IN THE

Supreme Court of the United States

October Term, 1978

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.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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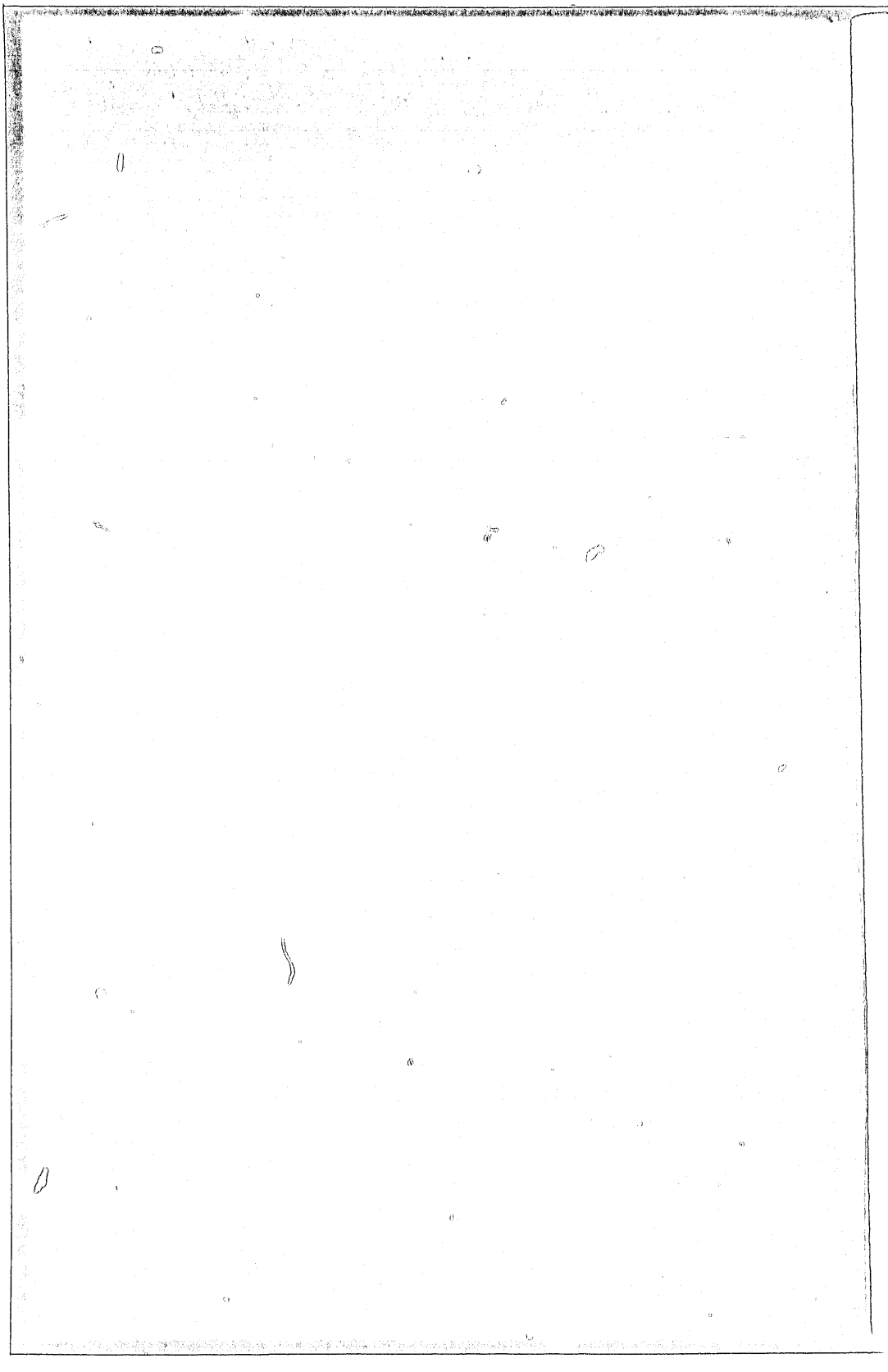

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This brief *amicus curiae* is submitted with the consent of the parties.

