IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

GARY L. PENICK, et al.

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

v.

MARK BRINKMAN, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AS *AMICI CURIAE*

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AS AMICI CURIAE

Interest of Amici*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established

*Letters of the parties consenting to the filing of this brief by amici have been filed with the Clerk.

under the laws of the State of New York. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. (The Legal Defense Fund is not part of the National Association for the Advancement of Colored People (NAACP) although it was founded by it and shares its commitment to equal rights. The Legal Defense Fund has had for over 20 years a separate board, program, staff, office and budget.) For many years attorneys associated with the Legal Defense Fund have represented black parents and school children in school desegregation litigation before this Court and numerous lower courts, see, e.g., Brown v. Board of Education, 347 U.S. 483; Green v. County School Board, 391 U.S. 430; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1; Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189. The Legal Defense Fund believes that its experience gained in prosecuting school desegregation actions and assisting in the desegregation process in school districts throughout the Nation may benefit the Court in deciding the instant cases.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) represents some 1,500,000 active workers, and their families, in the automobile, aerospace, agricultural implement and related industries. Including spouses and children, UAW represents more than 4-1/2 million persons throughout the United States and Canada. The UAW, since its founding days back in the mid-30's, has worked diligently against all forms of discrimination and racism and in favor of an ever more integrated society. UAW believes in school integration in all areas of the Nation and is deeply concerned lest the Court's decision in these cases turn back the clock on school desegregation in the North. UAW is dedicated to an industrial society in which black and white workers live in harmony in the mills and factories and believes that a society separated in the schools will never be a society integrated in the mills and factories.

ARGUMENT

Introduction

A quarter century after Brown v. Board of Education, 347 U.S. 483, these cases bring the Court and Nation to an important crossing in the

road to the elimination of racial segregation in public schools. We urge the Court to affirm the decisions of the Court of Appeals for the Sixth Circuit, which has followed this Court's decisions, and to resist the demands of petitioners for restrictive rules which will have the practical effect of preserving racial segregation in the schools by effectively precluding its elimination.

One major thrust of this Court's leading decisions implementing Brown has been an emphasis on practical remedial rules which actually result in the elimination of segregation. That is the major contribution of such decisions as Green v. County School Board, 391 U.S. 430, United States v. Montgomery County Board of Education, 395 U.S. 225, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, and Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189. Prior to Green and Swann the holding of Brown often existed as a right without a remedy. After Green and Swann many communities desegregated for the first time because of the new emphasis on the affirmative duty to desegregate by means such as those approved in Swann. Keyes applied these principles to a northern school district which had pervasive segregation caused by official policies

without the sanction of state statute. Although segregation in the Denver schools in Keyes was not total as it had been in Green and Swann, the Court held that substantial systemic discrimination would call for a systemwide desegregation decree. Keyes thus guided lower federal courts in determining when to hold a partially segregated northern school system to be equivalent to, and subject to the same remedies as, a classic dual system. The Sixth Circuit has faithfully applied the Keyes rules in these Ohio cases.

The Columbus and Dayton school boards ask the Court to make a fundamental turn away from the course it charted from Brown to Keyes. Indeed, they seek to reverse Keyes by building upon a passage in the Court's 1977 Dayton I opinion which actually cited Keyes:

> "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 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. (Dayton Board of Education v. Brinkman, 433 U.S. 406, 420.)

The petitioners would turn the "incremental segregative effect" language of Dayton I into a rule that would measure the rights of minorities with a "micrometer" - to borrow Judge Weinstein's apt word.[1/] If this Court interpreted the "incremental effect" requirement as a full-fledged retreat from Keyes it would turn its back on the problem of segregation by administrative practice and policies in those communities which never had statutory school segregation. Such a retreat from Keyes would cut off any hope of integrating the schools of many of our nation's communities and represent a tragic turning away from Brown. The Sixth Circuit read Dayton I in a way which harmon-

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1/ Judge Jack B. Weinstein's as yet unpublished speech at the Benjamin N. Cardozo School of Law criticized rulings which "measure compassion for minorities and the poor with a micrometer."

ized its language with Keyes, Swann and Green and rejected the call for a fundamental retreat in the effort to vindicate the right to a nondiscriminatory public education. We submit, in the argument which follows, that the Sixth Circuit was entirely correct in finding constitutional violations in both cases, and in concluding that the violations were sufficiently substantial in their effects as to demand systematic, and not piecemeal, remedies.

