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.

BRIEF OF RESPONDENTS OHIO STATE BOARD OF EDUCATION AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

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I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 583 F.2d 243 (6th Cir. 1978), and is found in the appendix to the Petition for a Writ of Certiorari in this action, at 189a. The opinion of the United States District Court for the Southern District of Ohio is reported at 446 F. Supp. 1232 (S.D. Ohio 1977), and appears in the appendix to the Petition for a Writ of Certiorari in this action at 142a.

This case (No. 78-627) is set for oral argument in tandem with No. 78-610, *Columbus Board of Education* v. *Penick*. The opinion of the United States Court of Appeals for the Sixth Circuit in that case is reported at 583

F.2d 787 (6th Cir. 1978). The opinion of the United States District Court for the Southern District of Ohio in that case is reported at 429 F. Supp. 229 (S.D. Ohio 1977).

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

III. STATEMENT OF THE CASE

The history of this litigation during the period from its inception on April 17, 1972 until the decision rendered by this Court on June 27, 1977 is set forth in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 97 S.Ct. 2766 (1977) (*Dayton*). On remand, pursuant to this Court's directive, the District Court conducted evidentiary hearings which commenced on November 1, 1977. Considering all of the evidence presented at the various trials and hearings of this action in the light of the principles established by this Court, the District Court concluded that the plaintiffs had failed to establish a right to relief. On December 15, 1977 it accordingly entered an order dismissing the plaintiff's complaint.

The District Court based its order on a detailed series of findings of fact and conclusions of law. In considering historical isolated incidents of constitutional violations it found that there was no proof of any incremental segregative effect from such actions. Existing racial imbalance was not found to be a result of any intentional segregative act or acts on the part of the Dayton Board, but rather the simple reflection of residential living patterns in the geographic area served by the school system.

Faculty assignment and hiring practices were reviewed. While such practices involved purposeful separation of teachers by race until 1951, all vestiges of these earlier practices had disappeared by 1969 — some three years before this litigation was instituted. Moreover, these earlier practices were specifically found not to have had any incremental segregative effect. The Trial Court, on the basis of the evidence, found that racial identifiability of schools was determined by their student composition and not by faculty assignment.

Attendance zones were held not to have been created with any discriminatory intent. Transfer policies were found to be non-discriminatory with the exception of a practice of transfers involving Shawen Acres Orphanage students — a practice which ceased in the early 1950's and which was held not to have had any incremental segregative effect. Site selection, construction, uses of portables and school utilization practices were found not to have involved any intent to discriminate and not to have had any incremental segregative effect.

Although Dunbar High School was established as a voluntary black school in 1933, the census data established that Dunbar would have been all black by 1960 even if it had not been a school for voluntary attendance. Establishment of the old Dunbar High School was accordingly held not to have had any incremental effect on the situation existing in the school system when suit was filed in 1972. The Trial Court further found that there was no segregative intent with respect to the creation of the new Dunbar High School.

The one adverse finding made in the previous decision of the District Court — the maintenance of optional attendance zones between contiguous schools throughout the district — was reexamined in the light of additional evi-

dence presented at the hearings following the remand. The evidence demonstrated neither segregative intent nor segregative effect in the establishment and maintenance of optional zones.

As was confessed by one of the experts called by the plaintiffs at the post-remand hearings, the Dayton Board had really done nothing to separate the races for at least two decades before this case came to trial. As an official of the plaintiff NAACP admitted, the worst thing that can be said in retrospect about the Dayton schools is that they reflect the racial imbalance of the geographic neighborhoods they serve.

After the dismissal of their complaint, the plaintiffs filed a notice of appeal to the Sixth Circuit Court of Appeals. On January 16, 1978 the Sixth Circuit issued a stay order holding in effect pending appeal the systematic racial balance plan which had been imposed prior to this Court's decision in *Dayton*. On June 27, 1978 the Sixth Circuit reversed the District Court's dismissal of the case, and it entered a final order reinstating the systematic racial balance plan. Applications for a stay were denied, and students in the Dayton system are still being transported to distant school buildings under a plan that cannot stand under the facts presented and the constitutional principles applicable to those facts.

IV. ARGUMENT

The Sixth Circuit In This Case Misapplied This Court's 1977 Decision In Dayton Board of Education v. Brinkman By Improperly Putting The Burden Of Proof On Petitioners, And By Emasculating The Incremental Segregative Effect Analysis Mandated By This Court.

This Brief is directed to the following two issues:

(1) Whether the Sixth Circuit erred in holding that the District Court improperly examined individually each alleged constitutional violation to determine its incremental segregative effect, contrary to *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977).

(2) Whether the Sixth Circuit erred in holding that the District Court improperly placed upon Plaintiffs-Respondents the burden of proof on the issue of incremental segregative effect, contrary to *Dayton Board of Education* v. *Brinkman, supra*; *Washington* v. *Davis,* 426 U.S. 229 (1976); and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). This Brief shows that each of these questions should be answered in the affirmative. The Sixth Circuit committed each of these errors, and in so doing unjustifiably extended and misconstrued the burden shifting principle of *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973).

It is important to remember the posture in which this case comes before this Court. This Court is not faced with a dual school system. In the 1973 Findings of Fact, the District Court found that the attendance zones, school site selection and construction actions, and the freedom of enrollment system of the Petitioner Dayton Board were not segregative in either their purpose or their effects.

