In the Supreme Court
of the
United States

October Term, 1978

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

vs.

MARK BRINKMAN, et al.,
Respondents.

On Writ Of Certiorari To The United States
Court of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAYTON BOARD OF EDUCATION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAYTON BOARD OF EDUCATION

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This motion of the Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule 42. Petitioner Dayton Board of Education and petitioners State of Ohio and Governor of Ohio have consented to the filing of this brief; however, consent has been withheld by counsel for respondents. These consents have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the

purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of this brief.

Pacific Legal Foundation believes that this case is of great importance to all citizens of the United States. It raises questions about the abilities of local school boards to administer their school systems with due consideration to population growth patterns, educational requirements, and monetary constraints. Further, it questions the rightful roles of the district court and court of appeals with respect to each other and with respect to remedies granted pursuant to alleged constitutional violations. Finally, and most importantly, this case raises the question of the rights of children, the pawns who too often are shuttled to and fro in order that mathematical formulae be fulfilled.

Pacific Legal Foundation is deeply concerned by the actions of the court of appeals in this case in ignoring the problems inherent in administering a public school system and in ignoring the effect its remedy would have on the children of Dayton. Because of the national significance of this case, Pacific Legal Foundation feels that the present parties cannot adequately represent the interests of the public while at the same time representing their own localized interests.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief amicus curiae be granted.

Respectfully submitted,

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February 20, 1979.

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INTEREST OF AMICUS

The interest of amicus curiae is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the court of appeals is reported below as: *Brinkman v. Gilligan*, 583 F.2d 243 (6th Cir. 1978) (hereinafter *Brinkman IV*).

STATEMENT OF THE CASE

The facts of this case, as set forth in petitioner Dayton Board of Education's Opening Brief and herein adopted, raise significant issues of grave public concern. Of these,

the issue of local control of public schools, the issue of the proper roles of administrative bodies and federal district and circuit courts with respect to each other, and the issue of the right of children to be free from arbitrary interference with their education are of vital importance.

This case has a lengthy history. In 1972, certain parents of children attending Dayton public schools alleged that the Dayton Board of Education (hereinafter Board) was operating a racially segregated school system in violation of the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983-1988, and 2000(d). Following trial, the district court found that certain actions by the Board were cumulatively in violation of the Constitution and ordered the Board to submit a plan which would fully integrate its schools. The Board plan retained the neighborhood school characteristics of the Dayton school system while removing optional attendance zones and improving teacher assignment practices. All parties appealed this order, and the Sixth Circuit Court of Appeals in *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974) (*Brinkman I*), found the remedy inadequate in view of the perceived scope of the violations. That court remanded with instructions to formulate a plan which would eliminate the pattern of one-race schools.

The district court ordered the Board and the plaintiffs to submit plans for integration of the public schools and adopted that plan submitted by the Board. This plan created several magnet schools and a freedom of enrollment policy throughout the system. The plaintiffs again appealed and the court of appeals again held the remedy to be inadequate. It remanded with instructions to prepare a systemwide plan for the 1976-77 school year which would conform to the decisions of the Supreme Court in *Keyes v.*

School District No. 1, 413 U.S. 189 (1973), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *Brinkman v. Gilligan*, 518 F.2d 853, 857 (6th Cir. 1975) (*Brinkman II*).

Following these guidelines, the district court ordered a plan in which every school in the Dayton system had to have a racial composition within 15% of the black-white population ratio of the city. This plan was approved by the court of appeals in *Brinkman v. Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (hereinafter *Brinkman III*). This decision was appealed to the Supreme Court, which granted certiorari (427 U.S. 1060) to consider the court ordered remedial plan in light of the constitutional violations found below.

This Court vacated the decision of the court of appeals stating:

> "Viewing the findings of the District Court as to the three-part 'cumulative violation' in the strongest light for the respondents, the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy which it apparently did." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977) (hereinafter *Dayton I*).

The case was remanded to the district court with instructions to make new findings and conclusions with respect to constitutional violations consistent with *Dayton I*, *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). *Dayton I*, 433 U.S. at 419. This Court further cautioned the lower courts to be mindful of the scope of any constitutional violations found when fash-

ioning a remedy. *Id.* at 420. The district court, after taking additional testimony, found no intentional acts of racial discrimination by the Board nor did it find that past acts of the Board had any incremental segregative effects. It therefore dismissed the suit. *Brinkman v. Gilligan*, 446 F. Supp. 1232 (S.D. Ohio 1977).