Statement of the Case

Both of these cases are before this Court, one of them for the second time (No. 78-627), after years of litigation. In each case, the Court of Appeals for the Sixth Circuit held that an urban public school district had had a systemwide policy of racial segregation prior to 1954, that it had not taken effective steps to undo the effects of that policy and that it had engaged in further acts of segregation during the period between 1954 and the initiation of the action. In each case, the Court of Appeals found that a systemwide policy of segregation was in effect when the suit was started and that it had a systemwide impact and held that a systemwide remedy was required. This Court granted the petitions for writ of certiorari, filed by the two school boards, challenging those conclusions.

Question to Which this Brief Is Addressed

This brief *amicus curiae* is addressed to the question whether the Court of Appeals, in arriving at its conclusion in each case that systemwide illegal segregation existed which had a systemwide impact which, in turn, required a systemwide remedy, applied principles that are sound, workable and consistent with the decisions of this Court.

In arguing that it did, we assume that the Court of Appeals properly evaluated the evidence in the record and we argue that it followed appropriate procedures in deducing its conclusions as to systemwide policy and impact from that evidence.

In further arguing that a systemwide remedy was appropriate, we express no opinion on the particular remedies ordered by the courts below.

Interest of the *Amicus*

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through preservation of the rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities in order to speed the day when all Americans may enjoy full equality without regard to race.

We submit this brief *amicus curiae* because we believe that it is essential to obtain prompt and effective implementation of this Court's decisions condemning racial segregation in public schools. Such implementation, already too long delayed, would be further delayed if not entirely frustrated if the contentions of the petitioners in these cases were upheld. Entirely unworkable and unrealistic restraints would be imposed on the process of judicial enforcement of the Constitution.

We regard judicial intervention in the operation of public schools as a thing to be avoided as far as possible. It cannot be avoided, however, when public school authorities engage in deliberate unconstitutional acts of segregation and, over a period of more than 20 years, not only fail to

take effective steps to undo the effects of their misconduct but engage in further unlawful acts. This Court said, in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971), that, in public school desegregation cases, "Judicial authority enters only when local authority defaults." There has been such a default in Columbus and Dayton. The power of the courts to take corrective action therefore now exists. They should not be hampered. In our opinion, they would be hampered by acceptance of the arguments offered by petitioners as a basis for reversing the decisions below.

Summary of Argument

I. The Court of Appeals correctly found that a systemwide policy of racial segregation was in effect in the Columbus and Dayton schools at the time these two suits were started.

A. The finding that segregation policies were in effect in 1954 rests on ample evidence and proper inferences from that evidence. The Court of Appeals drew reasonable conclusions as to the natural result of petitioners' intentionally illegal acts and properly concluded that the pre-1954 policy was systemwide.

B. The findings of systemwide illegal policies after 1954 were likewise proper. The inferences drawn by the Court of Appeals were consistent with the decisions of this Court and with common sense. It is unlikely that a school board would have a segregative intent as to only part of the schools it administers and it is reasonable, in view of

the evidence of post-1954 segregative acts, to put on the petitioners the burden of proving, from facts peculiarly within their knowledge, a neutral explanation of their acts.

II. The Court of Appeals properly found in each case that the systemwide policy of segregation had a systemwide impact, requiring a systemwide remedial order. This Court's decision in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977), does not require separate measuring of the effect of each act of illegal discrimination. Nor does it require the plaintiffs in a school desegregation action in which a systemwide policy of discrimination has been shown to exist to establish that every present manifestation of racial separation is due to the defendants' past illegal conduct. Such a requirement has never been applied by this Court in school segregation cases, North or South. Adoption of that requirement would make further progress toward implementation of this Court's decisions condemning such segregation virtually impossible.

Since the Court of Appeals properly found in each case both a systemwide policy of segregation and a systemwide impact of that policy, it properly ordered imposition of a systemwide remedy.

Argument

These cases deal with two school districts as to which there is a clear record of intentional acts of segregation over a substantial period, extending up to the time the two suits were started. That fact obviously requires rejection of the Columbus Board's emotional assertion that, if the approach of the court below is approved, "any urban

school system serving a community with racially imbalanced residential patterns may be presumed to be in violation of the equal protection clause and under a constitutional duty to achieve a strict racial balance in every school in the system'' (Petitioner's Brief in No. 78-610, p. 50). There is no reason to assume that every urban school district in the country has a history like that of Columbus and Dayton.