February 7, 1973 Findings of Fact and Memorandum Opinion of Law, pp. 5-8 and 9-10, reproduced as an appendix to the District Court's 1977 opinion, 446 F. Supp. 1254, 1256-1258. In its Findings of Fact and Conclusions of Law filed December 15, 1977, reported at 446 F. Supp. 1232 (S.D. Ohio 1977) (p. 142a of the appendix in the Petition for a Writ of Certiorari in this action), the District Court held that "acts of intentional segregation by the Dayton Board of Education ended over twenty years ago," 446 F. Supp. at 1253 (186a). The court further held that:

> "Evidence of segregative intent and incremental segregative effect has not been supplied. Accordingly, the Court must find that plaintiffs have failed to meet their burden of proof as now imposed by the Supreme Court of the United States." 446 F. Supp. at 1253 (186a).

Dayton Board of Education v. *Brinkman,* 443 U.S. 406, 420 (1977), stated that this case is one "where mandatory segregation by law of the races in the schools has long since ceased," and that the facts are "that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution." 433 U.S. at 417. The Sixth Circuit in this case did not disagree, *Brinkman* v. *Gilligan,* 583 F.2d 243, 249 (6th Cir. 1978) (197a): "We recognize that racial imbalance in student attendance patterns is not in itself a constitutional violation."

The position of the Ohio State Board of Education and State Superintendent of Public Instruction, hereinafter "state respondents," in the instant case is different from that in the Columbus case, *Columbus Board of Education* v. *Penick*, No. 78-610. In the instant case the District Court dismissed the action, 446 F. Supp. at 1253 (188a),

without having made any findings of liability against the state defendants. In contrast, these same state defendants in the Columbus case were found by the District Court to be liable for unconstitutional segregation of the Columbus school system, *Penick* v. *Columbus Board of Education,* 429 F. Supp. 229, 262-263 (S.D. Ohio 1977), affirmed except as to liability of state defendants, which was remanded, 583 F.2d 787, 815-818 (6th Cir. 1978).

Since the liability of the state respondents is yet to be finally determined, state respondents have a vital interest in the proper resolution of the incremental segregative effect and burden of proof issues which this Brief addresses.

1. The Sixth Circuit Erred In Holding That The District Judge Erroneously Examined Each Individual Alleged Violation To Determine Its Incremental Segregative Effect.

The Sixth Circuit in this case held that the District Court erroneously applied the incremental segregative effect analysis required by this Court's decision in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 420 (1977). The Sixth Circuit stated, 583 F.2d at 257-258:

> "The district court committed two errors in its approach to this inquiry. First, it individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence.
>
> * * *
>
> Secondly, the district court erred in allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific incremental effect of that discrimination. Where plaintiffs prove,

> as here, a systemwide pattern of intentionally segregative actions by defendants, it is the defendants' burden to overcome the presumption that the current racial composition of the school population reflects the systemwide impact of those violations. *See Keyes, supra,* 413 U.S. at 211 n. 17, 93 S.Ct. 2686. Nowhere in the record have defendants rebutted this presumption." (Emphasis in original.)

This section of this Brief shows that the Sixth Circuit was wrong when it stated that the District Court erred in individually examining each alleged constitutional violation to "determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted," *Dayton Board of Education* v. *Brinkman,* 433 U.S. at 420.

It is important to keep in mind that this Court's opinion in *Dayton Board of Education* v. *Brinkman, supra,* dealt with the remedial stage of a desegregation action. 433 U.S. at 408, 414-415. Subsequent opinions have recognized that this Court's opinion in *Dayton Board of Education* v. *Brinkman* dealt primarily with the remedial phase of school desegregation cases. *Brennan* v. *Armstrong,* 433 U.S. 672, 674 n.4 (1977) (vacating and remanding Milwaukee, Wisconsin school desegregation action which had been appealed as to liability, before remedial desegregation plan was formulated, and stating that *Dayton Board of Education* v. *Brinkman* "is primarily a remedy case and therefore irrelevant to the action of the Court of Appeals in this case."); *United States* v. *School District of Omaha,* 565 F.2d 127, 128 (8th Cir. 1977).

This Court in *Dayton Board of Education* v. *Brinkman* recognized that a step by step analysis is required in a desegregation case, and that the first stage of the analysis is the effort to determine whether constitutional violations are

present. See *Hills* v. *Gautreaux*, 425 U.S. 284, 293 (1976), holding that the federal courts' remedial powers may be exercised only on the basis of a constitutional violation; *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 434 (1976). Once these violations are shown, the second or remedial stage of the process must take place, and that remedial stage involves several steps. The Sixth Circuit has confused the steps applicable to the two stages, and held that the *Keyes* principle of a shifting burden of proof is applicable to the remedial stage of the case.

This Court's opinion in *Keyes* dealt with the first stage of a desegregation case, *i.e.*, the stage in which it is determined whether or not a constitutional violation has been committed. It was in the context of proving whether a constitutional violation was shown that this Court held that a finding of intentionally segregative school board actions in a meaningful portion of a school system creates a presumption that other segregative schooling in the system is not adventitious, and shifts to the school authorities the burden of proving that other segregative schools in the system are not the result of intentionally segregative actions. 413 U.S. at 208.

Dayton Board of Education v. *Brinkman* held that "federal courts have authority to grant appropriate relief of this sort [restructuring the administration of a local school system] *when constitutional violations* on the part of school officials *are proved.*" 433 U.S. at 410, citing *Keyes, supra* (emphasis added). *Keyes* formulated the burden of proof principles to be used by the District Courts in first determining whether a violation exists.

