IN THE

Supreme Court of the United States

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

vs.

MARK BRINKMAN, et al.,
Respondents.

BRIEF OF SPECIAL SCHOOL DISTRICT NO. 1, MINNEAPOLIS, MINNESOTA, AMICUS CURIAE

Dated: February 21, 1979
FAEGRE & BENSON
1300 Northwestern Bank Bldg.
Minneapolis, Minnesota 55402
Telephone: 612/371-5300
Of Counsel

DUANE W. KROHNKE
Attorney for Special School District No. 1, Minneapolis Minnesota, Amicus Curiae
1300 Northwestern Bank Bldg.
Minneapolis, Minnesota 55402
Telephone: 612/371-5300

1979—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-2078

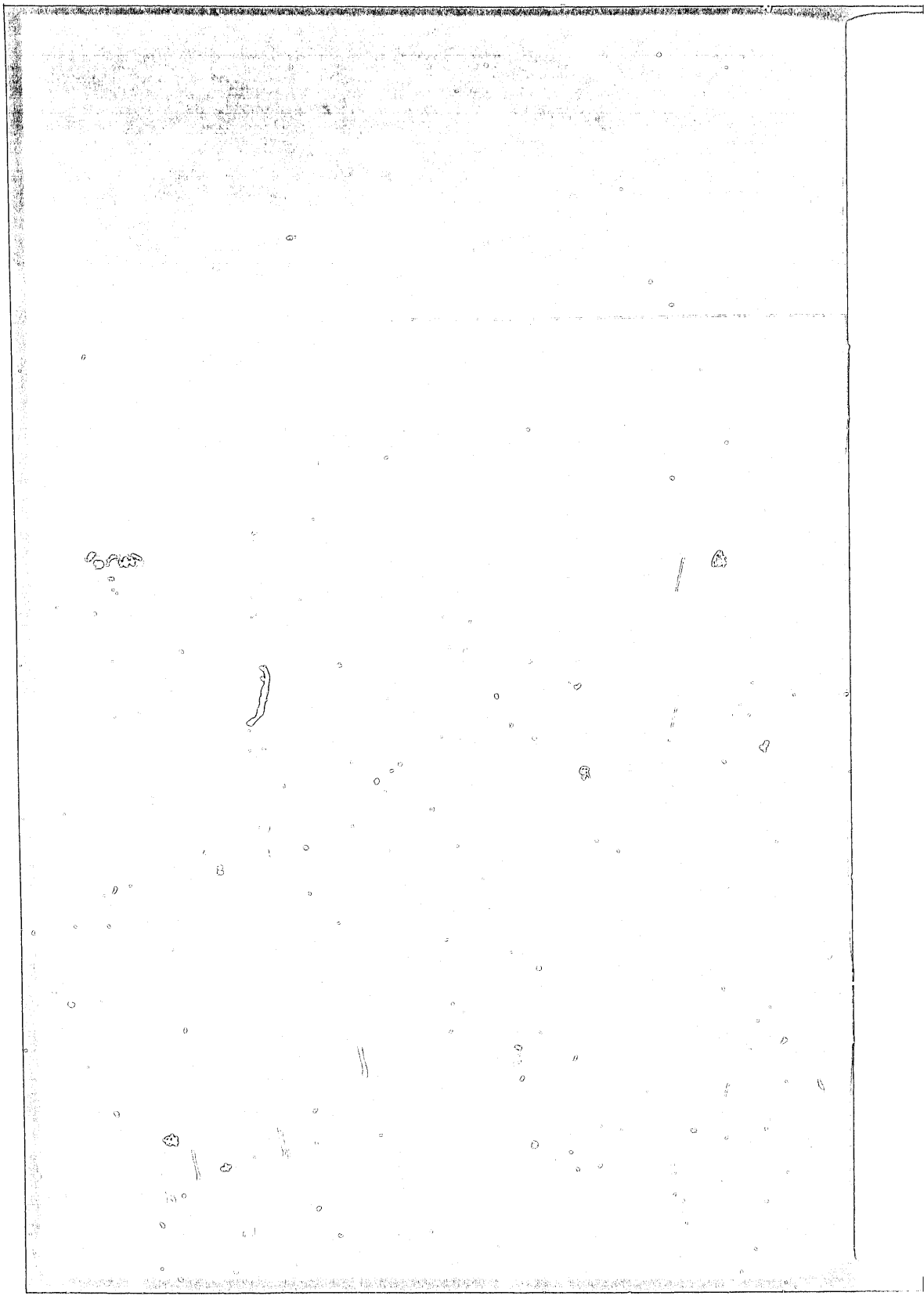

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

vs.

