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.*,
Respondents.

No. 78-627

DAYTON BOARD OF EDUCATION *et al.*,
Petitioners,
v.
MARK BRINKMAN *et al.*,
Respondents.

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

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS AMICI CURIAE

STEPHEN J. POLLAK
RICHARD M. SHARP
WENDY S. WHITE
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

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INTEREST OF AMICI[1]

1. *The National Education Association* (NEA) is an independent, voluntary organization of educators, open to any person who is actively engaged in the profession of teaching or other educational work, or any person interested in advancing the cause of education. NEA presently is the largest professional organization in the nation. Pursuant to the terms of its charter, 34 Stat. 805 (1906), NEA's purpose is "to elevate the character and advance the interests of the profession of teaching, and to promote the cause of education in the United States."

A major interest and objective of NEA is to secure equality of education and sound education for children of all races. It is convinced that segregated education is not only inherently unequal, but adversely affects the quality of education afforded to all students, not least by denying them adequate preparation for living and working in a society in which they must deal with persons not of their own race. Accordingly, NEA is committed to the goal of full and effective desegregation of all school systems in the country.

Reflecting these concerns, NEA has adopted a resolution providing in part:

> "The National Education Association believes it is imperative that full integration of the nation's schools be effected.
>
> "The Association recognizes that acceptable integration plans will include affirmative action programs and a variety of devices such as geographic realignment, pairing of schools, grade pairing, satellite and magnet schools. Some arrangements may require bussing of students in order to comply with estab-

[1] The parties have consented to the filing of this brief and their letters of consent have been tendered to the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

lished guidelines adhering to the letter and spirit of the law." *1978-79 NEA Handbook for Local, State, and National Associations*, p. 236.

In addition, NEA has participated as an amicus in numerous cases in this Court involving issues of school desegregation.[2]

2. *The League of Women Voters of the United States* (LWVUS) is a non-partisan, tax-exempt, non-profit membership corporation organized under the laws of the District of Columbia, with a current membership of 131,000 in 1,350 state and local Leagues in each state, the District of Columbia, Puerto Rico, and the Virgin Islands. Since its inception in 1920, the LWVUS' purpose has been to promote political responsibility through informed and active participation of citizens in government. In pursuance of its purpose, the LWVUS has articulated several guiding principles: the LWVUS believes, among other things, that no person or group should suffer legal, economic or administrative discrimination, and that responsible government should be responsive to the will of the people.

Under LWVUS' national position in support of equal access to education, the League has a long-standing commitment to school desegregation. At the national level, it has supported federal efforts designed to assist in the implementation of school desegregation plans, and it has opposed actions that would restrict the courts' and agencies' authority to fashion remedies. At the local level, Leagues have worked to promote peaceful school desegre-

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[2] See, *e.g.*, *Pasadena City Board of Education et al.* v. *Spangler*, 427 U.S. 424 (1976); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S 189 (1973); *Richmond School Board* v. *State Board of Education*, 412 U.S. 92 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

gation in a variety of ways including serving on advisory committees; working with local government, the media and parents; promoting human relations activities; and supporting amicus briefs, among others.

League efforts have focused not only on promoting voluntary integration efforts but also on helping to implement court-ordered plans where they become the means of effecting school desegregation.

The present cases raise important questions concerning the extent to which school officials must remedy school segregation to which both they and other public officials have contributed. In light of amici's commitment to the goal of desegregation, they are vitally interested in the determination of these questions. In addition, amici believe they can be of service by bringing to the attention of the Court common law tort principles bearing on the issues at bar.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), this Court said that in fashioning a remedy for possible constitutional violations by the Dayton Board, the district court

> "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." *Id.* at 420.

The applicability and meaning of this directive is the subject of sharp disagreement among the lower courts and the parties here.

In *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973), this Court recognized that proof of an intentionally segregative policy affecting a substantial portion of the school district will support a finding by the trial court of the existence of a dual system, absent a showing that the district is divided into clearly unrelated units. 413 U.S. 189, 201-203. The Court said that

> "In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subject of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, 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. Of course, 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.

In *Dayton I*, this Court, reaffirming the conclusion of *Keyes*, said that if there is a "systemwide impact" there may be a "systemwide remedy." 433 U.S. 406, 420.

In our view, plaintiffs in each case at bar have demonstrated that the school board had indeed pursued an intentionally segregative policy in a substantial portion of the school district, and that a systemwide remedy was appropriate. In light of the plaintiffs' extensive and persuasive arguments we do not propose to repeat those contentions here. Our brief concentrates on the prin-

ciples which we believe should guide this Court's decision if it were to conclude in either case, as it concluded in *Dayton I*, that the school board's violations were not systemwide.