The court of appeals, stating that the district court erred in failing to accord the proper legal significance to the facts in existence in Dayton prior to the time of *Brown v. Board of Education*, 347 U.S. 483 (1954) (hereinafter *Brown I*), and finding that proper burden shifting principles were not applied, reinstated in whole its earlier decision calling for the racial balance in every school in the Dayton system to match the racial composition of the city. *Brinkman IV*. It is this decision which is now before this Court.

The history of this case is a telling commentary on the attitude of many courts toward the nation's schools. The court of appeals shows little concern with respect to the uncertainties fostered in the parents and children as to their future educational plans and opportunities which may have been diminished or lost while this case has bounced back and forth in the judicial system. Equally disheartening is the inability of the court of appeals to respect the district court's function within the judicial system or to respect the efforts of the Dayton School Board in administering the public schools. The court of appeals' decision vitiates the function of a district court in cases such as this by doggedly insisting that its remedy is the only remedy regardless of findings below. The decision also subordinates the legitimate interests of school boards,

parents, and children by relegating them to the status of ciphers by which mathematical equations can be achieved.

The decision of the court of appeals establishes an unfortunate precedent which renders futile the good faith efforts of school boards to deal effectively with the myriad problems, including race, with which they are faced.

ARGUMENT

I

THE IMPOSITION OF A SYSTEMWIDE REMEDY IGNORES THE CLEAR MANDATE OF DAYTON I

In remanding *Brinkman III* to the district court, this Court instructed:

> "The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings and conclusions as to violations in the light of this opinion, Washington v Davis, 426 US 229, 48 L Ed 2d 597, 96 S Ct 2040 (1976), and Arlington Heights v Metropolitan Housing Dev. Corp. 429 US 252, 56 L Ed 2d 450, 97 S Ct 555 (1977). It must then fashion a remedy in the light of the rule laid down in Swann, and elaborated upon in Hills v Gautreaux, 425 US 284, 47 L Ed 2d 792, 96 S Ct 1538 (1976)." *Dayton I,* 433 U.S. at 419.

This Court, then, established a two part order. First, determine on the basis of the standards set forth in *Dayton I, Washington v. Davis,* and *Arlington Heights* whether violations had occurred and the nature and extent of such violations. Second, if violations are found, fashion a remedy according to the standards set forth in *Swann* and *Hills.*

A. The District Court Properly Determined the Absence of Constitutional Violations

The district court performed a careful analysis of the standards set forth by *Dayton I, Washington v. Davis,* and *Arlington Heights. Brinkman v. Gilligan,* 446 F. Supp. at 1235-36. In so doing, the district court, pursuant to the guidelines of *Arlington Heights,* 429 U.S. at 267, examined in detail: the historical background of the Dayton public school system; the specific sequence of events leading up to the status of the school system at the time this action was filed in 1972 in order to shed light on the Board's purposes; departures from normal procedural sequence; and legislative or administrative history.

The district court considered all the facts: those in the pre-*Brown I* era which indicated segregative intent or effect, and those facts which indicated a desegregative intent or effect. This "warts and all" examination revealed that while there had been numerous pre-*Brown I* violations, especially as to faculty assignment, the Board, in 1951, adopted a policy of phasing out segregative faculty placement policies. *Brinkman v. Gilligan,* 446 F. Supp. at 1238. Interestingly, this new policy of integration known as "dynamic gradualism" and described as moving " 'as fast as we can move tactfully, without creating polarization'," *id.,* anticipated the "all deliberate speed" standard adopted by this Court four years later in *Brown v. Board of Education,* 349 U.S. 294, 301 (1955) (hereinafter *Brown II).*

The district court also closely examined the Board's policies regarding attendance zones, school reorganizations, openings and closings, student transfers, site selection, school additions and portable classrooms, school utilization,

and various Board actions. *Brinkman v. Gilligan,* 446 F. Supp. at 1239-52.

Based on the consideration of all this evidence, the district court found that while there are many racially imbalanced schools in the Dayton system, acts of intentional segregation by the Dayton Board of Education had ended more than twenty years earlier. *Id.* at 1253. The district court further found that the plaintiffs had not supplied evidence of segregative intent and incremental segregative effect. The district court, therefore, found that plaintiffs had failed to meet their burden of proof under the standards established by this Court. *Id.*

In short, the district court found, upon examination of all the evidence in all challenged areas, that there was no intentional discrimination based on race and that where adverse impact was in evidence, such impact was not the result of racially based Board decisions. In fact, every action of the Board was found to have rational, nonracial reasons and the plaintiffs were unable to carry their burden of proof as required by *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corporation.* Because no constitutional violations were found, the proper remedy was the dismissal granted.

