue." Id. at 2797 (Kennedy, J. concurring).[4] Similarly, "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district can pursue." Id. at 2789. "[A] district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered." Id. at 2797.[5]

On July 3, 2007, counsel in the Comfort and Bollen cases filed in the District Court a "Motion for Relief From Final Judgment," claiming that the "decisional law upon which the final judgment in this matter is based has been changed by the Supreme Court's decision in Parents Involved." Memorandum in Support of Plaintiffs' Motion for Relief From Final Judgment ("Memo."), p. 1. Plaintiffs specifically based their motion on Fed. R. Civ. P. 60(b)(5). Motion, p. 1; Memo, pp. 1-2, 4. For the reasons set forth below, this Court's Judgment was correct at the time it was decided and remains so today, and there is no basis upon which to set aside the Judgment or re-open the litigation under Fed. R. Civ. P. 60(b). Accordingly, defendants respectfully request that plaintiffs' motion be denied.

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[4] The four dissenting Justices concurred in this view. Id. at 2836 (Breyer, J. dissenting). As a result, five current justices have ruled that avoiding racial isolation is a compelling state interest.

[5] The four dissenting Justices concurred here as well, and again five current Justices have adopted this position. Id. at 2836 (Breyer, J. dissenting). In addition, the majority opinion recognized a third compelling interest in "remedying the effects of past intentional discrimination." Id. at 2752.

II. ARGUMENT

A. The Supreme Court's Decision Does Not Alter This Court's Judgment

As grounds for their motion, plaintiffs claim that "[t]he decisional law upon which the final judgment in this matter is based has been changed by the Supreme Court's decision in Parents Involved." Memo p. 1. The Supreme Court's decision in Parents Involved does not in fact alter this Court's analysis of the Comfort and Bollen cases, and it would not disturb in any way the Judgment entered by this Court in 2003, even if this case still were on direct appeal. Moreover, as discussed infra at II.B, even if the Supreme Court's decision would have made a difference had the case still been on direct appeal, Rule 60(b) does not permit re-opening a decided and closed case now, after all appellate remedies have been exhausted.

1. The District Court Applied The Same Strict Scrutiny Standard Used By The Supreme Court

As the Supreme Court did when it reviewed the Seattle and Jefferson County plans in Parents Involved, this District Court analyzed the Lynn Plan by applying strict scrutiny review. Comfort, 283 F. Supp. 2d at 366, 369-392 (Court "will apply the more rigorous standard" of strict scrutiny); Parents Involved, 127 S.Ct. at 2742. The District Court analyzed the racial classification used in the Lynn Plan to determine if it advanced "'a compelling state interest,' an interest above and beyond ordinary government goals," that was "'narrowly tailored' to that end." Comfort, 283 F. Supp. 2d at 369; cf., Parents Involved, 127 S.Ct. at 2752.

The District Court then went on to make detailed findings, based on the extensive evidence presented at trial, to support its determination that the Plan in fact does "serve[] 'compelling' state interests and is 'narrowly tailored' to achieve them." Comfort, 283 F. Supp. 2d at 334. The District Court evaluated both the setting and the nature of the Plan, noting, as the Supreme Court recently did in Parents Involved, that K-12 education raises "very different issues requiring distinct legal

analysis" than, for example, higher education or employment. Id. at 334; see Parents Involved at 127 S.Ct. at 2754 (explaining that "context matters" and pointing out the "considerations unique to institutions of higher education" in analyzing the constitutionality of the University of Michigan Law School plan challenged in Grutter). See also Comfort, 418 F.3d at 16 (explaining that "context matters" and noting the differences in context between the K-12 setting in Lynn and the graduate school setting in Grutter – "Lynn emphasizes positive impact of racial diversity on student safety and attendance" – issues which naturally "loom larger in elementary and secondary schools"). Based on the evidence, this District Court found that the "Plan's use of race is measured and proportional to these compelling goals," pointing out, for example, that the Plan is "flexible, and of limited duration," contains no quotas, and changes as Lynn's demographics change. Comfort, 283 F. Supp. 2d at 377.

This District Court also reviewed and evaluated extensive testimony on the Plan and the events that led up to it and found that prior to its implementation, Lynn had exhausted efforts to use alternative means to accomplish the same compelling ends, and those efforts had failed. Id. at 335, 387-89; see Comfort, 418 F.3d at 22 ("record reflects that [Lynn] seriously considered, and plausibly rejected, a number of race-neutral alternatives").