In *Dayton I*, this Court said that the limited findings before it indicated only three possible and "relatively isolated" instances of unconstitutional action. With respect to the remedy, the Court assumed that it was possible to determine "how much incremental segregative effect these violations had on the [current] racial distribution of the Dayton school population. . . ." 433 U.S. 406, 420.

We question the validity of that assumption. Even though violations are "isolated," they are likely to affect significantly the racial composition of residential areas, which in turn results in additional school segregation. Where violations have had such a reciprocal effect, it may well be impossible to quantify the percentage of the total amount of segregation attributable to the school board as compared with other sources. Equally forbidding is the prospect of trying to count the number of children now attending segregated schools because of (a) the board's unconstitutional acts; (b) the acts of other persons or entities that were prompted by the board's violations; and (c) the acts of persons or entities that were independent of the board's violations. Thus, we urge that the "incremental segregative effect" concept should be abandoned in cases involving "isolated" violations because it will generally be impossible for a trial court to determine the "incremental segregative effect" of such violations.

Should this view be rejected, then we urge the Court to conclude that common law tort principles should be applied by the lower courts in determining, on a case-by-case basis, whether it is feasible to apportion responsibility for the current school segregation between the board and other causes of segregation. *Dayton I* surely

did not rule that the incremental segregative effect of a board's violations must be separated from all other school segregation when it is impossible to do so on a rational basis. In determining the feasibility of apportioning segregation among its causes, common law tort principles provide helpful guides. Since school desegregation cases usually arise under Section 1983 of Title 42,[3] application of tort principles is particularly appropriate. That section, as this Court recently observed, is "intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." [4]

At common law, the burden is on the defendant tortfeasor either to demonstrate a fair and reasonable basis for apportioning liability between himself and others or to make the plaintiff whole. See pp. 10-13, *infra*. Moreover, a tortfeasor is held liable for all foreseeable consequences of his conduct. The tortfeasor cannot escape liability on the ground that an intervening force has combined with and superseded or attenuated the effects of his tortious conduct if the intervening force was foreseeable. The same principles should prevent a school board from escaping liability for current segregation on the ground that residential segregation is an attenuating or superseding cause, if increased residential segregation was a foreseeable risk of the intentional segregative acts of school officials. See pp. 13-16, *infra*.

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[3] See *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189 (1973). See also cases cited in *Monell* v. *Department of Social Services*, 436 U.S. 658, 663 n. 5 (1978).

[4] *Carey* v. *Piphus*, 435 U.S. 247, 253 (1978), relying on *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976); *Mitchum* v. *Foster*, 407 U.S. 225, 238-242 (1972); *Monroe* v. *Pape*, 365 U.S. 167, 182 (1961); *id.* at 225-234 (Frankfurter, J., dissenting in part).

In apportioning responsibility for current school segregation, courts will also be confronted with the problem of what to do about the school segregation caused by public officials other than school authorities. In the cases at bar, both district courts found that public housing authorities and other state agencies have produced part of the residential segregation that now contributes to school segregation in Dayton and Columbus.[5] Such school segregation is state-imposed within the meaning of the Fourteenth Amendment and should be remedied by school authorities because they have jurisdiction to do so and have themselves wrongfully contributed to the unconstitutional condition. See pp. 16-18, *infra*.

ARGUMENT

I. WHERE SCHOOL SEGREGATION RESULTS FROM MULTIPLE CAUSES, INCLUDING PURPOSEFUL SEGREGATION BY SCHOOL OFFICIALS, COMMON LAW TORT PRINCIPLES REQUIRE THAT FULL LIABILITY BE ALLOCATED TO THE BOARD UNLESS THE BOARD DEMONSTRATES A FAIR AND REASONABLE BASIS FOR APPORTIONING THE SEGREGATION AMONG ITS CAUSES.