I. The Court Of Appeal's Findings of Constitutional Violations Are Consistent With This Court's Prior Decisions.

A. The Dayton and Columbus School Boards Maintained Intentionally Segregated Systems Prior To The Brown Decision And Failed To Take Affirmative Steps To Desegregate Prior To These Lawsuits.

Two unanimous panels of the Sixth Circuit found that the Columbus and Dayton school boards had engaged in intentional racial segregation in violation of the Equal Protection Clause of the Fourteenth Amendment. A common feature of the two cases, found by both panels, is that the school systems were discriminatory at the time of Brown and that steps to desegregate them had never been undertaken by the school authorities. The 1954

segregation was extensive, affecting at least 54 percent of Dayton's black pupils and 46 percent of Columbus' black elementary and junior high pupils, and the present segregation can be directly traced to that foundation. See infra.

Columbus.

In the Columbus case the panel (Judges Edwards, Lively and Merritt) held that the failure to desegregate the pre-1954 de jure system would have been a sufficient basis to affirm the district court's finding of present unconstitutional segregation even if there had been no other proof. (Of course there was extensive proof of recent segregative actions as well, as we shall discuss below.) District Judge Duncan's careful analysis of pre-Brown segregation (429 F. Supp. at 234-238) is briefly summarized by the Court of Appeals (583 F.2d at 796-799), which observed that Judge Duncan's finding that the Columbus system was dual and unlawful in 1954 were not seriously challenged in the briefs or oral argument on appeal. 583 F.2d at 798.[2/] Similarly in this

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2/ The "enclave of separate, black schools," i.e., Champion Junior High School and four elementary schools, Mount Vernon, Garfield, Felton and Pilgrim, was created, maintained and expanded from 1909 forward in east-central Columbus through the use of classic segregatory devices such as the assignment of faculty and staff on racially identifiable bases, gerrymandering of zones, and

Court the board devotes but two paragraphs of its over forty-page fact statement to the pre-1954 era, dismissing the segregatory practices as "reprehensible" but without current impact on the system. Petitioners' Brief, No. 78-610, p. 39. However, the Courts below demonstrated that the "reprehensible" discrimination was directly connected to current conditions. By the time of Brown the Board had created an enclave of five all-black schools which deliberately isolated a substantial portion of the black children in the system in all-black schools all with black principals and a heavy concentration of black teachers. Although segregation in Columbus schools was not total in 1954, the Court of Appeals found that intentional segregation did affect "a substantial portion of black students, as shown by the District Judge's findings and as supported by the record." 583 F.2d at 801. Approximately 46 percent of black elementary and junior high pupils

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2/ Cont'd.

the use of optional zones. See, Keyes v. School District No. 1, supra, 413 U.S. at 201-202; Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 20-21. The district court expressly noted that "[d]efendants do not appear to assert that these results were an accommodation to the neighborhood school concept." 429 F. Supp. at 236.

in the system attended these five de jure segregated schools.[3/] The courts below found that the 1975-76 pupil assignment figures demonstrate that the board had never carried out its continuing constitutional duty to desegregate the Columbus schools in two and a half decades. 583 F.2d at 800.

Dayton.

The panel in the Dayton case (Judges Phillips, Peck and Lively) reached a similar conclusion:

> Although we believe this finding to have been implicit in the previous decisions of this court, we now expressly hold that at the time of Brown I, defendants were intentionally operating a dual system in violation of the Equal Protection Clause of the fourteenth amendment. Our holding is based upon substantial evidence, much of which is undisputed. The finding of the district court to the contrary [footnote omitted] is clearly erroneous, Rule 52, Fed. R. Civ. P., and is based upon both a failure to attribute the proper legal significance to the evidence of pre-Brown I violations and upon various errors of law. 583 F.2d at 247.