Dayton Board of Education v. *Brinkman* recognized that the District Court must first make findings of fact and conclusions of law as to the existence of constitutional violations, and must then fashion a remedy. The court's use

of the word "must" indicates that this procedure is mandatory.

> "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)." 433 U.S. at 419 (emphasis added).

Immediately after the above-quoted passage from *Dayton Board of Education* v. *Brinkman,* this Court recognized that the District Court must follow two steps in order to determine the nature and scope of the constitutional violations. Again this Court used mandatory language, 433 U.S. at 420:

> "The *duty* of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to *first* determine whether there was any action in the conduct of the business of the school board which *was intended to,* and *did in fact, discriminate* against minority pupils, teachers, or staff. Washington v. Davis, supra. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found the District Court in the first instance, subject to review by the Court of Appeals, *must* determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." (Emphasis added.)

The incremental segregative effect analysis is used to determine the nature and extent of the constitutional violation which the remedy must redress. Numerous cases from this Court have held that a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation. These cases are collected in *Hills* v. *Gautreaux,* 425 U.S. 284, 293-294 (1976); *Dayton Board of Education* v. *Brinkman,* 433 U.S. at 420; *Milliken* v. *Bradley,* 433 U.S. 267, 280 (1977); and *Regents of the University of California* v. *Bakke,* —— U.S. ——, 57 L.Ed.2d 705, 778 (1978).

In the instant case the District Court scrupulously followed the incremental segregative effect analysis. Indeed, most of its December 15, 1977 Findings of Fact and Conclusions of Law (446 F. Supp. 1232 (S.D. Ohio 1977)) is devoted to an examination of the incremental segregative effect analysis. After a detailed review of the testimony and oth r evidence, the District Court concluded, 446 F. Supp. at 1253 (186a) that:

> "Evidence of segregative intent and incremental segregative effect has not been supplied. Accordingly, the Court must find that plaintiffs have failed to meet their burden of proof as now imposed by the Supreme Court of the United States."

The Sixth Circuit held that this conclusion was erroneous because the District Court "individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence." *Brinkman* v. *Gilligan,* 583 F.2d 243, 257 (6th Cir. 1978). The District Court did individually examine each alleged constitutional violation, as is required by this Court's opinion in *Dayton Board of Education* v. *Brinkman.* The only way that any District Court can determine the sum total of the incremental seg-

regative effects of alleged violations is to determine how much incremental segregative effect each alleged violation had. Yet the Sixth Circuit held that the phrase "incremental segregative effect" has a different meaning, 583 F.2d at 257: "The impact is 'incremental' in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution." The Sixth Circuit erred in holding that "incremental" referred to the time span over which the impact of school board action is manifested. This is shown by the following passage from *Dayton Board of Education* v. *Brinkman,* 433 U.S. at 420:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, *when that distribution is compared to what it would have been in the absence of such constitutional violations.* The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." (Emphasis added.)

The emphasized language in this quotation shows that the incremental segregative effect analysis is concerned not with the period of time over which the impact is felt, but rather with the amount or quantity of segregative inpact that constitutional violations had on the racial distribution of student population. In other words, the Sixth Circuit is wrong in saying that the impact is incremental in that it occurred gradually over the years instead of all at once. The impact is incremental in that it is the amount of segregative effect or impact which would not have existed but for the constitutional violations. The increment being measured is not temporal but quantitative.

The Sixth Circuit opinion in this case, 583 F.2d at 257-258, and the Sixth Circuit opinion in the Columbus case (No. 78-610 in this Court) *Penick* v. *Columbus Board of Education,* 583 F.2d 787, 813-814 (6th Cir. 1978), contain an internal inconsistency in their reasoning about the incremental segregative effect analysis. This inconsistency is shown by the opinion in *Penick,* 583 F.2d at 813-814, which is quoted in *Brinkman* v. *Gilligan,* 583 F.2d at 257-258.

The court began by correctly stating that the incremental segregative effect analysis requires individual examination of each separate episode or practice which is alleged to constitute a violation:

> "It is clear to us that the phrase 'incremental segregative effect' and 'systemwide impact' employed in the *Dayton* case require that the question of systemwide impact *be determined by judging segregative intent and impact as to each isolated practice, or episode.* Each such practice or episode inevitably adds its own 'increment' to the totality of the impact of segregation." 583 F.2d at 813-814 (emphasis added).

That is precisely what the District Judge did in the instant case. 446 F. Supp. at 1236, 1239, 1241, 1243, 1245, 1246, 1248, 1250, 1253.

The Sixth Circuit incorrectly went on to conclude that each segregative practice or episode should not be judged upon its separate impact on the school system:

> "*Dayton* does not, however, require each of fifty segregative practices or episodes to be judged solely upon *its* separate impact on the system. The question posed concerns the impact of the total amount of segregation found — after each separate practice or episode has added its 'increment' to the whole. It was not just the last wave which breached the dike and caused the flood." 583 F.2d at 814, quoted in *Brinkman* v. *Gilligan,* 583 F.2d at 257-258 (emphasis in original).