The decisions made in the wake of *Dayton I* by Judge Rubin in *Dayton* and Judge Duncan in *Columbus* demonstrate a need for this Court to refine or reject the incremental segregative effect concept. In *Dayton*, Judge Rubin held that plaintiffs had the burden of proving incremental segregative effect and dismissed the complaint because plaintiffs failed to carry the burden. 446 F. Supp. at 1236. In *Columbus*, Judge Duncan found that "it is not now possible to isolate [housing segregation and school

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[5] *Penick* v. *Columbus Board of Education*, 429 F. Supp. 229, 259 (S.D. Ohio 1977); *Brinkman* v. *Gilligan*, 446 F. Supp. 1232, 1236 (S.D. Ohio 1977).

segregation] and draw a picture of what Columbus schools or housing would have looked like today without the other's influence. I do not believe that such an attempt is required." 429 F. Supp. at 259. By implication, Judge Duncan also held that the burden of demonstrating the incremental segregative effect is upon defendants. On appeal, the Sixth Circuit took a third view. It concluded that "incremental segregative effect" is a description of the manner in which segregation occurs in a northern school system rather than a legal standard for determining how much school segregation must be remedied. *Brinkman* v. *Gilligan*, 583 F.2d 243, 257 (1978); *Penick* v. *Columbus Board of Education*, 583 F.2d 787, 814 (1978).

If this Court concludes that "incremental segregative effect" is a legal standard that is applicable to the cases at bar, it should refine the standard in a manner consistent with traditional principles of the common law of torts. As we show below, in the law of torts, courts have developed principles for limiting a defendant's liability for damages by allocating liability to various sources or causes of the harm suffered by plaintiff. Pursuant to common law, however, this allocation is appropriate only if the defendant is able to establish a fair and reasonable basis for apportioning the harm. In the event the defendant fails to make such a showing, he cannot escape liability for the combined harm caused by him and other forces.

A. Where A School Board Has Engaged In Intentional Acts Of School Segregation, Liability For The Current Segregation May Be Allocated Between The Board And Other Sources Of That Segregation Only If The Board Demonstrates The Existence Of A Fair And Reasonable Basis For Apportioning The Harm.

1. *Common Law Principles of Allocating Liability by Apportionment of Harm.* In tort law, the burden of proving that defendants' tortious conduct has caused the harm to plaintiff is ordinarily on the plaintiff. *Restatement of Torts, Second,* § 433B(1). An exception to this rule is made, however, when the tortious conduct of two or more actors combines to bring about the harm to the plaintiff. Section 433B ¶ 2 of *Restatement of Torts, Second,* provides:

> "Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."[6]

The reason for this exception is rooted in considerations of justice and fairness. As the draftsmen of the *Restatement* explain, the burden of proof as to apportionment of harm is shifted in recognition of

> "the injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has in-

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[6] See also *Restatement of Torts, Second,* § 433B ¶ 3:

> "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."

E.g., Summers v. *Tice,* 33 Cal. 2d 80, 199 P.2d 1 (1948) (plaintiff struck by a single birdshot fired by one of two negligent hunters).

> flicted has combined with a similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned." *Restatement of Torts, Second,* § 433B, Comment *d.*

Thus, "the defendant may justly be required to assume the burden of producing that evidence, or if he is not able to do so, of bearing full responsibility" for the harm. *Restatement of Torts, Second,* § 433B(c). *Cf. Bigelow* v. *RKO Radio,* 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his wrong has created."). See also *Armstrong* v. *O'Connell,* No. 65-C-173 (E.D. Wis., decided Feb. 8, 1979) (slip op.) p. 25.

In tort law, allocation of damages according to the harm caused by a particular defendant and others is permissible only if:

> "(a) there are distinct harms,[7] or
>
> "(b) there is a reasonable basis for determining the contribution of each cause to a single harm." *Restatement of Torts, Second,* § 433A.

Whether there is a reasonable basis for fairly apportioning the harm among its causes may turn on the nature of the harm, the nature of its causes, or both. Where the harm is death, for example, there ordinarily is no reasonable basis for apportionment of liability. On the other hand, where the harm is stream pollution and the effluents from two or more factories are measur-

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[7] The concept of "distinct harms" has no applicability here. According to the *Restatement,* when two individuals *independently* shoot the plaintiff at the same time, wounding him in the arm and the leg, it is "possible, as a logical, reasonable, and practical matter, to regard the two wounds as separate injuries, and as distinct wrongs." *Restatement of Torts, Second,* § 433A, Comment *b.*

able, the harm may be reasonably apportioned among the factory owners. *Restatement of Torts, Second*, § 433A, Comment *i* and *d*.

2. *Apportionment of Segregation.* If there is to be an apportionment of segregation between wrongdoing school boards and other sources, the foregoing common law principles, in our view, provide a sound basis for such apportionment.

To avoid full liability for any current school segregation to which it has contributed, a school board should be required to demonstrate that there is a fair and reasonable basis for apportioning the current school segregation between the board and other causal factors. In the words of the *Restatement*, such burden shifting is necessary to avert

> "the injustice of allowing a proved wrongdoer [here the school board] who has in fact caused harm [school and residential segregation] to escape the liability merely because the harm which [it] has inflicted has combined with similar harm inflicted, by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned." *Restatement of Torts, Second*, § 433B, Comment *d*.