This Court also found that the Lynn district's ongoing implementation and careful tracking and monitoring under the Plan of class size, enrollment, transfer requests, as well as the racial composition of each school and the district generally, were "the vehicle[s] through which the Plan administrators certify that the Plan is narrowly tailored to meet its goals." Comfort, 283 F. Supp. 2d at 350. The Court additionally pointed out that the Plan depended upon race-neutral components for its success:

> [T]he student assignment plan has been seen as an integral part of a larger, more comprehensive educational overhaul that involves

> improving school facilities, increasing resources, improving curricular offerings, as well as providing a wide variety of multicultural and multiracial educational opportunities. … [W]hat the record establishes, is that the race-conscious and race-neutral components of the Plan are inextricably intertwined and each independently necessary.

Comfort, 283 F. Supp. 2d at 353, n. 47.

The Supreme Court used the same narrow tailoring analysis in Parents Involved, and concluded that the schools there "failed to show that they considered methods other than explicit racial classifications to achieve their stated goals," noting that "in Seattle several alternative assignment plans – many of which would not have used express racial classifications – were rejected with little or no consideration" and that Jefferson County "failed to present any evidence that it considered alternatives[.]" 127 S.Ct. at 2760, citing Grutter, 539 U.S. at 339. As discussed below, the Seattle and Jefferson County plans differ meaningfully from Lynn's, which the Supreme Court twice declined to review.

2. The "Similarity" of This Case to Parents Involved Has No Effect On the District Court's 2003 Judgment

Plaintiffs claim that this case is "similar" to Parents Involved, and that their motion, therefore, should be allowed. Memo. p. 2. This is not so. The cases are "similar" in that they involve reviewing the constitutionality of voluntary desegregation plans. But it is the details, operation and context of the plans, as well as the findings made by this District Court, that plaintiffs ignore, including important differences between the Lynn Plan and the plans reviewed in Parents Involved. For example, under the Lynn Plan, all children are able to attend their neighborhood school. Comfort, 283 F. Supp. 2d at 347. This is not the case in Seattle or Jefferson County. The Seattle plan, which applied to its ten public high schools, only permitted incoming ninth-graders to rank the schools they wish to attend in order of preference, but did not guarantee them the right to attend any of them. Parents Involved, 127 S.Ct. at 2747 (Roberts, C.J.). Similarly, in Jefferson

County, families of kindergarten and elementary school students new to the system were permitted to indicate first and second choices among schools within a residential, but not neighborhood, cluster. Id. at 2749-50. Unlike Lynn, therefore, neither Seattle nor Jefferson County schoolchildren enjoyed the absolute right to attend neighborhood schools. Id. at 2747, 2750.

Also unlike the Lynn Plan, the Seattle and Jefferson County plans classified students by race as an integral part of the initial assignment process. For example, in Seattle, racial classifications were used as the second of three tie-breaking factors to determine assignments to over-subscribed high schools. Id. at 2747. In Jefferson County, assignments and subsequent transfers were determined on the basis of available space and the district's racial guidelines. Id. at 2749-50. In contrast, in Lynn, every child may attend a neighborhood school. Lynn uses racial classifications only for the narrow purpose of deciding whether to grant or deny a subset of student transfer requests. Lynn never uses race to determine a student's initial school assignment, and a student's race is not considered at all unless a student requests a transfer to or from a school affected by racial isolation. Race is among the factors Lynn considers in deciding whether to grant or deny such a transfer request. Other factors include hardship and sibling status. Comfort, 283 F. Supp. 2d at 348-49. Even where race is considered, the Plan provides a separate exemption for bi-racial or multi-racial applicants. Id. at 362, n. 66. Thus, the concern expressed by the majority's opinion about an over-simplified racial dichotomy of white/non-white, see Parents Involved, 127 S.Ct. at 2754, does not arise here either.

The District Court's findings regarding past practices in Lynn also distinguish this case from Parents Involved. The District Court concluded that the transfer policy was designed in part to combat Lynn's history of discriminatory transfer practices, which had contributed to Lynn's historically segregated schools. Comfort, 283 F. Supp. 2d at 386-87. The District Court found, for

example, that when the Board of Education first confronted Lynn about racial imbalance, the Board "attributed the concentration of minority students at [Lynn's] Washington [Community School] in part to residential patterns, but more significantly to the district's school assignments." Id. at 344-45. The district's attempt to remedy with a program that regulated segregative transfers created new problems:

> Again, there was official manipulation of the policy. Officials were accused of bending the rules for white parents. Administrators regularly approved the requests of white parents to transfer their children out of predominantly minority neighborhood schools. For example, in the 1987-1988 school year 107 out-of-neighborhood white students were attending the 93% white Aborn high school as a result of transfers . . . [At trial] Lynn officials conceded that these transfers were in blatant violation of the school assignment policy in place at the time.