3/ In 1954-55, systemwide enrollment was 55,354 pupils, including 32,642 elementary students, 12,647 junior high students and 8,348 high school students.

The District Judge acknowledged intentional segregation existed prior to Brown, but dismissed the case and granted no relief on the ground that "[a]cts of intentional segregation which ended in excess of twenty years ago are not constitutional violations in the absence of a showing of an incremental segregative effect thereof." Pet. for Certiorari, No. 76-627, p. 188a. In reversing this conclusion the Sixth Circuit noted that the Dayton Board had an overt policy of faculty segregation which forbade black teachers

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3/ Cont'd.

Pl. L. Ex. 61 at p. 28. Black enrollment was approximately 15 percent in this period. 429 F.Supp. at 268; 583 F.2d at 799. The approximate number of black students was 8,303 pupils systemwide, 4,896 elementary pupils and 1,897 junior high.

The 1954-55 enrollment at black Champion junior high was 739, and the enrollment at black Beatty Park (which replaced the Mount Vernon school), Felton, Garfield and Pilgrim elementary schools was 2,384. Pl. L. Ex. 61 at pp. 22-24.

Thus, 48.7 percent of black elementary students (2,384 of 4,896) in the Columbus school system attended the four black schools, and 39.0 percent (739 of 1,897) of black junior high students attended Champion. Overall, 46.0 percent of black elementary and junior high students (3,123 of 6,793) attended the five schools, and 37.6 percent of black pupils systemwide (3,123 of 8,303) attended the five schools.

from teaching white or mixed classrooms until at least 1951-52 and effectively continued the policy through the 1970-71 school year. 583 F.2d at 247-248. The court found the faculty segregation policy "inextricably tied to racially motivated student assignment practices." Ibid. For example, by staffing schools such as Dunbar High with all-black faculties who were forbidden to teach white pupils the board established a citywide all-black high school which operated so much apart from Dayton's white system that its athletic teams were forbidden to compete with other Dayton schools. This total separation was exactly in the classic pattern of dual systems in the Deep South. To be sure, some black pupils were permitted to attend other Dayton high schools which were predominantly white, but they were segregated and discriminated against within schools by practices such as "separate facilities, including separate swimming pools and locker room facilities . . . maintained at Roosevelt [school] for black and white students" until about 1950 (583 F.2d at 251), the total exclusion of black children from the swimming pool at Steele High School (A. 423-

424) and the segregation of black children in the back rows of classes they did attend with whites. (A. 90). The Court of Appeals noted that the "choice" of attending Dunbar was for many blacks "merely a less drastic alternative than attending other schools which practiced intra-school segregation and discrimination." 583 F.2d at 250.

The Court of Appeals described comparable manipulations which created all-black elementary schools, and concluded that "at the time of Brown I, approximately 54.3 percent of the black pupils in the Dayton school system were assigned to four schools that had all black faculties and student bodies."[4/] 583 F.2d at 251. The Court of Appeals said that "Garfield, Willard, Wogamon and Dunbar schools were deliberately segregated or racially imbalanced due to the actions of defendants" (583 F.2d at 251), that this discrimination was not "confined in one distinct area" (583 F.2d at 252),

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4/ The Court of Appeals found that beginning in 1912, the Dayton school board continuously maintained first all-black classes and then all-black schools on the West Side of Dayton through the use of "subterfuge[s] to segregate children," (Clemons v. Board of Education of Hillsboro, Ohio, 228 F.2d 853, 856 (6th Cir. 1956)) such as student transfer policies, assignment of faculty and staff on a racially identifiable basis, and the use of dual overlapping attendance zones. 583 F.2d at 249-251.

but rather that the "segregative practices at the time of Brown I infected the entire Dayton public school system" (Ibid.) by working to "maintain other schools in the district as predominantly white." (Ibid.) The Court found that the district not only failed to adopt an effective desegregation program after Brown, but that its actions "actually have exacerbated the racial separation existing at the time of Brown I." (583 F.2d at 253).