MARK BRINKMAN, et al.,
Respondents.

BRIEF OF SPECIAL SCHOOL DISTRICT NO. 1, MINNEAPOLIS, MINNESOTA, AMICUS CURIAE

INTEREST OF AMICUS

Special School District No. 1, Minneapolis, Minnesota ("the School District") is a political subdivision of the State of Minnesota charged with the responsibility of operating and governing the public schools in the City of Minneapolis. (Minn. Laws ch. 462 (1959).)

Since 1972, the School District, pursuant to federal court desegregation orders, has implemented a substantial

desegregation/integration plan resulting in a multitude of significant changes in the organization of its schools. As a result, the School District has eliminated any incremental segregative effects at the six schools for which there were specific findings of discriminatory acts in the assignment of pupils in the 1960's. In addition, as a result of the plan, there has been substantial, systemwide reduction of concentration or isolation of minority pupils.

Yet the federal court litigation continues.

Now pending in this Court is the School District's petition for certiorari to review the judgment of the Eighth Circuit Court of Appeals affirming the district court's denial of the School District's motion to dissolve or modify the desegregation decree. (*Booker* v. *Special School District No. 1,* 451 F.Supp. 659 (D. Minn.). *aff'd,* 585 F. 2d 347 (8th Cir. 1978), *pet. for cert. filed,* 47 U.S.L.W. 3348 (No. 78-781, Nov. 11, 1978).) Since, according to the Clerk of this Court, the School District's petition is being held until this Court has decided the *Columbus* and *Dayton* cases, the School District submits this brief, amicus curiae, to focus attention on transcending issues of national importance in the *Columbus, Dayton* and *Minneapolis* cases.

ARGUMENT

With the granting of certiorari in the *Columbus* and *Dayton* cases, this Court has once again returned to the task of amplifying "guidelines, however incomplete and imperfect, for the assistance of school authorities and courts" in implementing the basic principles of *Brown* v. *Board of Education,* 347 U.S. 483, 495 (1954), and *Brown* v. *Board of Education,* 349 U.S. 294, 300 (1955). (*E.g.,*

Swann v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 14 (1971).)

Now, as in the past, this Court's establishment of clear guidelines regarding the proper scope of federal judicial remedies for school districts' violations of the equal protection clause of the fourteenth amendment is of the utmost importance for all of the federal courts, for school districts and communities throughout the United States, and for school children and their parents.

In amplifying the guidelines, this Court needs to reaffirm the principle established in the first *Dayton* case that the federal judicial remedy must be limited to eliminating the "incremental segregative effect" of the constitutional violations. (*Dayton Bd. of Ed.* v. *Brinkman*, 433 U.S. 406, 420 (1977).) This principle, although first formulated in 1977, has its roots in, and is consistent with, this Court's prior school desegregation cases. (*E.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 16.)

Moreover, the "incremental segregative effect" principle is also consistent with, if not required by, this Court's rulings that proof of discriminatory or segregative intent or purpose is a necessary condition for proving violations of the equal protection clause;[1] that segregatory intent or motive is not a sufficient condition for the constitutional violation and that there must also be proof of causation, *i.e.*, proof that the act complained of would not have occurred in the absence of the impermissible purpose or motive;[2] that a city's having "both predominantly black

---

[1]*See, e.g., Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976); *Keyes* v. *Special School District No. 1*, 413 U.S. 189, 208 (1973).