Accordingly, we do not address, and this Court need not consider, the question of the power and obligation, if any, of the courts to correct *de facto* segregation in the absence of proof of intentional unconstitutional conduct.

POINT I

The Court of Appeals correctly found in each case that a systemwide policy of segregation was in effect in the schools.

The Court of Appeals concluded in each case that the school district was being operated under a general policy of maintaining segregation up to the time that the case was initiated (583 F.2d, at 253, 814). This conclusion was based on clear evidence that such a policy was in effect prior to 1954, that there was never any clear break with that policy or effort to undo its effects and that there was evidence of official acts designed to maintain segregation subsequent to 1954. We submit that, on these facts, common sense required the conclusion of a systemwide policy of segregation reached by the Court of Appeals.

A. Pre-1954 Segregation

The Court of Appeals found in the Dayton case that, "at the time of *Brown I* [*Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954)], defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment" and that "defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system" (583 F.2d at 247, 252).[1] It made similar findings in the Columbus case (*Id.*, at 798-9).[2] It further found that neither district took the kind of corrective steps that the decisions of this Court require in such circumstances "to effectuate a transition to a racially non-discriminatory school system." *Brown* v. *Board of Education,* 349 U.S. 294, 301 (1955) (*Brown II*) (583 F.2d at 249, 800).

The obligation to take such steps exists whether the prior segregation was of the Southern type (by virtue of statute) or the Northern type (by virtue of official action without statutory authority). That was made clear when this Court imposed the same obligation in *Keyes* v. *School District,* 413 U.S. 189, 203 (1973).

Petitioners in No. 78-627 appear to deny that the evidence and findings of a policy of intentional segregation up to 1954 have any probative effect on the issue of whether such policies continued thereafter (Brief No. 78-627, pp. 16-17). That argument might have been valid if there had

1. Specifically, the court found, *inter alia,* that prior to 1954 the school board had a "purposely segregative" faculty assignment policy (583 F.2d, at 247-8), applied "racially motivated student assignment practices" (at 248), including optional transfers for white students in black schools (at 249), and excluded the black high school from the City Athletic Conference (at 249-50).

2. The findings included assignment of faculty on a racial basis and gerrymandering of attendance districts (583 F.2d, at 797-8).

been a break with the past—if the Board had moved effectively to undo the effects of the pre-1954 segregation. As noted above, the Court of Appeals found that it had not. Indeed, we find the petitioners in No. 78-627 still insisting that the Dayton schools were never segregated (Brief, p. 16), a posture they could hardly assume if they had engaged in the kind of corrective effort that the law requires. (Petitioners in No. 78-610 do not concede even *arguendo* that the Columbus school system was ever segregated. See pp. 63-4 of their Brief.)

Petitioners devote a great deal of space to criticizing the Court of Appeals for considering the "natural and foreseeable" results of their actions as proof of illegal "intent" (Petitioners' Brief in No. 78-627, pp. 20-26; in No. 78-610, pp. 81-90). They urge that the Court of Appeals drew an inference of such intent from the mere fact of racial imbalance or from such acts as locating a school in an area of racial concentration.

The Court of Appeals did no such thing.[3] Thus, the language quoted by petitioners in No. 78-627 follows a

3. Note, however, that the fact of racial imbalance is not irrelevant. In *Alexander* v. *Louisiana,* 405 U.S. 625 (1972), a case involving the criminal conviction of a black person, this Court found that proof of a low proportion of Negroes at every stage of the jury selection process, together with the fact that the race of each individual was stated on the forms used by the jury commissioners, was sufficient to shift to the state the burden of disproving discrimination, even though "there is no evidence that the commissioners consciously selected by race" (at 630). The Court said (at 631-2):

> Once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.

This decision and a number of others to the same effect were cited with approval in *Washington* v. *Davis,* 426 U.S. 229, 241 (1976).

recitation of evidence showing a number of clearly intentional acts of segregation (583 F.2d at 247-51). The Court of Appeals then properly concluded that "the natural, probable and foreseeable result of defendants' activities was the creation and perpetuation of a dual school system" (*id.* at 252). In view of the previous findings of intent, this is a far cry from using the foreseeable result concept "to determine segregative intent" (Petitioners' Brief in No. 78-627, p. 20).