The Sixth Circuit here confused the determination of incremental segregative effect with the determination of whether the segregative practices or episodes have a systemwide impact. Only after the District Court examines the incremental segregative effect of the alleged unconstitutional practices can it determine whether there has been a systemwide impact. Again, the key passage from this Court's opinion in *Dayton Board of Education* v. *Brinkman* is 433 U.S. at 420, quoted *supra*:

> "The remedy must be designed to redress *that difference*, and only if there has been a systemwide impact may there be a systemwide remedy." (Emphasis added.)

The phrase "that difference" refers to the difference between "how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." 433 U.S. at 420.

Thus the internal inconsistency in the Sixth Circuit opinions is this. The court began by stating that it is proper to judge segregative intent and impact as to each isolated practice or episode. The court then reversed itself and said that the question was the impact of the total amount of segregation found after each separate practice or episode added its increment to the whole amount of segregation. This circular and confusing analysis only paid lip service to this Court's requirement of analysis of incremental segregative effect. By requiring the District Court to do no more than determine "the impact of the total amount of segregation found after each separate practice or episode has added its 'increment' to the whole." 583 F.2d at 814. the Sixth Circuit has formulated a different test for the District Courts in the Sixth Circuit

to apply. The District Courts in the Sixth Circuit are now encouraged to look to "the impact of the total amount of segregation found," and may slide by the comparison of the effect of these violations on the racial distribution of the school population "when that distribution is compared to what it would have been in the absence of such constitutional violations." *Dayton Board of Education* v. *Brinkman,* 433 U.S. at 420.

The effect of this Sixth Circuit analysis is to resurrect the "cumulative violation" analysis condemned in *Dayton Board of Education* v. *Brinkman,* 433 U.S. at 413-416, 419, which permits a number of practices together to be a sufficient basis for a finding of a constitutional violation. The effect of the above-described internal inconsistency in the Sixth Circuit's opinions is to dilute or emasculate the required analysis of incremental segregative effect.

The two cases before this Court (the Columbus case, No. 78-610, and the instant case, No. 78-627) are not the only instances in which the Sixth Circuit has ignored this Court's requirement of an incremental segregative effect analysis. In *N.A.A.C.P.* v. *Lansing Board of Education,* 581 F.2d 115 (6th Cir. 1978), the Sixth Circuit affirmed a district court's remedial order for the Lansing, Michigan elementary schools even though the Sixth Circuit explicitly recognized that "the district court did not specifically make findings on the 'incremental segregative effect' of these violations," 581 F.2d at 115. Yet this Court's opinion in *Dayton Board of Education* v. *Brinkman* held that such findings were mandatory, stating that "the District Court in the first instance, subject to review by the Court of Appeals, *must determine* how much incremental segregative effect these violations had on the racial distribution," 433 U.S. at 420 (emphasis added).

2. The Sixth Circuit Erred As A Matter Of Law In Placing The Burden Of Proof Upon Defendants-Petitioners.

The Sixth Circuit repeatedly held that the burden of proof in the trial court in this case was upon the Petitioner Dayton Board of Education. *Brinkman* v. *Gilligan,* 583 F.2d 243, 251-252, 255, and 258 (6th Cir. 1978). In so doing, the Sixth Circuit made an unwarranted extension of the burden shifting principles of *Keyes* v. *School District No. 1,* 413 U.S. 189, 208-211 (1973), and violated the principles of *Washington* v. *Davis,* 426 U.S. 229 (1976), *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), and *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 413 (1977). Much confusion now exists in this area of the effect of the latter three cases on earlier desegregation opinions. The Sixth Circuit in the instant case ignored the holdings of both *Washington* v. *Davis* and *Arlington Heights* as to a plaintiff's burden of proving purposeful or intentional segregative actions and reversed the order of the District Court which had applied the holdings of those two cases. *Brinkman* v. *Gilligan,* 446 F. Supp. at 1235-1236, and 1253.

It is especially difficult to reconcile *Washington* v. *Davis, Arlington Heights,* and *Dayton Board of Education* v. *Brinkman* with the earlier *Keyes* holding that under certain circumstances the burden of proof in these desegregation cases can shift to defending school authorities. This Court's clarification of this burden shifting rule is needed now.

A. Keyes Should Be Held To Shift Only The Burden Of Going Forward With Evidence, Not The Burden Of Persuasion.

This issue is one of first impression for this Court in desegregation cases. The opinions in this Court and in the lower courts have not distinguished between the two meanings of the burden of proof (*i.e.*, the burden of going forward with evidence, and the burden of persuasion) in stating that proof of intentional segregation in a meaningful part of a school district shifts to the defendant school authorities the burden of showing that other segregated schools are not also the product of intentionally segregative actions. To avoid placing an impossible burden on defending school authorities, this Court should now expressly hold that under *Keyes,* only the burden of going forward with evidence can ever shift to defendant school boards.

The burden shifting holding of *Keyes* is that once a plaintiff proves purposeful or intentional segregation in a meaningful portion of a school system, the burden shifts to the defendant school authorities to prove that other segregated schools in the system are not also the result of intentionally segregative actions. 413 U.S. at 208:

> "Applying these principles in the special context of school desegregation case, we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, *creates a presumption that other segregated schooling* within the system *is not adventitious.* It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and *shifts* to those authorities *the burden of proving that other segregated schools* within the system *are not also the result of intentionally segregative actions.*" (Emphasis added.)