The common law burden shifting principles discussed above apply where the defendants' wrongdoing is mere negligence. In a school desegregation case, the defendants' wrongdoing consists of intentional segregative acts and policies designed to deprive individuals of their constitutional rights. If a negligent wrongdoer must bear full responsibility for harm he cannot apportion, the same principle should apply *a fortiori* to a school board that has engaged in intentional racial segregation.[8]

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[8] Compare W. Malone, *Ruminations On Cause-In-Fact*, 9 Stan.L. Rev. 60, 72-73 (1956).

Finally, there is a compelling reason for requiring a board to remedy current school segregation in its entirety —*i.e.*, to bear responsibility for the whole—unless it can demonstrate a fair and reasonable basis for apportioning liability. Assuming that there are circumstances in which disentangling the effects of defendants' segregatory acts would be possible, the difficulty of that task necessarily would increase with the number of demonstrated constitutional violations. It would be ironic indeed if the burden of proof were allocated in such a fashion as to absolve the perpetrator of multiple violations because the scope of his violations has made it impossible for the plaintiff to demonstrate what portion of the segregation was attributable to those violations.

B. Where Increased Residential Segregation Is A Foreseeable Risk Of A School Board's Constitutional Violations, The Board Is Liable For Current School Segregation Resulting From Such Residential Segregation.

At common law, a tortfeasor's liability for harm is not attenuated or superseded by the foreseeable [9] intervention of other causes of the harm. Section 443 of the *Restatement of Torts, Second,* provides that

> "The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about."

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[9] In many school desegregation cases, when increased segregation is a foreseeable consequence of a proposed school policy or decision, courts consider the adoption of the proposed policy or decision to be some evidence of a desire or intent on the part of the school board to bring about the foreseeable segregation. *Oliver* v. *Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974). See also the *Restatement of Torts, Second,* § 8A. In this brief, we are not concerned with the interrelationship of foreseeability of harm and the intent to produce such harm.

Prosser states that the question of whether a defendant is to be relieved of liability because of an intervening cause generally has been determined

> "by asking whether the intervention of the later cause is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated. It is therefore said that the defendant is to be held liable if, but only if, the intervening cause is 'foreseeable.'" Prosser, *Law of Torts*, (4th ed. 1971), p. 272.

This proposition implies that the defendants will be held liable for the harm flowing from an "intervening cause" if the intervening cause was foreseeable. Applied to the context of school desegregation, if increased residential segregation was a foreseeable risk of the defendants' intentional acts of school segregation, defendants should be liable for any resulting school segregation.

As this Court has recognized, decisions of school officials concerning the location of schools may contribute significantly to residential segregation:

> "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods." *Swann, supra*, 402 U.S. at 20-21.

In *Keyes*, the Court noted that other school board actions, such as "the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty on racially identifiable bases" may affect the racial composition of residential neighborhoods. 413 U.S. at 202.

Thus, in the *Columbus* case, Judge Duncan specifically noted that "in Columbus, like many other urban areas,

there is often a substantial reciprocal effect between the color of the school and the color of the neighborhood it serves." 429 F. Supp. at 259.[10] "The racial identification of the school," as the district court found, "in turn tends to maintain the neighborhood's racial identity, or even promote it by hastening the [exodus of whites] in a racial transition area." *Id.* A racially identifiable school serves as a black or white semaphore for real estate dealers, potential buyers, lenders, developers and others who may make important and often racially tainted business decisions affecting the area surrounding the school.

Generally the increased residential segregation resulting from intentionally segregatory acts of a school board is reasonably foreseeable.[11] In analyzing the effects of a statutory dual system, Judge Wisdom has pointed out that

> "Here school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. *Of course*, the concentration of Negroes increased in the neighborhood school. Cause and effect came together." *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 876 (5th Cir. 1966) (emphasis added).

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[10] In *Armstrong* v. *O'Connell*, No. 65-C-173 (E.D. Wis., decided February 8, 1979) (slip op.), the court found that "within an otherwise undifferentiated residential area, school boundaries tend to be the most meaningful boundaries in defining a neighborhood. Thus, the racial identifiability of a school helps to racially identify the neighborhood." Slip Op. at 21. See also *Evans* v. *Buchanan*, 393 F. Supp. 428, 436 (D. Del. 1975).