[2]*Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. at 270 n.21; *Mt. Healthy City School Dist.* v. *Doyle*, 429 U.S. 274, 285-87 (1977).

and predominantly white schools . . . is not alone violative of the Equal Protection Clause;"[3] that school desegregation decrees must recognize the vital national tradition of local autonomy of school districts;[4] and that considerations which have led this Court to treat race as a constitutionally suspect classification are not entirely vitiated in a remedial context.[5]

But merely reaffirming the "incremental segregative effect" principle will not be sufficient, given the treatment of that principle by the lower courts in the *Columbus, Dayton* and *Minneapolis* cases. Further action is necessary in order to ensure that the lower federal courts follow this Court's decisions regarding judicial desegregation remedies.

First, this Court should establish the permissible methods of proving "incremental segregative effect" and the elimination of such effect.[6] Under the first *Dayton* decision, of course, the constitutional norm is what the racial distribu-

---

[3]*Washington* v. *Davis*, 426 U.S. at 240; *see also Dayton Bd. of Ed.* v. *Brinkman*, 433 U.S. at 413; *Austin Ind. School Dist.* v. *United States*, 429 U.S. 990, 992-95 (1976) (Powell, J., concurring); *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U.S. 424, 436 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 24.

[4]*Dayton Bd. of Ed.* v. *Brinkman*, 433 U.S. at 410; *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1977); *Hills* v. *Gautreaux*, 425 U.S. 284, 293-94 (1976); *Keyes* v. *Special School Dist. No. 1*, 413 U.S. at 240-53 (Powell, J., concurring); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 16, 30-31; *Brown II*, 349 U.S. at 300. The tradition of local autonomy of schools is more than that; it is rooted in the constitutional allocation of powers between the federal government, on the one hand, and state and local governments, on the other hand. (U.S. Const., 10th amend.)

[5]*Regents of Univ. of Calif.* v. *Bakke*, — U.S. —, 57 L.Ed.2d 750, 776 (Powell, J.), 815-16 (Brennan, J.) (1978); *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 172-74 (1977) (Brennan, J., concurring); *DeFunis* v. *Odegaard*, 416 U.S. 312, 337-43 (1974) (Douglas, J., dissenting).

[6]The Minneapolis case has such evidence. *(See* Petition for Certiorari, at 7-8, 13-14, *Special School Dist. No. 1* v. *Booker, No. 78-781* (Nov. 11, 1978).

tion of the school population *would have been* in the absence of the constitutional violation. (433 U.S. at 420.) Thus, evidence of a hypothetical condition or "alternative universe" is necessary. The key issue here is residential or housing patterns in the "alternative universe". If, as the district court in the *Minneapolis* case thought, the party seeking to prove the "alternative universe" must establish a causal link between the hypothetical school system and housing patterns and thus prove hypothetical residential patterns, then the "incremental segregative effect" principle is totally meaningless, for "no court in any school case will ever be able to say with any assurance 'where people would have lived, where schools would have been located [or] how much integration would have obtained' absent officially imposed discrimination." (*Booker* v. *Special School Dist. No. 1*, 451 F.Supp. at 659. *See* Petition for Certiorari, at 13-14, *Special School Dist. No. 1* v. *Booker*, No. 78-781 (Nov. 11, 1978); *Accord* Findings of Fact, Conclusions of Law, Decision and Order,at 10-11, 20, 24-25, *Armstrong* v. *O'Connell*, No. 65-C-173 (E.D. Wis. Feb. 8. 1979.) The net result of such an approach is a *sub rosa* obliteration of the distinction between *de facto* and *de jure* segregation. Instead, the School District respectfully suggests that for purposes of establishing "incremental segregative effects" and the elimination of such effects, housing or residential patterns in the "alternative universe" should be assumed to be the same as they were or are in the real world unless there is specific evidence that the school officials took actions which directly caused changes in housing patterns.[7]

[7]This Court also needs to state the obvious—that evidence regarding the "alternative universe" of necessity must make assumptions. Thus, it is improper for a court to reject evidence of "incremental segrega-