The burden of proof issue in this case is critical because the outcome of the case may turn upon the allocation of the burden of proof;[1] the practical effect of the placement of the burden of proof upon defendants in a school desegregation action in the manner done by the Sixth Circuit in this case is to place an almost insurmountable hurdle before defendant state and local school boards. These boards of education must either disprove segregative intent (and the only practicable means of so doing is subjective proof, *i.e.*, denials of that intent by board members), or prove that a board's past actions did not contribute to present segregative conditions. This is the holding of *Keyes, supra,* 413 U.S. at 211:

> "Thus, if respondent School Board cannot *disprove segregative intent,* it can rebut the prima facie case *only* by showing that its past segregative acts did not create *or contribute* to the current segregative condition of the core city schools." (Emphasis added.)

Arlington Heights, supra, used language similar to the "contribute" language of the opinion in *Keyes*. *Arlington Heights* said judicial deference to challenged legislative action is not justified when "there is a proof that a discriminatory purpose has been a motivating factor in the decision," 429 U.S. at 265-266. See also 429 U.S. at 270: "Respondents [plaintiffs] simply failed to carry *their burden* of proving that discriminatory purpose was a *motivating* factor in the Village's [defendant's] decision." (Emphasis added.)

Hence the burden shifting principles of *Keyes* are unique

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[1] *Lavine* v. *Milne,* 424 U.S. 577, 585 (1976): "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application."

and have a very harsh effect.[2] There is language in the *Keyes* majority opinion indicating that the burden that is shifted under the *Keyes* rule is not simply the burden of going forward with evidence, but rather is the burden of persuasion (*i.e.*, the risk of nonpersuasion), 413 U.S. at 210:

> "Their burden is to adduce proof sufficient to *support a finding* that segregative intent was not among the factors that motivated their actions." (Emphasis added.)

Other language in the *Keyes* majority opinion is of the type used by courts to describe the shifting of the burden of going forward with evidence. 413 U.S. at 209:

> "In that circumstance, it is both fair and reasonable to require that the school authorities bear the *burden of showing that their actions* as to other segragative schools within the system were not also motivated by segregative intent.
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> * * *
>
> In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which 'fairness' and 'policy' require state authorities to *bear the burden of explaining actions or conditions* which appear to be racially motivated." (Emphasis added.)

See also the opinion of Mr. Justice Powell, concurring in part and dissenting in part, 413 U.S. at 228: "The burden then must fall on the school board to demonstrate it is

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[2] *Keyes* also appears to say that the school board has the burden of justifying its conduct by clear and convincing evidence, rather than by a mere preponderance, 413 U.S. at 209. *Accord: United States* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973); *Walston* v. *County School Board of Nansemond County, Va.*, 492 F.2d 919, 924 (4th Cir. 1974); *Reynolds* v. *Abbeville County School District*, 554 F.2d 638, 642 (4th Cir. 1977).

operating an 'integrated school system.' " This Court should clarify this ambiguity in *Keyes,* and hold that, as in the usual federal civil case, the burden that is shifted under the *Keyes* rule is the burden of going forward with evidence.

The distinction between the two meanings of the phrase "burden of proof" was best explained in James, Burdens of Proof, 47 Va. L. Rev. 51 (1961):

> "The term 'burden of proof' is used in our law to refer to two separate and quite different concepts. The distinction was not clearly perceived until it was pointed out by James Bradley Thayer in 1898. The decisions before that time and many later ones are hopelessly confused in reasoning about the problem. The two distinct concepts may be referred to as (1) the risk of non-persuasion, or the burden of persuasion or simply persuasion burden; (2) the duty of producing evidence, the burden of going forward with the evidence, or simply the production burden or the burden of evidence." (Footnotes omitted.)

The language used by the Sixth Circuit in this case appears to mean that the Sixth Circuit placed on Defendants-Petitioners not only the burden of going forward with evidence but also the burden of persuasion. This holding is erroneous. Even if the burden of proof was properly placed on Defendants-Petitioners, it was only the burden of going forward with evidence that should shift to defending school authorities under *Keyes.*

The Sixth Circuit here referred to the burden of proof that it held should have been put upon Defendants-Petitioners as the burden " 'to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.' " *Brinkman* v. *Gilligan,* 583 F.2d at 254, quoting *Keyes,* 413 U.S. at 210.

To shift not only the burden of going forward with evidence but also the burden of persuasion is contrary to the ordinary rules of evidence in the federal courts. Federal Rule of Evidence 301 governs presumptions in federal courts and provides that the burden of going forward with evidence is shifted, and the burden of persuasion (risk of nonpersuasion) is not shifted. Federal Rule of Evidence 301 reads in full:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but *does not shift to such party the burden of proof in the sense of the risk of nonpersuasion,* which remains throughout the trial upon the party on whom it was originally cast." (Emphasis added.)

In accordance with the plain language of this rule, the courts have held that the burden of going forward with evidence is shifted and the burden of persuasion is not shifted under that rule. *Usury* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 27 (1976); *Legille* v. *Dann,* 544 F.2d 1, 6-7 n.37 (D.C. 1976); *N.L.R.B.* v. *Heyman,* 541 F.2d 796, 801 n.10 (9th Cir. 1976).