Columbus and Dayton

In light of the findings of the Court of Appeals that both systems were dual at the time of Brown and that there was no effort to dismantle these dual systems, the conclusions of constitutional violation are firmly based on Keyes. In Keyes, after first noting that segregation in Denver had not been statutory, the Court's opinion stated that "nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." 413 U.S. at 201. The Keyes opinion held that in the absence of a showing that racially inspired school board

actions were limited to "separate, identifiable and unrelated units," then "proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system." There is no plausible claim in either Dayton or Columbus that the pre-1954 discrimination was limited to "separate, identifiable and unrelated units." Rather, the Court of Appeals properly found that such discrimination was sufficiently integral and systematic to render them dual racial systems. And as the Court said in Keyes, "where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' Brown II, supra at 301." 413 U.S. at 203.

The main significance of 1954 is that the board's constitutional duty to desegregate stems from that time. The finding that the segregated situation which existed in 1954 still exists in the 1970's demonstrates that no effective desegregation plan, (Green v. County School Board, supra, 391 U.S. at 439-440) had been implemented in Dayton or Columbus. Of course if either system had become integrated in the years since 1954, then an inquiry about new constitutional violations would be required. But the

segregated schools of the 1970's trace directly to the pre-1954 segregation without any intervening era of desegregation. Indeed, there is no claim in either case that an effective desegregation plan has been implemented. Both boards defended on the ground that they were not operating dual systems in 1954. Having lost on this defense, and having failed to show that the systems were ever subsequently desegregated, Green and Swann require a judgement against the defendants.

As we shall discuss below, the post-1954 actions of the school authorities were not racially neutral. But even if defendants arguments of neutrality were valid, Swann teaches that "an assignment plan is not acceptable simply because it appears to be neutral." 402 U.S. at 28. Even if the Dayton and Columbus authorities' actions since Brown are assumed arguendo to have been neutral, the results obtained from their policies which concededly eschewed any affirmative desegrative action failed to "counteract the continuing effects of past school segregation." Swann, supra, 402 U.S. at 28. Accordingly, the Sixth Circuit was correct in finding systemwide constitutional violations, and systemwide efforts

to desegregate the systems are required by Swann and Keyes.

B. In Addi ion To The Failure To Take Affirmative Actions To Desegregate Dayton and Columbus Following Brown, The School Boards Maintained Racially Segregated Systems By Aggravating Discriminatory Acts.

Both Sixth Circuit panels rejected the school boards' arguments that their conduct since the Brown decision had been racially neutral, and instead found the existence of illicit intentionally segregatory actions and policies, with systemwide impacts.

Columbus.

In the Columbus case the Sixth Circuit panel endorsed the trial judge's extensive findings that the school authorities used their site selection and new school construction policies intentionally to segregate black children in the many schools constructed between 1950 and 1975. The panel held that "the District Judge was justified in relying in part on the history of the Columbus Board's site choices and construction program in finding deliberate and unconstitutional systemwide segregation." 583 F.2d 804.[5/] The segregation of

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5/ The district court described in detail the site location and establishment of attendance boundaries for Gladstone (1965) and Sixth Avenue (1961) elementary schools in the area southwest

faculty members in racially identifiable black and white schools was also maintained into the 1970's. 583 F.2d 804-805.[6/] A series of specific instances of gerrymandering, pupil attendance options, and discontiguous pupil assignment areas which operated to segregate black students were also set forth in both opinions below (583 F.2d

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5/ contd.
of the east-central black community, and for Cassady and Innes Road elementary schools in 1975 in the north Mifflin annexation area. 429 F. Supp. at 248-251. Other segregative construction occurred at all levels in and around the expanding black community between 1950 and 1975, viz., the Arlington Park area to the northeast, the mixed central city area, the Marion-Franklin Township area, another annexed area east of Marion-Franklin Township, the area north of the central black community and in the east-central area itself. See, Respondents' Brief, No. 68-610, pp. 50-76.