B. The Court of Appeals Improperly Shifted the Burden of Proof to the Defendants

This Court in *Dayton I* addressed its mandate to both the district court and the court of appeals. That the lower courts reached so widely divergent a result may be explained by the fact the court of appeals utterly ignored the mandate of this Court to consider the standards estab-

lished by *Washington v. Davis* and *Arlington Heights. Dayton I,* 433 U.S. at 419. Rather than conducting an analysis of these basic precedents, as did the district court, the court of appeals created its own standards. In reaching its decision to reinstate in whole its earlier remedy, the court of appeals based its rationale primarily on two points. The court stated that the district court failed to attribute the proper legal significance to the racial characteristics of the Dayton schools' staff in 1954 and further failed to employ proper burden shifting principles in light of these characteristics. *Brinkman IV,* 583 F.2d at 251.

The evidence is undisputed that the history of the Dayton School Board in hiring and assignment of black teachers prior to 1950 was reprehensible. The court fixates on this fact by stating that this alone makes out a *prima facie* case of racial discrimination. *Id.* This holding completely ignores the subsequent remedial action and leaves undisputed the substantive findings of the district court in the post-1950 era.

The undisputed evidence in the district court shows that as a result of the 1951 policy of "dynamic gradualism" to integrate the teaching staff, the Board was in substantial compliance with Department of Health, Education and Welfare guidelines for staff hiring and assignment by the 1971-1972 school year. *Brinkman v. Gilligan,* 446 F. Supp. at 1238. In the year this suit was instituted, therefore, the schools of Dayton were *not* identifiable as to race by the composition of their staff. The court of appeals justifies ignoring almost 20 years of positive racial desegregation by misreading the standards established by this Court:

> " 'We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of

> school authorities were to any degree motivated by segregative intent *and the segregation resulting from those actions continues to exist,* the fact of remoteness in time certainly does not make those actions any less "intentional." ' " *Brinkman IV,* 583 F.2d at 249, *quoting from, Keyes,* 413 U.S. at 210-11 (emphasis added).

What the court of appeals overlooked in reaching its erroneous conclusions is that "the segregation resulting from those actions" did not exist in 1972 when this suit was filed nor does it exist today.

The court of appeals also addresses pupil assignment practices which, prior to 1950, were, in some cases, segregative. The court states that this fact, again, is sufficient to make out a *prima facie* case of racial segregation. What the court is ignoring is the good faith efforts to deal with this problem. Undisputed evidence adduced at trial shows that the Board attempted to reorganize and integrate the predominantly black West Side schools in 1951. *Brinkman v. Gilligan,* 446 F. Supp. at 1239-40. The court of appeals simply refuses to mention, let alone weigh, such evidence of desegregation efforts on the part of the Board. Unlike the district court's action in examining the facts, warts and all, the court of appeals chose to consider only the warts.

This attitude mirrored that of the court of appeals as described and disapproved in *Washington v. Davis,* 426 U.S. at 237:

> "That the Department had made substantial efforts to recruit blacks was held beside the point and the fact that the racial distribution of recent hirings and of the Department itself might be roughly equivalent to the

> racial makeup of the surrounding community, broadly conceived, was put aside as a 'comparison [not] material in this appeal.'" (Citation omitted, brackets in original.)

It should, of course, be noted that *Washington v. Davis* arose in a jurisdiction which was subject to *de jure* segregation at the time of *Brown I. Bolling v. Sharpe,* 347 U.S. 497 (1954). This fact did not prevent this Court in *Washington v. Davis* from examining the intervening desegregative acts, nor did the prior *de jure* segregation in the District of Columbia make out a *prima facie* case of current segregation and shift the burden of proof to the defendants.

Despite the specific mandate of this Court to consider the standards set by *Washington v. Davis, Dayton I,* 433 U.S. at 419, the court of appeals utterly disregarded this precedent and established its own standard. On the basis of its limited factual consideration, the court of appeals concluded that at the time of *Brown I,* certain Dayton schools were deliberately segregated or racially imbalanced due to the actions of the Board. *Brinkman IV,* 583 F.2d at 251. The court found this sufficient to constitute a *prima facie* violation of the Fourteenth Amendment pursuant to *Swann,* 402 U.S. at 18, and to shift the burden of proof to the defendants. *Brinkman IV,* 583 F.2d at 251.