Id. at 345. The Lynn Plan has been key to ending this racial isolation and preserving diversity and equal educational opportunities. See id. at 335.

Other differences between the Lynn Plan and the Seattle and Jefferson County plans include the numbers of students affected, the racial composition of the district and each of its various schools, the number and types of schools affected, the monitoring and appeal process, and the expansive set of complementary race-neutral programs and reforms described above, which contribute to creating a diverse learning environment and ensuring that all Lynn students receive a strong education regardless of which school they attend. Id. at 347, 348, 349-50, 352.

Plaintiffs' argument that this case is "similar" to Parents Involved does not address these characteristics of the Lynn Plan, as the District Court did. Instead, plaintiffs simply quote Justice Kennedy's reference to Comfort, 418 F.3d at 1 as "a case presenting an issue similar to the one here," Memo, p. 3 (emphasis added), a description that defendants do not dispute. Next, plaintiffs refer to an amicus brief that the Commonwealth submitted in Parents Involved and claim that in doing so, the Commonwealth "acknowledged the similarities" between the appellate decisions in

Parents Involved and Comfort. Memo p. 2. This superficial reference to "similarities" does not begin to support setting aside the four-year old judgment for the defendants in this case.[6]

B. Rule 60(b)'s Extraordinary Provisions For Relieving A Party From The Effects Of A Final Judgment Do Not Apply Here

Rule 60(b)(5) of the Federal Rules of Civil Procedure provides extraordinary relief from prospective judgments, and then only in certain limited circumstances. See Lepore v. Vidockler, 792 F.2d 272, 274 (1st Cir. 1986)("a motion [under Rule 60(b)] may be granted only under exceptional circumstances."). Based on the bedrock principle in our jurisprudence that litigants, the courts, and society can trust in the finality of judgments, only in rare instances may a court relieve a party from a judgment under any of Rule 60(b)'s provisions. United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 660 (1st Cir. 1990); see Cotto v. United States, 993 F.2d 274, 277 (1st Cir. 1993), quoting from Ackermann v. United States, 340 U.S. 193, 198 (1950)(Rule 60(b) delineates specific grounds for relief because "'there must be an end to litigation someday'"). Accordingly, plaintiffs who seek relief under Rule 60(b) bear a heavy burden. See United States v. Kayser-Roth Corp., 272 F.3d 89, 95 (1st Cir. 2001), citing, Teamsters, Chauffeurs, Warehousemen Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 19 (1st Cir. 1992). "Because Rule 60(b) is a vehicle for 'extraordinary relief,' motions invoking the rule should be granted 'only in exceptional circumstances.'" Davila-Alvarez v. Escuela De Medicina Universidad Central Del Caribe, 257 F.3d 58, 63 (1st Cir. 2001) quoting from Lepore, 792 F.2d at 274.

[6] The Commonwealth submitted its amicus brief in support of the Seattle and Jefferson County plans and their efforts to ensure "the ability to implement policies and programs designed to achieve the compelling goal of integration and reducing racial isolation in K-12 public schools[.]" Brief Amicus Curiae of the Commonwealth of Massachusetts in Support of Respondents, p. 1. At no time did the Commonwealth state or suggest that the plans were the same, nor was that the point of the amicus brief. "Similar" is a far cry from identical.

Plaintiffs must satisfy specific conditions under Rule 60(b): "(1) timeliness, (2) the existence of exceptional circumstances justifying extraordinary relief, and (3) the absence of unfair prejudice to the opposing party." Kayser-Roth, 272 F.3d at 95. Additionally, plaintiffs must provide this Court "reason to believe that vacating the judgment will not be an empty exercise." See id. quoting from Teamsters, 953 F.2d at 19. Moreover, "[p]urely conclusory allegations are not sufficient to establish the Rule 60(b) precondition." Kayser-Roth, 953 F.2d at 95. Plaintiffs must provide a sufficiently strong analysis to convince this court "that if the judgment is set aside, [they] have the right stuff to mount a potentially meritorious claim or defense…." See Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002).