Second, this Court should make it clear that the "incremental segregative effect" principle applies to all cases "where mandatory segregation by law of the races in the schools has long since ceased." (433 U.S. at 406.) In other words, *Dayton* was not a "sport" limited to its facts or to cases where there are only limited violations similar to those in *Dayton*. This had been decided by this Court when it vacated systemwide remedy judgments in the *Omaha* and *Milwaukee* cases. (*School Dist. of Omaha* v. *United States*, 433 U.S. 667 (1977); *Brennan* v. *Armstrong*, 433 U.S. 672 (1977).)[8] Yet some lower courts, like the lower courts in the *Columbus* and *Minneapolis* cases, believe that *Dayton* and the "incremental segregative effect" principle are so limited. (*Booker* v. *Special School Dist. No. 1*, 451 F.Supp. at 661. *See* Petition for Certiorari, at 13, *Special School Dist. No. 1* v. *Booker*, No. 78-781 (Nov. 11, 1978); Petition for Certiorari at 18-20, *Columbus Bd. of Ed.* v. *Penick*, No. 78-610 (Oct. 11, 1978); *accord* Findings of Fact, Conclusions of Law, Decision and Order, at 6, *Armstrong* v. *O'Connell*, No. 65-C-173 (E.D. Wis. Feb. 8, 1979).)

Third, this Court needs to point out that certain language in earlier cases should not be read to mandate systemwide quota or racial balancing orders, such as were

---

tive effect" or its elimination on the grounds that it involved judgments as to why the discriminatory act occurred or as to what would have happened had the act not occurred. Yet that is what the district court did in the *Minneapolis* case. (*Booker* v. *Special School Dist. No. 1*, 451 F.Supp. at 662; Petition for Certiorari at 13-14, *Special School Dist. No. 1* v. *Booker*, No. 78-781 (Nov. 1978).)

[8]This Court should clarify the relationship between the presumptions discussed in the Denver case (*Keyes* v. *Special School Dist. No. 1*, *supra*, and the "incremental segregative effect" principle.

entered in the *Columbus* and *Minneapolis* cases,[9] which are not supported by the need to eliminate "incremental segregative effect" under *Dayton*. One such case is *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 422 U.S. at 25, where this Court under an unusual set of facts approved the use of a mathematical ratio for racial balance in the schools as a "first step" in formulating a remedy. Other cases needing reinterpretation in light of *Dayton* are *Green* v. *County School Board*, 391 U.S. 430, 438 (1968), where this Court said that the goal of the federal courts was to desegregate the entire school system "root and branch",[10] and *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971), where this Court stated that the goal of judicial remedies was to achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." The need for clarification of these earlier cases is demonstrated by the action of the district court in the *Minneapolis* case in basing its denial of the School District's dissolution motion on the ground that this Court had not overruled or qualified *Green* and *Davis*. (*Booker* v. *Special School Dist No. 1*, 451 F.Supp. at 664; *accord* Findings of Fact, Conclusions of Law, Decision and Order, at 14, *Armstrong* v. *O'Connell*, No. 65-C-173 (E.D. Wis. Feb. 8, 1979).)

---

[9]Petition for Certiorari, at 6, 9-10, *Special School Dist. No. 1* v. *Booker*, No. 78-781 (Nov. 11, 1978) (no school shall have more than 39% of one minority group or more than 46% of all minority groups); Petition for Certionari, at 26 n.10, *Columbus Bd. of Ed.* v. *Penick*, No. 78-610 (Oct. 11, 1978) (decree set limits on a school's black enrollment at plus-minus 15% of total district-wide black enrollment).

[10]As was pointed out in the concurring opinion in *Austin Independent School District* v. *United States*, 429 U.S. 990-95 (1976), the "root and branch" metaphor was used in a case involving a rural, sparsely populated school district, not a large urban school system.

Finally, this Court should clearly state that the "incremental segregative effect" principle applies to school districts already subject to federal court desegregation decrees as well as to school districts which are still litigating the liability question. Such a conclusion is consistent with, and required by, general equitable principles as well as by this Court's decision in *Pasadena City Board of Education* v. *Spangler, supra.*

CONCLUSION

Special School District No. 1, Minneapolis, Minnesota respectfully requests this Court to address the points discussed herein in its decisions in the *Columbus* and *Dayton* cases.

Dated: February 21, 1979.

Respectfully submitted,

Duane W. Krohnke
1300 Northwestern Bank Building
Minneapolis, Minnesota
Telephone: 612/371-5300
Attorney for Special School District No. 1, Minneapolis, Minnesota, Amicus Curiae

Of Counsel:
FAEGRE & BENSON
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402
Telephone: 612/371-5300