The passage relied upon by the court of appeals provides:

> "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional

rights under the Equal Protection Clause is shown." *Swann,* 402 U.S. at 18.

The court of appeals neglects to recognize that this maxim is phrased in the present tense. Notwithstanding, that court interprets the meaning to be: where it was at one time possible to identify a "white school" or a "Negro school." This attitude of the court of appeals was referred to in *Dayton I,* 433 U.S. at 417, as "a sort of 'fruit of the poisonous tree' " view. This impression is reinforced by the court of appeals' reliance for the premise of schools as racially identifiable on the basis of faculty assignment on the chart furnished by the plaintiffs and reproduced in *Brinkman I,* 503 F.2d at 698. This chart shows that only one high school, Dunbar, has a majority of black members on its faculty, and at the stated percentage of 50.3% black, it would take a keen observer to recognize the three tenths of a percent excess which allegedly brands Dunbar as an identifiably "black school."

With a *prima facie* case now established, the court of appeals shifts the burden of proof to the Board. *Brinkman IV,* 583 F.2d at 252. This allows the court to find that the Board has not established that the character of the school system in 1954 was the result of racially neutral acts. *Id.* In effect, the court, by this circular reasoning, now uses its *prima facie* standard to shift the burden of proof to the Board which cannot meet the burden of proving racially neutral acts and thereby creates a *prima facie* case of discrimination. Thus, the court of appeals is now able to conclude:

"Nowhere in the record do defendants convincingly demonstrate that the systemwide student racial imbal-

ance characteristic of the Dayton public school system since at least the time of *Brown I* likewise was not the product of segregative acts." *Id.* at 254.

Similarly, under its own standards, the court of appeals finds:

> "Nowhere in the record have defendants demonstrated that the present systemwide racial imbalance would have occurred even in the absence of their segregative acts." *Id.*

This *prima facie* case/burden shift circle allows the court to ignore, without discussion, the racially neutral or even integrative motives presented by the Board and accepted by the district court.

The court of appeals was given these guidelines by this Court on remand:

> "the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed Rules Civ Proc 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors." *Dayton I,* 433 U.S. at 417-18.

The court of appeals certainly did use Rule 52(a). At the outset of its opinion the court states:

> "To the extent that any findings of fact and conclusions of law of the district court are to the contrary, they are either clearly erroneous, Rule 52, Fed.R. Civ.P., or are incorrect as a matter of law." *Brinkman IV,* 583 F.2d at 247.

The form is mechanically correct but the substance of this holding is lacking. The court substantiates its holding by the facts extant in 1951 rather than in 1972 as to the error of the district court's interpretation of the applicable law. Any facts which would not support the court's premise are ignored. The court then determines that the Board has an affirmative duty to carry out all actions with the affirmative intent to integrate Dayton schools completely and to "diffuse black and white students throughout the Dayton school system." *Id.* at 256.

This holding and the systemwide transportation plan ordered by the court of appeals in enforcement of the court's racial balance plan is reminiscent of the situation in *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976). In *Spangler,* this Court noted that the lower court's interpretation of its own systemwide desegregation order:

> "appears to contemplate the 'substantive constitutional right [to a] particular degree of racial balance or mixing' which the Court in Swann expressly disapproved. Id., at 24, 28 L Ed 2d 554, 91 S Ct 1267." *Id.* at 434.

Spangler went on to observe that the lower court there apparently believed that it had the authority to impose its racial balance requirement:

> "even though subsequent changes to the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible." *Id.*

Under the *prima facie* case/burden shift theory of the court of appeals in *Brinkman IV,* of course, the Pasadena Board

would not have been able to prove these neutral factors. In placing the burden of proof in its proper place, the *Spangler* Court declared:

> "There was also no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants." *Id.* at 435.

This Court in *Spangler* thus clearly charged the plaintiffs with the burden of showing segregative actions attributable to defendants, even though previous acts of segregation had been proven. In shifting the burden to the defendants to prove that its acts were nonsegregative, the *Brinkman IV* court is incorrect as a matter of law.