6/ The teacher assignment policy ended in 1974 only after independent administrative proceedings before the Ohio Civil Rights Commission resulted in reassignment of faculty to approximate the systemwide racial composition. 429 F.Supp. 238, 259-260. The administrative proceedings, however, did not concern discriminatory administrative staff assignment, which continued unabated. Thus, in 1975-76, 73.3 percent of black administrators were assigned to schools with 70-100 percent black student bodies. 429 F. Supp. at 240.

at 805-813).[7/] The Court of Appeals found these actions are "significant ... in indicating that the Columbus Board's 'neighborhood school concept' was not applied when application of the neighborhood concept would tend to promote integration rather than segregation." 583 F.2d at 805. The findings of manipulation of the neighborhood school concept for segregative purposes effectively destroys the board's claim to neutrality in its conduct since Brown.

7/ The court below described in detail the segregatory use of gerrymandering and optional attendance zones involving the Near-Bexley Option in a small white enclave east of Columbus' black east-central core area, and the Highland, West Mount and West Board Elementary Options. 429 F. Supp. at 243-247, 271-274. Other such options involved the Downtown area, Pilgrim elementary, Franklin-Roosevelt junior highs, Central-North high schools and East-Linden-McKinley high schools. See, Respondents' Brief, No. 78-610, pp. 45-58.

The courts below also detailed the segregatory use of discontiguous pupil assignment zones involving Moler-Alum Crest elementary schools, and Heimandale-Fornof elementary schools. 429 F. Supp. at 247-248, 275. Other discontiguous zoning involved the Near-Bexley options, Arlington Park-Eleventh Avenue-Leonard elementary schools, Arlington Park-Linmoor junior highs, Arlington Park-Medina junior highs and, Pinecrest-Jones Road-Barnett elementary schools. See, Respondents' Brief, No. 78-610, pp. 50-68.

Judge Edwards' opinion dutifully analyzed the finding of violation in Columbus in accordance with the Dayton I requirement that the incremental segregative effect of such violations be considered. 583 F.2d at 814. Judge Edwards described five aspects of the violation (including the pre-1954 conduct discussed above) as necessarily systemwide in their impact:

(1) The pre-1954 establishment of "five schools intentionally designed for black students and known as 'black' schools" had a systemwide effect;

(2) The post-1954 failure to desegregate the system had systemwide impact;

(3) The school construction and siting policy was systemwide in its impact;

(4) The student assignment policy which produced the large majority of one-race schools was held to be systemwide;

(5) The segregated faculty assignment policy affected both black and white students systemwide and racially identified the schools.

The panel concluded with its own holding that 6,600 pages of the record supported a finding tracking the language of Dayton I that the policies and practices of segregation had systemwide application and impact. 583 F.2d at 814.

The district court expressly held that "[t]he evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior, and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state boards." 429 F. Supp. at 266. This finding applied to 1975-76 statistics, means that 65.5 percent of the black pupils in the Columbus public school district were "substantially and directly affected" by de jure segregation.[8/]

Dayton.

Similarly, Judge Phillips, writing for the panel in the Dayton cases, thoroughly reviewed the record of school authorities' conduct since Brown and concluded that there were substantial post-Brown violations. 583 F.2d at 253-257. The court found discrimination in faculty assignments. Pre-Brown racial faculty assignment policies were

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8/ 65.6 percent of black students attended schools with 50 percent or greater pupil enrollment. See Pl. Ex. 392. At the elementary level 74.5 percent of black students were attending predominantly black schools, 56.8 percent at the junior high level and 53.6 percent at the high school level.