1. Plaintiffs Seek Extraordinary Action, Without Alleging Any Actual Harm

Plaintiffs seek the extreme relief of re-opening the final judgment of this Court, and allege that "[w]ithout such relief, the Plaintiffs would be the only school children in America who lack the equal protection rights established by the Court in *Parents Involved*…." Memo. at p. 2. This overstatement is unsupported and inaccurate. Plaintiffs' motion indeed acknowledges that only one plaintiff is actually still in middle school in Lynn, Memo. at 1-2, but does not show how that plaintiff is affected by any judgment of this Court.

Although plaintiffs' motion asserts that the one allegedly affected plaintiff is "limited in the choices of out-of-district schools to which he may transfer," Memo. at p. 1-2, plaintiffs do not even allege, let alone prove, that the plaintiff actually wishes to transfer, has applied to transfer, or has been denied his school of choice. Cf. Teamsters, 953 F.2d at 20 (1992)(party seeking relief from judgment under 60(b) must establish "circumstances justifying extraordinary relief"). In fact, before the 2002 trial in this Court, that plaintiff was permitted to attend the school of his choosing. See Comfort, 283 F. Supp. 2d at 363.

Accordingly, although plaintiffs seek the "extraordinary relief" that will be "granted only under exceptional circumstances," they do not allege any current or actual harm to any plaintiff. See Lepore v. Vidockler, 792 F.2d at 274. Plaintiffs' allegations regarding "at least one Plaintiff" certainly do not meet the "circumstances justifying extraordinary relief" to move this Court to re-open its final judgment. See Teamsters, 953 F.2d at 18, 20 (court considering a Rule 60(b) motion need not credit a movant's "bald assertions" or "unsubstantiated conclusions").

2. Significant Harm Will Accrue to Lynn If the Plaintiffs' Motion Is Granted

In contrast to the absence of evidence of harm to plaintiffs, plaintiffs' motion seeks to impose considerable disruption and harm on the City and residents of Lynn. By their motion, plaintiffs seek to overturn this Court's detailed determination that the Plan was constitutional and a commendable effort to "run a thriving, multiracial, and successful school system." Comfort, 283 F. Supp. 2d at 400. The Plan followed in the wake of almost ten years of significant racial imbalance in the Lynn school system, an imbalance so rampant and detrimental that the "emergence of increasingly racially identifiable schools in Lynn created a crisis." Id. at 344. In addition to racial polarization, predominantly minority schools in Lynn were suffering from inequalities of "building facilities, learning materials, and teacher commitment." Id. There were resultant "discipline problems: parents and administrators were apathetic; students were angry, felt abandoned, and often lashed out." Id. There was a "racially charged and intolerant atmosphere" in the Lynn schools that led to cross-racial conflict and students' resort to racial slurs and self-segregation by racial groups. Id. The Lynn Plan challenged by these plaintiffs was carefully crafted to address Lynn's crisis using both race-neutral and race-conscious components. See id.

At the time of trial, the Plan had resulted in a vast improvement in Lynn schools, including an increasing racial balance, 90% funding to renovate and expand six elementary schools, the

development of magnet schools with particular educational themes, less self-segregation, interracial friendship, and improved standardized test results and student achievement. See Comfort, 283 F. Supp. 2d at 351-52 ("By all accounts, and by all measures, since the implementation of the Plan the Lynn schools have become a success story. That success was recounted in the moving testimony of the participants, in expert testimony, and in the data."). Plaintiffs do not attempt to and cannot show the absence of prejudice to Lynn should their motion to re-open the judgment be allowed. See Teamsters, 953 F.2d at 20 (party seeking relief from judgment under 60(b) must show the "absence of unfair prejudice to the opposing party").[7]

3. Rule 60(b)(5) Does Not Apply Because The District Court's Final Judgment Is Not A Judgment Having "Prospective Application"

While plaintiffs rely exclusively on Fed. R. Civ. P. 60(b)(5), a moving party is only entitled to relief under that Rule from a judgment that has "prospective application." Fed. R. Civ. P. 60(b)(5) (a party may be entitled to relief from a judgment if "it is no longer equitable that the judgment should have prospective application") (emphasis added). As grounds for their motion, plaintiffs claim that "[t]he decisional law upon which the final judgment in this matter is based has been changed by the Supreme Court's decision in Parents Involved," Memo. p. 1, and that the