II

DESEGREGATION REMEDIES MUST BE SENSITIVE TO THE INTERESTS OF CHILDREN AND PARENTS IN EQUAL ACCESS TO SCHOOLS

A. A Systemwide Remedy Violates Dayton I

In *Dayton I,* this Court stated that even when the three-part cumulative violations found by the district court were viewed in the strongest light for respondents, the court of appeals "simply had no warrant in our cases for imposing the systemwide remedy which it apparently did." *Id.* at 417. On remand, the district court found no racially motivated purpose behind the acts of the Board of Education and consequently determined that no remedy was authorized. *Brinkman v. Gilligan,* 446 F. Supp. at 1253. The court of appeals, through adoption of an incorrect standard of proof, found that the Board had failed to prove its acts

lacked racial animus and reinstated its systemwide remedy.

While amicus curiae, Pacific Legal Foundation, believes with the district court that the evidence does not support a finding of segregation in the Dayton public school system as a result of racially motivated acts on the part of the Board, and that, therefore, no remedy is authorized, amicus believes that the issue of the scope of remedy imposed by the court of appeals should be addressed.

The court of appeals adopted the standard that the existence of a dual school system at the time of *Brown I* embraced a systemwide program of segregation affecting a substantial portion of the schools, teachers, and facilities and thus had systemwide impact. Second, the failure (by the court's reverse standard of proof) after 1954 to desegregate the school system had a systemwide impact. Finally, the impact of defendants' practices according to that court "clearly was systemwide in that the actions perpetuated and increased public school segregation in Dayton." *Brinkman IV,* 583 F.2d at 258. Of course, under this view, any segregative act, no matter how limited the scope, would perpetuate and increase public school segregation and thereby have systemwide impact. Such a standard is plainly wrong. This Court, in *Dayton I,* reemphasized that even though constitutional violations had been found (which presumably would perpetuate and increase public school segregation), the imposition of a systemwide remedy exceeded the scope of the violations. *Dayton I,* 433 U.S. at 417.

Restricting the scope of desegregation remedies is based on policy considerations of protecting the interests of all

those affected by the remedy, be they school administrators, students, parents, or taxpayers.

B. Local School Boards Are the Proper Bodies to Initiate and Implement Desegregation Plans

This Court, in discussing the complexities arising from a transition to unitary school systems, has stated:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems." *Brown II*, 349 U.S. at 299.

The existence of these varied local problems is the precise reason that courts should not be quick to take on the role of superintendents of public instruction.

This principle was reemphasized in *Dayton I:*

> "But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Id.* at 410 (citations omitted).

In *Austin Independent School District v. United States*, 429 U.S. 990 (1976), this Court vacated the judgment ordering a systemwide remedy of another court of appeals and remanded in light of *Washington v. Davis*. In a concurring opinion, Mr. Justice Powell noted that the court of appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified. Justice Powell also pointed out

that Austin, as is the case with Dayton and most larger cities, suffers from residential segregation which creates significant problems for school officials seeking to achieve a nonsegregated school district. As Justice Powell observes, such residential patterns are typically beyond the control of school authorities and are more a function of economic pressures and voluntary preferences. Under these circumstances, there was no evidence in the record to suggest that, absent the constitutional violations found by the lower court, the Austin school system would have been integrated to the extent contemplated by the court's desegregation plan. *Id.* It is submitted that a similar situation exists in this case. Even if the presumptions of violations established by the court of appeals were correct, there is no suggestion in the record that, absent such violations, the schools would have achieved the predetermined racial balance ordered by the court.

In Dayton, the School Board is faced with much the same problems as are the boards of any multi-racial, growing city. It faces the need to select and purchase sites for construction; develop curriculum programs which will provide the best education possible; hire staff and administrative personnel; and accomplish these duties within a framework of limited budgets and rising costs. The Board must also consider these factors in light of neighborhood school policies and in accordance with the varied interests of the parents and citizens of the city. In the face of these considerations, the modern record of the Dayton School Board has been exemplary.

As noted previously, the Board, in 1951, instituted a policy of "dynamic gradualism" in order to phase out a

segregative policy of teacher placement. The Board also attempted in the same year to reorganize the schools on the west side of Dayton in order to integrate the black schools located there. By initiating these programs and by other actions, such as the assignment of the black children of the Shawen Acres Orphanage to predominately white schools in 1950 (*Brinkman v. Gilligan*, 446 F. Supp. at 1241), the Board has shown a great sensitivity to the racial problems of Dayton. It cannot be inferred that the Board has revised this positive, integrative direction in the ensuing 29 years.