maintained through 1969 and effectively continued in practice through 1970-1971. 583 F.2d at 253, 503 F.2d at 697-700. The board was still opening new all-black schools with all-black faculties in the 1960's, e.g., McFarlane and the new Dunbar. 583 F.2d at 253-254. The court rejected the contention that the racial imbalance was adventitious, pointing out that optional attendance zones were used in the 1970's for racially segregative purposes. 583 F.2d at 255.[9/] The court also made findings that school construction and site selection decisions as well as grade structure and reorganization decisions had contributed affirmatively to the continuation of the segregated system set up prior to 1954. 583 F.2d at 256-257. The policy of replacing inner city schools with sometimes irregularly sized schools in the same attendance zones and building new schools at the peripheries of the expanding Dayton community far from inner city areas resulted in 22

9/ See, e.g., optional attendance zones involving Dunbar, Patterson Coop, Colonel White-Kiser, Roosevelt-Fairview and White, Residence Park-Adams, Westwood-Gardendale, Jefferson-Brown and Jefferson-Cornell Heights. 503 F.2d at 695-696, Respondents' Brief No. 78-627, pp. 44-51.

of 24 new schools and 78 of 86 additions that were 90 percent or more black or white. 583 F.2d at 255. The school board's reorganization of 20 elementary schools into a middle school system in 1971-72, as the Ohio State Department of Education put it, added "one more action to a long list of state imposed activities which are offensive to the Constitution and which are degrading to school children." 583 F.2d at 256, 503 F.2d at 702.[10/]

Finally, the panel considered the incremental segregative effect of what it called the "defendants' most egregious practices." 583 F.2d at 258. Like the panel in the Columbus case, it found that pre-Brown segregation "'affect[ed] a substantial portion of the schools, teachers and facilities' of the Dayton schools and, thus clearly had systemwide impact." 583 F.2d at 258. The court also said that post-Brown acts "perpetuated and increased public school segregation in

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10/ Although the Court of Appeals did not find it necessary to rely on such proof in its last opinion, the Dayton school board also pursued segregative transfer and transportation policies. 503 F.2d at 703; Respondents' Brief, No. 78-627, pp. 53-59.

Dayton." 583 F.2d at 258.[11/]

These solid findings of post-Brown discrimination reinforce the conclusion that the Dayton and Columbus boards have not only failed to fulfill their obligations to dismantle the dual systems they created prior to Brown, but affirmatively contributed to the segregation extant today. The depth and detail of the findings is impressive. The conclusions of segregative intent are based upon objective facts in the records and should be affirmed.

II. The Sixth Circuit Has Properly Applied the Equitable Principle That A Remedy Must Be Reasonably Related To The Violation

A. The Dayton I Requirement Of Findings Of Incremental Segregative Effect Should Either Be Interpreted In Harmony With Keyes, As The Sixth Circuit Read It, Or It Should Be Overruled.

11/ In 1971-72, the year the action was filed, the Dayton school district had 54,000 students, 42.7 percent of whom were black. There were 69 schools; 49 had student enrollments 90 percent or more of one race (21 black, 28 white), 75.9 percent of black students being assigned to the 21 black schools. 503 F.2d at 694-695, 583 F.2d at 254.

Both panels of the Sixth Circuit read this Court's Dayton I opinion as reaffirming the Keyes holding that where segregation policies had a systemwide impact systemwide relief is required. Both courts deemed that it was compliance with Dayton I to determine that the identified segregative policies of the two school board were not isolated or limited to insubstantial fragments of the systems, but were instead systemwide in their application. Both panels acknowledge the Dayton I language which called for findings about the "incremental segregative effect" of the violations and a comparison of the present racial distribution of the pupils with "what it would have been in the absence of such constitutional violations." (583 F.2d at 257; 583 F.2d at 813). However, neither opinion deemed it necessary to embark on a highly supposititious and hypothetical reconstruction of where the pupils might be if the pervasive segregation policies had never been implemented. Where segregation is isolated, as for example by a recent gerrymander that affects a few schools and pupils, one might reasonably attempt such a reconstruction, and reach a conclusion to limit the remedy to a few schools. But where, as in these cases, so many aspects of the segregation

policy were of long standing and were systemwide in their effects there can be no meaningful reconstruction of what might have occurred. This Court could not have intended to so burden the process of desegregation.