In the Columbus case, petitioners go even further and say that the Court of Appeals drew its inference of segregative intent as to certain actions of school officials "solely" because a disproportionate impact may have been foreseeable (Petitioners' Brief in No. 78-610, pp. 87, 89). That was obviously not the case (573 F.2d, at 251-2).

We submit that the Court of Appeals had ample basis for its findings that a systemwide policy of intentional segregation was in effect in Columbus and Dayton when this Court handed down its decisions in the *Brown* case.

B. Post-1954 Segregation

The Court of Appeals further concluded, in each case, that a systemwide policy of segregation was in effect at the time that the suit was started (583 F.2d, at 253, 814). In each case, that finding rested not only on the evidence of such a policy before 1954 and an absence of subsequent corrective measures but also on a number of acts of deliberate segregation in the subsequent years.[4] Petitioners

4. As to Dayton, the Court of Appeals found, *inter alia*, a continuation of "racial assignment of faculty through the 1970-71 school year" (583 F.2d, at 253), assignment of students and faculty on the

(footnote continued on next page)

seek to minimize the significance of these incidents by characterizing the lower courts' conclusions regarding system-wide segregation as resting on "remote and isolated" violations (See, e.g. Petitioner's Brief in No. 78-610, pp. 48, 62).

The word "remote" presumably applies to the pre-1954 practices. It is established, however, that such practices do not lose their impact merely by the lapse of time, particularly when their effects have never been undone. As this Court said in *Green* v. *County School Board,* 391 U.S. 430, 438 (1968): "This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system." With respect to the "Northern" type of segregation, this Court said in *Keyes* (413 U.S., at 210-11):

> The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown.* 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."

The validity of petitioners' use of the word "isolated" can only be judged on each record as a whole. Since we do not regard this *amicus* brief as an appropriate place to

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basis of race when certain schools were closed (at 253-4) and the "use of optional attendance zones for racially discriminatory purposes" (at 255).

As to Columbus, the Court found a "segregative school construction and siting policy," a student assignment policy which produced a large majority of racially identifiable schools and a racially based faculty assignment policy (*id.* at 814).

argue factual issues, we limit ourselves to expressing the opinion that the evidence reviewed by the Court of Appeals in the two cases (583 F.2d at 253-7, 799-800) shows far more than mere isolated acts. In the *Keyes* case, this Court specifically rejected an effort to characterize similar evidence as showing only "isolated and individual" violations (413 U.S. at 208-9).

A large part of the petitioners' attack on the findings of the Court of Appeals consists of objections to its use of presumptions as a basis for shifting the burden of proof. In particular, they object to the fact that the Court of Appeals treated evidence of intentional segregation in parts of the school district as sufficient basis for drawing an inference that a systemwide policy of segregation could be presumed in the absence of evidence to the contrary (Petitioners' Brief in No. 78-610, pp. 62-67; in No. 78-627, pp. 13-20).

The procedure used by the Court of Appeals, we submit, was entirely consistent with this Court's decision in *Keyes*. After reviewing the general principles of law applicable to inferences and burdens of proof (413 U.S., at 207-8), this Court said (at 208):

> Applying these principles in the special context of school desegregation cases, 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.

Plainly, then, the presumptions challenged by the petitioners were not "created by the Sixth Circuit" (Petitioners' Brief in No. 78-627, p. 18). That court followed the paths laid down by this Court in *Keyes*.

Neither are these presumptions "artificial and erroneous" (*ibid*). They are consistent not only with the general principles of evidence reviewed in *Keyes* but also with common sense.

To begin with, it is inherently unlikely that a school board would have a policy of segregating part but not all of the district under its management. The Columbus and Dayton Boards did segregate certain schools both before and after 1954. We suggest that the segregatory intent evidenced by these activities could hardly have applied to some but not all of the schools in the district. Nothing in the 25 years of litigation since *Brown* suggests that school authorities commonly have such bifurcated policies. Although they may in some cases, the high likelihood that they do not is a logical first step in the adoption of a rebuttable presumption to that effect. It is based on the "probabilities of the situation." Clearly, "*Presuming and Pleading,*" 12 Stan. L. Rev. 5, 12-13 (1959).