[11] "Foreseeability is to be determined in the light of what a reasonable man would have foreseen and is not limited to what defendant did in fact foresee, though it includes that." 2 Harper & James, *The Law of Torts*, § 20.5 at 1149 (1956).

Similarly, in *Columbus* Judge Duncan found that defendants "were aware" of the important influence that racially identifiable schools had on real estate transactions in the district. 429 F. Supp. at 249. This Court has also taken note of what must be obvious to school officials who are attempting to confine black children in one school and white children in another—namely, that their segregatory techniques

> "have the *clear* effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." *Keyes, supra,* 413 U.S. at 202 (emphasis added). See also *Swann, supra,* 402 U.S. at 20-21.

In sum, where increased residential segregation is a reasonably foreseeable risk of a school board's constitutional violations, the board should be liable for current school segregation resulting from such residential segregation.

II. A SCHOOL BOARD FOUND TO HAVE COMMITTED UNCONSTITUTIONAL ACTS OF SCHOOL SEGREGATION MUST REMEDY ALL UNCONSTITUTIONAL SEGREGATION WITHIN THE BORDERS OF THE SCHOOL DISTRICT.

In most school desegregation cases, public officials in addition to school authorities will have contributed to school segregation. In *Columbus*, the district court found on the record before it that:

> "Housing segregation has been caused in part by federal agencies which deal with financing of housing, *local housing authorities*, financing institutions,

> developers, landlords, personal preferences of blacks and whites, real estate brokers and salespersons, restrictive convenants, *zoning and annexation*, and income of blacks as compared to whites." 429 F. Supp. at 259 (emphasis added).

The Court further determined that "[t]he interaction of housing and schools operate[d] to promote segregation in each." *Id.*

In *Dayton*, the Court found that:

> "Since shortly after the 1913 flood, Dayton's black population has centered almost exclusively on the West Side of Dayton. . . . Without question the prime factor in this concentration has been housing discrimination, both in the *private and public* sector. . . . This segregated housing pattern has had a concomitant impact upon the composition of the Dayton public schools." 446 F. Supp. at 1236 (emphasis added).

The incremental segregative effect doctrine of *Dayton I* should not allow school authorities to escape their responsibility for remedying all state-imposed school segregation within their jurisdiction. This remedial principle is mandated by the Fourteenth Amendment's command that "no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'" *Swann, supra*, 402 U.S. at 18. Whatever the responsibility of an innocent school board to remedy the unconstitutional actions of its sister agencies, see *Swann, supra*, 402 U.S. at 23, when the school board itself has engaged in intentional acts of school segregation, it can and should be required to remedy all unconstitutional school segregation within the borders of the district. It is necessary to impose this responsibility on the school board because the board is the only agency with the ability or power to implement the state's school desegregation obligation. A contrary

rule would allow the State to escape its responsibilities under the Fourteenth Amendment by compartmentalizing authority and responsibilities among various agencies.

In sum, the Fourteenth Amendment should not be read to permit the harmful effects of a constitutional violation to endure because one agency liable for school segregation is impotent to remedy it, and the agency that can remedy it is not obliged to do so. *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958). See *United States* v. *Missouri*, 363 F. Supp. 739, 748 (E.D. Mo. 1973). See also Justice Stewart's concurring opinion in *Milliken I*, *supra*, 418 U.S. at 755.

CONCLUSION

The judgments below should be affirmed because in each case, as respondents have shown, the record reveals that the constitutional violations committed by the school board have had a systemwide impact. If, however, this Court concludes that district courts must attempt to disentangle the segregatory effects of a defendant's constitutional violations from other causes of current school segregation, then the Court should make clear that unless defendants demonstrate a fair and reasonable basis for apportionment they must remedy the current school segregation in its entirety.[12]

The Court should also make clear that a wrongdoing school board is required to remedy all state-imposed school segregation within the borders of the school district,

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[12] Explicit allocation of the burden of proof to defendants does not warrant remand of these cases for evidentiary hearing. Following *Dayton I*, the defendants had the opportunity to demonstrate at the remedy phase of the trials, that one or more schools or areas of the school system should not be included within the relief. See *Swann*, 402 U.S. at 26. See Penick Brief, p. 121. The Dayton board, moreover, has pointed out that "the burden of proving an absence of incremental segregative effect . . . is not an issue on which the outcome of this litigation should be deemed to turn. . . ." Dayton Br., p. 45.

whether the product of school authorities, housing authorities, or other state and local public officials.

Respectfully submitted,

STEPHEN J. POLLAK
RICHARD M. SHARP
WENDY S. WHITE
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005