[7] After the merits of plaintiffs' claims were heard during an eleven-day trial, no affirmative relief was granted, because this Court entered judgment for the defendants and the matter was accordingly dismissed. Now plaintiffs purport to seek not only relief from this Court's final judgment but also entry of "a new judgment consistent with the holding of Parents Involved." Memo at p. 7. This is wholly inappropriate under Rule 60(b), which only provides relief from a court's prior order or judgment but does not grant additional relief beyond those perimeters. See, e.g., Delay v. Gordon, 475 F.3d 1039, 1044 (9th Cir. 2007)(courts may not use Rule 60(b) to grant affirmative relief in addition to the relief contained in the prior judgment); Charter Towp. of Muskegon v. City of Muskegon, 303 F.3d 755, 762 (6th Cir. 2002) ("60(b) does not authorize a court to grant any affirmative relief."); United States v. $119,980.00, 680 F.2d 106, 106 (11th Cir. 1982)("Rule 60(b) is available, however, only to set aside the prior order or judgment. It cannot be used to impose additional affirmative relief."); 12 James Wm. Moore, et al, Moore's Federal Practice § 60.25 ("Rule 60(b) is available only to set aside a prior judgment; a court may not use Rule 60 to grant affirmative relief in addition to the relief contained in the prior order or judgment.").

"continued application of the final judgment to the Plaintiffs makes this judgment prospective in nature [and] appropriate for relief under Rule 60(b)(5)." Id. at 2. Because this District Court's Judgment manifestly did not have "prospective application" with the meaning of the Rule, plaintiffs' motion must be denied.

As all of the United States Supreme Court cases addressing Rule 60(b)(5)'s "prospective application" requirement make plain, a judgment with prospective application is one in which a plaintiff has been granted some form of continuing relief, either in the form of a consent decree or an injunction. See Frew ex rel. Frew v. Hawkins, 540 U.S. 431 (2004)(consent decree); Agostini v. Felton, 521 U.S. 203 (1997)(permanent injunction); Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992)(consent decree); Polites v. United States, 364 U.S. 426 (1960)(denaturalization decree). By contrast, they do not include an outright judgment for the defendant, as here. In Agostini, the case upon which plaintiffs base their motion, the Supreme Court explicitly endorsed this definition by stating that its "decision will have no effect outside the context of ordinary civil litigation *where the propriety of continuing prospective relief is at issue*.") Agostini v. Felton, 521 U.S. 203, 238 (1997) (emphasis added). Accord Kayser-Roth, 272 F.3d at 95 (citing Agostini in rejecting a 60(b)(5) motion regarding the prospective operation of a declaratory judgment, and noting that 60(b)(5) would only be applicable to the prospective nature of future response costs at issue in the judgment).[8]

Plaintiffs' exclusive reliance on Agostini is thus misplaced. In Agostini, defendant school officials sought "relief from the operation of the District Court's prospective injunction" that barred

[8] A judgment has "prospective application" or is "executory" if it "does not fix all of the rights and liabilities of the parties and leaves some of those rights and liabilities to be determined on the basis of future events." See 11 Charles Alan Wright, et al, Federal Practice and Procedure, 2d § 2863 (2d ed.).

them from sending public school teachers into parochial schools to provide Title I-mandated remedial education to disadvantaged children. Agostini, 521 U.S. at 209. The Supreme Court previously had upheld the injunction in Aguilar v. Felton, 473 U.S. 402 (1985). Twelve years later, in the face of what they deemed to be a change in the Court's Establishment Clause analysis, the defendants requested Rule 60(b) relief, arguing that subsequent decisions had changed to "make legal what the [continuing injunction] was designed to prevent." Agostini, 521 U.S. 214. The Supreme Court agreed, finding that Aguilar was no longer good law, and vacated the injunction Id. at 235, 240. In reaching its decision, however, the Supreme Court stated that its decision to grant the motion was "intimately tied to the context in which it arose," id. at 238, namely that the case involved "a party's request under Rule 60(b)(5) to vacate a continuing injunction[.]" Id. at 239 (emphasis added). Notably, plaintiffs have not identified, and the Commonwealth has not found, a single case following Agostini in which a Rule 60(b)(5) motion was allowed, other than cases involving consent decrees or injunctions.[9]

Plaintiffs argue that because at least one plaintiff remains subject to the Lynn School Committee's voluntary student assignment plan, the Court's final judgment and dismissal of plaintiffs' claims is "prospective in nature," because of the res judicata effects of that prior judgment. See Memo. p. 2. Under this theory, every judgment entered by any court would be "prospective in nature" and subject to challenge under Rule 60(b)(5). This would eviscerate Rule 60(b)'s clear focus on finality and repose. Dismissal of an action and a party's subsequent inability to relitigate its claims are an effect common to all judgments, not a "prospective application" as