Dunbar High School in Dayton illustrates the difficulty with such a reading of Dayton I. As we have described above, Dunbar was established as a citywide high school for blacks, with an all-black faculty, and a policy forbiding blacks to teach whites. It was named for a well-known black poet. Blacks were either automatically assigned to Dunbar or induced to attend by other means including the discouraging effects of segregative and discriminatory treatment in the white schools. Whites were excluded from Dunbar by the overt faculty policy. It is difficult to imagine how the attendance pattern of all of Dayton's high schools might have developed if Dunbar had never been established and maintained as the citywide school for blacks only, or if it had ever been desegregated after being established as a one-race school. No witness could testify with any certainty whether black citizens would have located their homes near other high schools if their

children had been welcomed there or that whites would have lived near Dunbar if it had been an integrated school from the beginning. Segregated schools were an integral part of the ghettoization of blacks. Who can know to what extent the ghettos of Dayton and Columbus would be different, if the schools had been operated on a non-discriminatory basis, and had taught a lesson of non-discrimination and equality instead of a lesson of white supremacy.

If the Dayton I holding does limit the right to a desegregated education to schools which plaintiffs can prove would have been integrated absent specific discriminatory conduct, it would resurrect the school-by-school fractionating of these cases which the majority rejected in Keyes, over dissents by Mr. Justice Powell and Mr. Justice Rehnquist. In granting a stay in Columbus, Mr. Justice Rhenquist indicated a view that the Sixth Circuit was misinterpreting the Court's Dayton I mandate. Columbus Board of Education v. Penick, 58 L Ed 2d 55 (Justice Rehnquist in chambers). If that view is correct (and we urge above that it is not) then we believe that the Dayton I requirement should be overruled. If plaintiffs have the burden of proving a basis for

desegregation school-by-school, or of calculating the precise numbers of pupils affected by each segregationist act, the Dayton I rule will impose a practical barrier to any meaningful relief even if the case of egregious overt segregation such as at Dunbar High.

We ask the Court to adhere to the express holding of Keyes that plaintiffs in a school desegregation case should not "bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system," and that "a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities" was a proper predicate for finding that a system was a dual system. 413 U.S. at 200-201. This was the Court's "common sense" conclusion considering the reciprocal effect that a policy of keeping some schools black has in keeping other schools white, and the effect that earmarking certain schools as black would have on the racial composition of the neighborhoods in the metropolitan area. 413 U.S. 202-203. This holding of Keyes seemed to have been clear at the time to the members of the Court who dissented. The dissenting opinion of Mr.Justice Powell objected to a systemwide remedy in part because although

the school board was "legally responsible for some of the segregation that exists," he believed that if they had properly discharged their "constitutional duty ... over the past decades, the fundamental problem of residential segregation would persist." 413 U.S. at 249. Mr. Justice Rehnquist dissented, objecting to the application of the Green decision's affirmative desegregative duties to Denver, and relief that might require that "pupils be transported great distances throughout the district to and from schools whose attendance zones have not been gerrymandered." 423 U.S. at 257. The majority rejected this argument with a reaffirmation of Green. Keyes, supra, 413 U.S. at 200-201, note 11.

It is this central holding of Keyes that petitioners seek to reverse through their reading of Dayton I. We believe, however, that the Keyes holding about the interrelationship between segregative practices among schools within a system is as valid today as when Keyes was decided six years ago. The contrary rule that plaintiffs in a school desegregation case should have the burden of school-by-school justification of a desegregation remedy is as invalid today as when rejected in Keyes.

Where the school district has been shown to have engaged in a segregation policy which has had substantial impact, the same "[c]onsiderations of 'fairness' and 'policy'" (Keyes, supra, 413 U.S. at 214) which led to the Keyes holding as to the allocation of the burden of proof still apply. Nothing has changed since 1973 which requires this Court to adopt new procedures and remedies for the disestablishment of northern public school segregation. The lesson of over two decades of school desegegation jurisprudence is that the substantive right to equal educational opportunity is governed by the law of procedure and remedy. We therefore respectfully submit that these cases present the Court with no less an issue than the future of school desegregation in the North: "[t]o take away all remedy for the enforcement of a right is to take away the right itself." Poindexter v. Greenhow, 114 U.S. 270, 303.