Taken in whole, and with consideration to the monumental task of running a public school system, the Dayton Board's action should be supported as an example of a positive effort to remove the vestiges of past racial discrimination.

C. The Rights of All Children and Their Parents Must Be Observed When Fashioning Remedies

Mr. Justice Brennan, in his concurring opinion in *Dayton I*, 433 U.S. at 424, noted that the district court:

> "should be flexible but unflinching in its use of its equitable powers, always conscious that it is the rights of individual schoolchildren that are at stake, and that it is the constitutional right to equal treatment for all races that is being protected."

This passage points out an important and often forgotten element of school desegregation cases—the human element. Too many times courts impose remedies calling for racial balance in the schools based upon the percentages

of the population in the area, forgetting that behind each of the numbers stands a school age child.

In *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974), this Court declared that because local autonomy is perceived to be essential both to the maintenance of community concern and support for the public schools and to the quality of the educational process, no single tradition in public education is more deeply rooted than local control over school operations. Justice Powell, concurring in *Austin, supra*, at n.7, declared that a court has the duty, in fashioning a desegregation remedy, to balance the individual and collective interests. The individual interests, as personal and important as any in our society, relate to the family and to the concern of parents for the welfare and education of their children. Families share these interests wholly without regard to race. As Justice Powell concludes, these factors should be considered in imposing a desegregation remedy the burden of which falls not upon the officials responsible for the offending action, but rather upon innocent children. *Id.*

Many factors contribute to the educational development of the nation's youth. Of these, the school plant and its teaching staff are only one element. Other factors which must be given due consideration are the importance of the parents' place in education, parental involvement in the schools through room mother and parent-teacher programs, opportunities for extra curricular activities, adequate nutrition, and adequate exercise and rest. Although the Board has not explicitly so stated, these factors, to a large part, are best served by a neighborhood school policy such as

Dayton's. Consider, for example, the problems a parent might have in attending a Parent-Teacher Association meeting at his child's school which is located many miles from his home. In an area such as Los Angeles, where some children are bussed to schools 20 miles from home, this important part of child educational development may be totally lacking. Sending children to school many miles from their homes also places an extra burden upon parents who would like to assist in daytime school activities. Parents of modest income may be altogether precluded from helping in the classroom simply because they cannot afford the costs of transportation. Taking children out of their neighborhood schools may also diminish their opportunity to participate in extracurricular activities. Where athletics, band, or other such activities are conducted outside of regular school hours, the child who has to ride the bus may be precluded from participating. Finally, great weight must be given to the physical effects of long distance transportation on the children themselves. It is simply not equitable to extend the school day of elementary children by many hours, in some instances, in order to comply with harsh, system-wide transportation schemes. None of these factors were considered in fashioning the remedies in *Brinkman IV*.

CONCLUSION

School desegregation is a problem with which the courts have been faced throughout the last quarter century. That quite a large number of these cases have come before this Court is a testament both to the great complexities which they present and to the great variety of situations under which they arise. This case is no exception.

The Dayton Board of Education started the process of desegregating Dayton schools and professional teaching staffs in 1950 and at the time of the commencement of this action in 1972 had substantially eliminated all barriers to black children, teachers, and administrators. The Board has been able to accomplish this goal without dismantling the neighborhood schools concept and without creating polarization within the community. There is some evidence of isolated instances of arguably unequal treatment within the 22-year history preceding this case, but the district court found the school system of Dayton to be substantially unitary.

The court of appeals has ignored this positive history and has further ignored the mandate of this Court to apply the standards of *Washington v. Davis* to this case. By so doing, it was able to justify the imposition of a system-wide remedy which negates much of the success of the Dayton Board. This systemwide remedy has also ignored the legitimate interests of the School Board and all of the parents and children of Dayton in order to achieve a goal of racial balance.

This Court's mandate in *Brown I* was not designed to lead to the unwarranted judicial interference evidenced in this case. Dayton's efforts in school desegregation should be recognized as an example of what local school boards are able to accomplish in a harmonious and friendly community atmosphere rather than attacked as a system which

continues to suppress minority citizens. For the reasons set forth herein, amicus curiae Pacific Legal Foundation urges this Court to find that the actions of the court of appeals were unwarranted and that the dismissal granted by the district court was the proper remedy in this case.

Respectfully submitted,

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February 20, 1979.