Taking the next step toward such a presumption is justified by the fact that a systemwide policy of segregation would not ordinarily surface in all parts of a district. It would be invoked on a school-by-school and device-by-device basis, when and where needed to preserve segrega-

tion. In those parts of a district where segregation continued of its own momentum, no overt applications of a continuing policy would be needed. But the policy would still be general.

Third, some of the kinds of segregating devices which the Boards used here—gerrymandering of attendance districts, optional attendance zones, and site selection—do not automatically proclaim their illegal intent or nature. As Judge Jerome N. Frank said in *F. W. Woolworth Co.* v. *N.L.R.B.*, 121 F.2d 658, 660 (CA 2, 1941):

> Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, "Use me," like the cake, bearing the words "Eat me," which Alice found helpful in Wonderland.

Hence, each instance of possible segregatory action must be examined in detail, as the decisions below show. It must be expected that some will go unnoticed—or at least unproven.

Finally, and perhaps most important, the facts regarding each practice are peculiarly within the knowledge of the school officials and not readily accessible to the plaintiffs. This is the classic situation for the creation of a rebuttable presumption. McCormick, *Evidence* (Second Edition (Cleary), St. Paul, 1972), p. 787. Once the plaintiffs have succeeded in obtaining evidence of a number of instances of deliberately segregative acts, as they did here, it is not unreasonable to hold that those who claim that

these instances were "isolated" have the burden of showing that their conduct was otherwise proper.

We submit that the Court of Appeals properly found that the Columbus and Dayton school districts were racially segregated in 1954, that petitioners did not act effectively to integrate the schools thereafter and that both districts were being operated under a systemwide policy of segregation when these two suits were started.

POINT II

The Court of Appeals properly found in each case that the systemwide policy of segregation had a systemwide impact, requiring a systemwide remedial order.

The Court of Appeals found in each case that the systemwide policy of segregation in effect at the time the suit was started had had a systemwide impact. Thus, in the Dayton case, it declared that the remedy must reflect both the failure to disestablish the pre-1954 segregation and the "post-1954 acts of systemwide impact which have contributed affirmatively to the continuation of a segregated system" (583 F. 2d, at 257). In the Columbus case, it held that "each policy or practice cited had (and was intended to have) a systemwide application and impact" (583 F. 2d, at 814).

Petitioners argue that, under this Court's earlier decision in the Dayton proceeding, *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977) (*Dayton I*), the court below could not make a finding of systemwide segregation

or order a systemwide remedy without a showing, presumably by the plaintiffs, that, but for the illegal acts of segregation and the failure to correct them, there would have been no segregation at the time the suit was started. Thus, in the Columbus case, petitioners, after referring to various instances of segregative acts, assert that they must be disregarded because "there is no evidence in this record that *any* of these past instances have a current impact" (Brief, pp. 62-3; see also Petitioners' Brief in No. 78-627, pp. 16-18). This approach is obviously at odds with the plain holding by this Court in the *Keyes* case, *supra* (413 U.S., at 208), quoted above, that a finding of intentional segregation shifts to the school authorities the burden of "proving that other segregated schools within the system are not also the result of intentionally segregated actions." The term "result," in this context, is equivalent to "impact."

Having failed to meet the burden thus described, petitioners in effect ask this Court to treat its decision in *Dayton I* as having overruled this aspect of *Keyes*. We submit that *Dayton I* should not be so construed.

The key paragraph in the *Dayton I* decision reads as follows (433 U.S., at 420):

> The duty of both the District Court and of 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. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes,* 413 U.S., at 213.

It must be noted that this Court reached this conclusion at a point in the Dayton proceedings in which the Court of Appeals had made findings on only a limited number of acts of segregation, all subsequent to 1954. Pursuant to the language in the second sentence of this paragraph, further evidence was taken in the case and much more extensive findings were made by the Court of Appeals. Thus, this case can no longer be viewed as one "where mandatory segregation by law of the races in the schools has long since ceased." The supplemental record makes it clear that whatever segregation formerly existed has continued. The courts below have now found that intentional discrimination has continued up to the initiation of the suits.