The burden shifting rule of *Keyes* is unique in that *Keyes* is the only case uncovered by counsel for the state respondents in which the burden has been held to shift based upon constitutional requirements. "Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine* v. *Milne,* 424 U.S. 577, 585 (1976). In civil cases presumptions have usually been upheld when they do not shift the burden of persuasion. *Lavine* v. *Milne* upheld a New York statutory presumption

that a person was disqualified from receiving welfare benefits for seventy-five days if that person voluntarily terminated employment to qualify for welfare benefits. This Court stated, 424 U.S. at 584: "The provision carrys with it no procedural consequence; it shifts to the applicant neither the burden of going forward nor the burden of proof, for he appears to carry the burden from the outset." See also 424 U.S. at 585 n.9. In contrast, the *Keyes* language quoted above means that at least the burden of going forward with evidence shifts, and is susceptible to the interpretation that the burden of persuasion also shifts to the defending school authorities in desegregation actions.

The burden shifting rule that is most analogous to that of *Keyes* is found in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). These case held that Title VII of the Civil Rights Act of 1964 forbids the use of employment tests that are discriminatory in effect unless the defendant employer carries the burden of showing that a given requirement has a manifest relationship to the employment in question. "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 425. Just as in *Keyes*, a minority plaintiff must make out a prima facie case of discrimination, and then the burden shifts to the defendant. The question then is, of course, what burden shifts to defendant?

The cases have held that it is the burden of going forward with evidence, and not the burden of persuasion, which shifts to defendants in these Title VII cases. This is made plain by the discussion in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973), which describes the sequence of proof after a prima facie case is

proved. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802. Once such a reason is articulated by the defendant employer, the plaintiff employee must then "be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." 411 U.S. at 804. Hence the burden of persuasion is not upon the defending employer; once the defending employer carries his burden of going forward with evidence, the plaintiff employee must carry his burden of persuasion. *Accord*: *Chalk* v. *Secretary of Labor,* 565 F.2d 764, 766 (D.C. Cir. 1977), *cert. denied,* 98 S.Ct. 1527 (1978).

Two subsequent opinions in cases before this Court show that the burden that shifts in a Title VII action is the burden of going forward with evidence. *Furnco Construction Corp.* v. *Waters,* —— U.S. ——, 57 L.Ed.2d 957, 968-969 (1978), rejected the view that the *McDonnell Douglas* prima facie showing is "the equivalent of an ultimate finding by the trier of fact that the original rejection of the applicant was racially motivated," and held, 57 L.Ed. 2d at 969:

> "A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not those actions were bottomed on impermissible considerations."

See also *Nashville Gas Co.* v. *Satty,* —— U.S. ——, 54 L.Ed. 2d 356, 368 (1977) (Powell, J. concurring in the result and concurring in part), citing *Albemarle Paper Co.* v. *Moody* and *McDonnell Douglas Corp.* v. *Green, supra,* and

stating: "the issue is not simply one of burden of proof, which properly rests with the Title VII plaintiff."

Several lower court cases have expressly stated that the burden of proof that is shifted in a Title VII action is the burden of going forward with evidence, and not the burden of persuasion. *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420 n.6 (5th Cir. 1975), analyzed the *McDonnell Douglas* burden shifting rule, and concluded: "Upon rebuttal evidence being offered, the ultimate burden of persuasion by a preponderance of the evidence that discrimination had taken place fell upon appellant's [plaintiff's] shoulders." *Hester* v. *Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974, held:

> "Title VII comes into play only when such practices result in discrimination. At that point, *the burden of producing evidence shifts* to the employer, who must offer satisfactory justification for his procedures." (Emphasis added.)

Accord: *United States* v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582, 586 (4th Cir. 1972), *cert. denied sub nom. Locals 268 & 1130 of the Brotherhood of Railroad Trainmen* v. *United States*, 411 U.S. 939 (1973), in which the Fourth Circuit stated that "the *burden* shifted to the C&O *to come forward with evidence* to show that it had never discriminated in hiring black brakemen," (emphasis added); *James* v. *Stockham Valves and Fittings Co.*, 394 F. Supp. 434, 492-493 (N.D. Ala. 1975). The court expressly held in one of its conclusions of law that the risk of nonpersuasion never shifts:

> "8. The defendant may overcome the prima facie case by producing credible, contradictory evidence, but is not required to produce a preponderance of such evidence. *The risk of nonpersuasion remains at all times on the plaintiffs.*" (Emphasis added; citation omitted.)

The court held that once the defendant carried its burden, the burden of going forward with evidence shifts back to the plaintiff, 394 F. Supp. at 493:

> "12. Once a defendant has adequately rebutted any inferences raised, the burden shifts back to a plaintiff to come forward with further specific evidence of the discriminatory impact of the challenged practices."

Accord: *Commonwealth of Pennsylvania* v. *Glickman*, 370 F. Supp. 724, 731 (W.D. Pa. 1974).

In civil cases this Court has struck down certain presumptions which do not give adequate opportunity for rebuttal. *Vlandis* v. *Kline*, 412 U.S. 441, 453 (1973), held that a permanent irrebuttable presumption of nonresidence contained in a Connecticut statute violated the Due Process Clause because it provided no opportunity for college students who applied for admission from out of state to demonstrate that they had become bona fide Connecticut residents. See also *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 644-645 (1974); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); Note, The Irrebuttable Presumption Doctrine In The Supreme Court, 87 Harv. L. Rev. 1534, 1544-45 (1974). *"And when the presumed fact itself determines whether* a benefit is awarded or a *burden is imposed, then the legal outcome itself depends upon proof of the basic fact."* 87 Harv. L. Rev. at 1545 (emphasis added). Under the Sixth Circuit's interpretation of *Keyes*, the presumed fact of racially segregated schooling (the "presumption that other segregated schooling within the system is not adventitious," *Keyes*, 413 U.S. at 208) itself determines whether the burden of proof is imposed on defending school authorities. The presumption "shifts to those authorities the burden of proving that other segregated schools within the system are not also

the result of intentionally segregative actions." *Keyes,* 413 U.S. at 208. Thus the legal outcome itself depends upon proof of the basic fact. See footnote 1, *supra.*