We urge the Court to affirm the rule of Green and Swann that any school district which has violated the constitutional rights of its black students must undertake the maximum feasible amount of desegregation. Their duty is to "make every effort to achieve the greatest possible

degree of actual desegregation, taking into account the practicalities of the situation" and considering the use of "all available techniques including the restructuring of attendance zones and both contiguous and noncontiguous attendance zones." Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37; see Swann, supra, 402 U.S. at 22-31. That rule would be entirely crushed and thwarted in most of the Nation by a doctrine which considers the process of desegregation as a necessary evil to be applied grudgingly and sparingly as if with a "micrometer" -- to repeat Judge Weinstein's characterization.

B. These Cases Will Determine The Future Of School Desegregation In The North.

In a February 1979 survey the United States Commission on Civil Rights found "that the adjustment of parents and students to desegregation continues and the predictions of serious racial conflict and a deteriorating quality of education have proved groundless."12/ The Commission found that school desegregation" not only continues to

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12/ U. S. Comm. on Civil Rights, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT, ii (Feb. 1979).

be a constitutional requirement but a vital national goal that we believe is broadly supported by the American people." Id. at iii. The Commission found that integration was a success in many communities, including notably Charlotte-Mecklenburg, North Carolina, and Denver, Colorado, the communities involved in Swann and Keyes. Id. at 34-35, 40-41, 72. This Court's leadership has had a salutary effect in many communities. Without such continued leadership, however, the future of integration in the North would be bleak. The Commission also found that in some districts and regions--notably the Northeast and North Central regions--segregation remains at discouragingly high levels. Id. at ii, 20.

The specter of endless segregation of the races in the public schools of the North haunts these cases. The adoption of petitioners' position would remove the light of hope for an integrated society at the end of the tunnel, and with it the essential trust and confidence between the races on which our national stability and progress depend.

This Court might have chosen one or more direct routes to desegregation of the public schools of the North rather than the labyrinthic "de jure" inquiry. The Court might have found

state-induced and supported housing segregation patterns sufficient ground for invalidating and remedying the concomitant school segregation.[13] Or the Court might have held that school authorities must advance a truly compelling interest before perpetuating by student assignment the racial isolation of our urban residential patterns.[14] Finally, this Court under the broad protective provisions of the Thirteenth and Fourteenth Amendments might have invalidated and provided remedies for de facto school segregation.[15]

These are routes which would promise nationwide school desegregation rather than a continuing double standard between North and South predicated on past de jure conduct. But this Court has instead relied in Keyes upon the narrower route for Northern school desegregation through findings of school board discriminatory intent and presumptions based thereon. Now petitioners would render

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13/ Cf., Milliken v. Bradley, 418 U.S. 717, 755 (1974) (Stewart, J. concurring).

14/ Silard, Toward Nationwide School Desegregation: A "Compelling State Interest" Test of Racial Concentration in Public Education, 51 N. Car. L. Rev. 675 (1973) (passim).

15/ Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 N.Y.U.L. Rev. 285 (1965).

Keyes meaningless and unworkable and thus make permanent the pattern of segregated public schools in the North. Those who have devoted their lives to laboring in the vineyards for an integrated society believe they have earned the right to speak plainly: If this Court were to accept petitioners' position, segregated schools (and as a consequence a more segregated society) will be the legacy of the Court, just as surely as a segregated society was the legacy of the Court that decided the Civil Rights Cases, 109 U.S. 3 and Plessy v. Ferguson, 163 U.S. 537.

CONCLUSION

It is respectfully submitted that the judgments of the United States Court of Appeals for the Sixth Circuit in these cases should be affirmed.

Respectfully submitted,

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