Petitioners place heavy reliance on this Court's use in *Dayton I* of the word, "incremental," insisting that it requires an analysis of the effects of each separate act of segregation. We submit that "incremental" in this context means "cumulative" or "additive." It refers to the amount by which the acts of segregation, taken together,

added to the segregation that might otherwise have existed. The Court of Appeals was correct, we submit, in saying in the Columbus case (583 F. 2d, at 814) that:

> Each such practice or episode inevitably adds its own "increment" to the totality of the impact of segregation. 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.

This interpretation is borne out by the balance of the sentence in *Dayton I* in which "incremental" appears. It refers to the effect of the violations on the distribution "of the Dayton school population," not its effect on separate parts of that population.

Additional support for this interpretation can be found in the fact that petitioners' approach would be unworkable. We do not believe that this Court could have meant, as the petitioners in the Columbus case assert (Petitioners' Brief, p. 56), that the *Dayton I* decision "mandates a detailed factual inquiry into the current effect of specific acts of discrimination by school officials, thereby sorting out that portion of racial imbalance in schools proximately caused by school officials from the portion of racial imbalance attributable to housing patterns and the discriminatory acts of others." Are the courts to assess separately the effect of each intentionally segregative use of optional attendance areas, discontinuous attendance areas, site selection and

racial assignment of teachers—all of which constitute parts of a systemwide policy?

The *Dayton I* decision was issued on the basis of findings by the Court of Appeals of only a limited number of segregative acts, all subsequent to 1954, and this Court apparently proceeded on the assumption that whatever official segregation existed before 1954 had "long since ceased." In such a situation, in which the remedial order might well be limited to a few schools involved in isolated acts of segregation, an analysis of the specific impact of the acts in question might well be appropriate and feasible. But that is not the case here.

Neither can petitioners' interpretation of *Dayton I* be justified by the phrase, "when that distribution is compared to what it would have been in the absence of such constitutional violations." Certainly the kind of piecemeal analysis which petitioners believe that this language requires has never been conducted in the many cases in which this Court has required systemwide desegregation. Those cases, dealing primarily with states in which segregation was required by statute, establish that segregation must be eliminated "root and branch." *Green* case, *supra,* 391 U.S. at 437-8. The *Keyes* case establishes that the same rules apply to the "Northern" type of official segregation (413 U.S., at 210).

We do not believe that the cases require the lower courts to determine how much of the existing segregation can be attributed to deliberate illegal acts and how much to, for example, residential segregation—a factor much empha-

sized by petitioners (see, for example, Petitioners' Brief in No. 78-610, pp. 13-17, 63-4, 74-9). The existence of such segregation was noted by this Court in the *Swann* case and elicited this comment (402 U.S., at 26):

> In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

There is nothing here to support the view that the courts in segregation cases are required to measure the impact of a systemwide segregation policy, as distinguished from the impact of such factors as residential segregation, on each school.

To the extent that a single sentence in this Court's opinion in *Dayton I* suggests the contrary, we urge this Court to make it clear that that was not its intention. We believe that it would be unrealistic to require plaintiffs and courts in school segregation cases to reconstruct the past and to establish what would have happened if the public school authorities had not violated their constitutional obligations. It is our considered opinion, as an organization that has been close to the struggle for equality during the past decades, that such a requirement would bring progress toward undoing past segregation to a halt.

For the reasons given above, we believe that the Court of Appeals properly found that, in both Dayton and Columbus, there was a systemwide policy of segregation in the public schools, which had a systemwide impact. This Court's decision in *Dayton I* establishes that, on these findings, the Court of Appeals was required to order the formulation and application of a systemwide remedy (433 U.S., at 420).

Conclusion

It is respectfully submitted that this Court should hold that, in both No. 78-610 and No. 78-627, the Court of Appeals properly found that a systemwide policy of racial segregation was in effect in the public schools at the time the suit was started, that that policy had a systemwide im-

pact and that a systemwide remedial order was therefore appropriate and necessary.

Respectfully submitted,

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