Whatever the outcome of the evolving irrebutable presumption doctrine, the lesson of those cases for the purpose of this case is that policy considerations of fundamental fairness require the courts to examine closely the practical effect of placement of the burden of proof. *Accord*: *Keyes,* 413 U.S. at 209. The result of that close examination in this case should be the holding that only the burden of going forward with evidence, and not the burden of persuasion, can ever shift to defending school authorities.

The effect of shifting the burden of persuasion to school desegration defendants would be that the presumption of the defendants' responsibility would be almost impossible to rebut? Why? As long as the contributing cause or motivating factor standard is the law (see pp. 22-23, *supra*), defendant school authorities would then have to carry not only the burden of going forward with evidence but also the burden of persuasion that all their myriad actions did not contribute to present segregated conditions, or were not in some infinitesimal part motivated by discriminatory purpose. *Keyes,* 413 U.S. at 211; *Arlington Heights, supra,* 429 U.S. at 265-266, 270. Since the motivations of public bodies are varied and legislative and administrative actions are multipurposed, *Arlington Heights, supra,* 429 U.S. at 265, the placement of the burden of persuasion upon school authority defendants makes that burden, in practical terms, an impossible one. This Court should clarify *Keyes* and hold that only the burden of going forward with evidence is shifted.

B. The Sixth Circuit Erred In Placing On Defendants-Petitioners The Burden Of Proof On Intent And On Incremental Segregative Effect.

The District Court in this case held that "There is a burden upon plaintiffs to establish by a preponderance of evidence *both a segregative intent and an incremental segregative effect in order to establish a violation* of the Equal Protection Clause of the Fourteenth Amendment." *Brinkman* v. *Gilligan,* 446 F. Supp. 1232, 1253 (S.D. Ohio 1977), quoted by the Sixth Circuit, 583 F.2d at 246 (emphasis added by the Sixth Circuit). The Sixth Circuit held that this was a "misunderstanding of the Supreme Court's mandate," 583 F.2d at 246 (footnote omitted). The Sixth Circuit was wrong. It was not a misunderstanding of this Court's mandate in *Dayton Board of Education* v. *Brinkman.* It was a correct statement of the law by the District Court.

The District Court correctly applied, and the Sixth Circuit erroneously ignored, this Court's holdings in *Washington* v. *Davis, Arlington Heights,* and *Hills* v. *Gautreaux, supra,* when it held that it is the plaintiff's burden to establish by a preponderance of the evidence a segregative intent. The District Court properly held that it was also plaintiff's burden to establish incremental segregative effect. 446 F. Supp. at 1253. The Sixth Circuit erred in holding that the burden shifting principles of *Keyes* applied to the incremental segregative effect analysis as well as to the segregative intent analysis. 583 F.2d at 258.

Washington v. *Davis, Arlington Heights,* and *Dayton Board of Education* v. *Brinkman, supra,* were decided after *Keyes.* These cases reaffirmed the principle that there can be no violation of the Equal Protection Clause of the

Fourteenth Amendment without proof of purposeful or intentional discrimination. *Keyes* itself recognized the indispensable element of purpose or intent to segregate, 413 U.S. at 208:

> "We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation to which we referred in Swann is *purpose* or *intent* to segregate." (Footnote omitted; emphasis in original.)

Washington v. *Davis* rejected "the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *soley* because it has a racially disproportionate impact." 426 U.S. at 239 (emphasis in original). Rather, the court held that a plaintiff must prove a purpose or intent to discriminate, 426 U.S. at 239-245. This Court held that this principle applied to school desegregation cases:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory *purpose*. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." 426 U.S. at 240 (emphasis added).

Washington v. *Davis* quoted the language from *Keyes* stating that the differentiating factor between unlawful de jure segregation and lawful de facto segregation is purpose or intent to segregate, 426 U.S. at 240. In discussing *Keyes*, the court stated that "the principal issue in litigation was whether and to what extent there had been *purposeful* discrimination resulting in a partially or wholly segregated school system." 426 U.S. at 243-244 (emphasis added).

The holding of *Washington* v. *Davis* was explained in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).[3] This was an action in which plaintiffs complained that denial of rezoning of land from single family to multiple family classification in order to build a racially integrated, low and moderate income housing project was racially discriminatory. This Court stated that *Washington* v. *Davis* "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact" *Arlington Heights*, *supra*, 429 U.S. at 264-265. *Arlington Heights* held: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. 429 U.S. at 265. *Arlington Heights* also recognized that plaintiff has the burden of proving the requisite intent, 429 U.S. at 270: "Respondents [plaintiffs] simply failed to carry *their burden* of proving that discriminatory purpose was a motivating factor in the Village's decision." (Emphasis added.) This proof of racially discriminatory intent or purpose can only be adduced by a plaintiff, and thus *Keyes* cannot be read to shift the burden of proof of intent onto defendants simply because of the difficulties of proof for plaintiffs.