[9] Compare S.D. New York v. G. Gardner, 344 F. Supp. 2d 421 (S.D.N.Y. 2004)(considering 60(b) motion in context of whether prisoner entitled to reconsideration of his failure to exhaust administrative remedies); Abdur'rahman v. Bell, 392 F.3d 174 (6th Cir. 2003) (considering 60(b) motion in the context of habeas petition)(cert. dismissed 537 U.S. 1227 (2002)); Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1251 (9th Cir. 1999)(applying 60(b)(5) to a declaratory judgment which had prospective restriction regarding future rent adjustments).

contemplated by Rule 60(b)(5). See Twelve John Does v. District of Columbia, 841 F.2d at 1138 (noting that "[v]irtually every court order causes at least some reverberations into the future" but the continuing consequences of a court's action "does not necessarily mean it has 'prospective application' for the purposes of Rule 60(b)(5)"). Moreover, as discussed above, plaintiffs have not demonstrated that this plaintiff is affected in any detrimental way by the Lynn Plan or the Judgment.

4. Plaintiffs Fail to Show a Change in Law Qualifying as Exceptional Circumstances Justifying Extraordinary Relief Necessary for Rule 60(b)(5)

Even if the Court's Judgment could be considered to be "prospective" within the meaning of Rule 60(b)(5), relief still would not be appropriate. This is because changes in decisional law alone usually do not trigger Rule 60(b)(5), even for judgments that do have prospective effect. Boch Oldsmobile, 909 F.2d at 660; see Agostini, 521 U.S. at 239 ("intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief").[10] Here, plaintiffs fail to overcome Agostini's directive that this and other District Courts should never infer that a recent decision has overturned a prior precedent. Id. at 237 ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent"). Agostini makes it clear that before district courts can recognize a change in law, the Supreme Court needs to have said explicitly that a given case is overturned. In Agostini, the Court ruled that the trial court was correct to deny Rule 60(b)(5) relief because such motions "had to be denied unless and until this Court reinterpreted the binding precedent." 521 U.S. at 238; accord Figueroa v. Rivera, 147 F.3d 77, 81 n.3 (1st Cir. 1998) (citing Agostini's admonition that

[10] Even accepting plaintiffs' argument that the Supreme Court's "decisional law" upon which the Court's judgment was based "has been changed," it would not permit relief under Rule 60(b)(5). See Lubben, 453 F.2d at 650 (for a judgment to be "based upon" a prior judgment within the meaning of Rule 60(b)(5), the prior, reversed judgment must be "a necessary element of the decision…[and a] "change in applicable law does not provide sufficient basis for relief under Rule 60(b)(5)").

federal courts follow applicable precedent, even if it appears weakened, and stating, "We obey this admonition.").

Plaintiffs have identified no legal precedent that this Court relied upon in its Judgment that has been overruled, reversed or otherwise changed by the Supreme Court's recent decision in Parents Involved in Community Schools v. Seattle School District No. 1, or any other case. Similarly, they fail to point to a single section of this Court's Judgment that they say has been overruled or changed by the Supreme Court's recent decision. Their failure to do so is fatal to their argument under Rule 60(b)(5). See Agostini v. Felton, 521 U.S. at 278; Figueroa v. Rivera, 147 F.3d at 77, 81 n. 7. Plaintiffs do not identify anything that the Court did wrong in light of the Supreme Court's opinion. The District Court's Judgment must stand.

CONCLUSION

For the reasons set forth above, defendants respectfully ask that the Court deny Plaintiffs' motion.

COMMONWEALTH OF MASSACHUSETTS

MARTHA COAKLEY
ATTORNEY GENERAL

/s/ Maura T. Healey
Jeffrey D. Clements (BBO No. 632544)
Maura T. Healey (BBO No.640856)
Zoë Stark (BBO No. 658985)
Lillian Hirales (BBO No. 652698)
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200
jeffrey.clements@state.ma.us
maura.healey@state.ma.us

LYNN SCHOOL COMMITTEE
DEFENDANTS

/s/ John C. Mihos
John C. Mihos (BBO No. 345580)
7 Franklin Street
Lynn, MA 01901
(781) 581-5313

CITY OF LYNN DEFENDANTS

/s/ James Lamanna
James Lamanna (BBO No. 637433)
Assistant City Solicitor
Lynn City Hall-Room 406
Lynn, MA 01901
(781) 598-4000

CERTIFICATE OF SERVICE

I hereby certify this Document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and that paper copies will be sent to those indicated as non-registered participants by first class mail on July 17, 2007.

/s/ Maura T. Healey