This Court's subsequent decision in *Dayton Board of Education* v. *Brinkman* held that the District Court must "first determine whether there was any action in the conduct of the business of the school board *which was intended to, and did in fact, discriminate* against minority pupils, teachers, or staff. Washington v. Davis, supra." 433 U.S. at 420 (emphasis added). Hence this Court's opinion in

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[3] *School District of Omaha* v. *United States*, 433 U.S. 667, 668 (1977), said that this Court "restated and amplified the implications of this [*Washington* v. *Davis*] holding in *Arlington Heights* . . . ."

Dayton Board of Education v. *Brinkman* requires proof of both the purpose and the effect of a school board's action. The District Court in this case so held, *Brinkman* v. *Gilligan*, 446 F. Supp. at 1250.[4]

In applying these standards, the Sixth Circuit was guilty of the error against which Mr. Justice Powell cautioned in *Austin Independent School District* v. *United States*, 429 U.S. 990, 991 (1976), in that it "erred by readiness to impute to school officials a segregative intent far more pervasive than the evidence justified."

That this conclusion is so can be shown by a comparison of the *Keyes* description of de jure segregation with this Court's description of the evidence in this case, in *Dayton Board of Education* v. *Brinkman*. As previously stated, *Keyes* emphasized that the distinguishing factor between de jure segregation and de facto segregation is purpose or intent to segregate. 413 U.S. at 208. Put another way, *Keyes* defined a de jure segregation as "a current condition of *segregation resulting from intentional state action* directed specifically to the core city schools." 413 U.S. at 205-206 (emphasis added). However, this Court in *Dayton Board of Education* v. *Brinkman* found that Dayton is a case "where mandatory segregation by law of the races in the schools has long since ceased," 433 U.S. at 420.

That fact was simply ignored by the Sixth Circuit after this Court's remand. Instead, the Sixth Circuit refused to follow the incremental segregative effect analysis mandated by *Brinkman*, see pp. 14-21, *supra*, and held that the De-

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[4] The District Court there stated:

> "This is a critical distinction that must be recognized. Plaintiffs now bear a burden of demonstrating 'any action . . . which was intended to, and *did in fact*, discriminate . . .' *Dayton Board of Education* v. *Brinkman*, *supra*, 433 U.S. at page 420, 97 S.Ct. at page 2775, emphasis added."

fendants-Petitioners had the burden of proof on the incremental segregative effect issue. 583 F.2d at 257-258.

In its 1977 opinion in this case, this Court ordered the lower courts to analyze the facts in this case in light of its opinions in *Washington* v. *Davis* and *Arlington Heights, supra*:

> "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)." 433 U.S. at 419 (emphasis added).

The District Court in this case did so, *Brinkman* v. *Gilligan*, 446 F. Supp. 1232, 1235 (S.D. Ohio 1977), but the Sixth Circuit did not.[5]

The Sixth Circuit's insistence in applying the burden shifting principles of *Keyes* (583 F.2d at 247, 249, 251, 252, 255, and 258) without discussion of *Washington* v. *Davis* and *Arlington Heights* indicates that the Sixth Circuit did not apply the holdings of those cases with respect to a plaintiff's burden of showing the requisite intentional or purposeful discrimination.

Both *Washington* v. *Davis* and *Arlington Heights* post-

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[5] Indeed, the only point in the Sixth Circuit opinion in this case at which that court cited *Washington* v. *Davis* or *Arlington Heights* was at 583 F.2d at 249, in which those cases were cited for the proposition that although racial imbalance in student attendance patterns is not in itself a constitutional violation, such racial imbalance may have increased significance in the context of repeated intentional segregative acts.

date *Keyes*. Their holdings that plaintiffs must prove an intent to discriminate[6] are inconsistent with the Sixth Circuit's application of *Keyes* in the instant case. The effect of the Sixth Circuit holding in this case was to repeatedly shift to defendants the burden of proof on discriminatory intent. This was not contemplated by *Washington* v. *Davis* and *Arlington Heights*.[7]

The only way that this Court's opinions in *Washington* v. *Davis* and *Arlington Heights* can be read and applied consistently with *Keyes* is if (1) plaintiffs in desegregation cases are required to prove, without benefit of burden shifting principles, segregation with the requisite purpose or intent "in a meaningful portion of a school system," *Keyes*, 413 U.S. at 208; and only then (2) may the plaintiffs have the benefit of the burden shifting principles of *Keyes*, 413 U.S. at 208-211. In this case the Sixth Circuit erroneously ignored the "meaningful portion of a school system" element of *Keyes*, and simply held that the burden of proof shifted to defendants as to virtually every element of Plaintiffs-Respondents' case. 583 F.2d at 246, 249, 251, 252, 253, 255, 258.

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[6] See *Williams* v. *Anderson*, 562 F.2d 1081, 1086 (8th Cir. 1977), a civil rights action on behalf of black teachers in which the court stated: "These and other decisions establish that the plaintiffs must prove an intent to discriminate on the part of the defendants to prevail in a § 1983 action."

[7] As previously shown, *Arlington Heights* held that plaintiffs-respondents in that case failed to carry their burden of proof of discriminatory purpose, 429 U.S. at 270:

> "Respondents simply failed to carry *their burden of proving* that discriminatory purpose was a motivating factor in the Village's decision." (Emphasis added.)

The court held that "Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S. at 270 n.21.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with instructions to affirm the judgment of the District Court, which dismissed the action.

Respectfully submitted,

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