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.

MERITS BRIEF OF RESPONDENTS, THE OHIO STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION

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OPINIONS BELOW

The July 14, 1978 opinion of the Court of Appeals is reported at 583 F. 2d 787 (Sixth Cir., 1978). It is reproduced in the appendix to the petition for certiorari at pages 140-207.

The March 8, 1977 liability opinion and order of the United States District Court for the Southern District of Ohio is reported at 429 F. Supp. 229 and is reproduced in the appendix to the petition at pages 1-86.

The July 7, 1977 Memorandum and Order of the District Court commenting on this Court's decision in *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977) does not appear in an official reporter. It is reprinted in the appendix to the petition at pages 90-96.

The July 29, 1977 order of the District Court concerning desegregation plan guidelines is not reported officially but is reproduced in the appendix to the petition at pages 97-124.

The October 4, 1977 order of the District Court requiring implementation of a systemwide desegregation plan is not reported officially but is reproduced in the appendix to the petition at pages 125-137.

The present case has been set for oral argument in tandem with No. 78-627, *Dayton Board of Education v. Brinkman.* In that case the opinion of the Court of Appeals for the Sixth Circuit is reported at 583 F. 2d 243 (Sixth Cir., 1978) and is reprinted in the appendix to the petition in this action at pages 219-247. The opinion of the U.S. District Court for the Southern District of Ohio in that case is reported at 446 F. Supp. 1232 (S.D. Ohio, 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1978. The petition for a writ of certiorari was filed

on October 11, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the United States Constitution, Section 1.

> ". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. In a school desegregation case, where mandatory segregation by law has long since ceased, does the imposition of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceed the equitable jurisdiction of a federal court where the court has failed to determine how much incremental segregative effect discrete and isolated segregative acts had on the racial composition of the individual schools within the system at the time of trial, as compared to what the racial composition would have been in the absence of such acts?

2. May a federal court employ legal presumptions, in combination with evidence of discrete and isolated constitutional violations, to justify a systemwide racial balance remedy where (i) there is no evidence of a causal connection between those unconstitutional actions and the existence of other racially imbalanced schools, (ii) there is a high degree of residential segregation, and (iii) the systemwide remedy would not be warranted by the incremental segregative effect of the identified violations?

3. May a federal court infer segregative intent from the mere assignment of students to schools nearest their homes pursuant to a long-standing, statutorily required and educationally sound neighborhood school policy where

the foreseeable effect of such assignment, because of segregated housing patterns in the urban school district, is to cause some schools to be racially imbalanced?

4. Where there was no direct proof that segregation of students was a factor which motivated the decision of school officials, may a federal court infer segregative intent solely from evidence that a collateral foreseeable effect of the decision made would be to continue or increase statistical racial imbalance within schools when the same decision would have been made for educational and administrative reasons?

STATEMENT OF THE CASE

Introduction

These respondents, The Ohio State Board of Education and Superintendent of Public Instruction, were the "state defendants" referred to in the opinions of the lower courts. The District Court found that they violated their constitutional responsibilities by failing to correct de jure segregation and racial imbalance caused by the Columbus Board of Education and its superintendent. The Court of Appeals for the Sixth Circuit affirmed the District Court's judgment as to the Columbus defendants. As to the state defendants, however, the Court of Appeals remanded to the District Court for further findings and consideration of the state defendant's liability. [Pet. App. 204-207.]

Because of errors which the lower courts committed in their treatment of the issues presented by this case, these respondents, The State Board of Education and Superintendent of Public Instruction, supported the Columbus defendants' petition for a writ of certiorari. For the reasons given hereafter, we urge this Court to reverse the judgment of the Court of Appeals and remand the action to the District Court for further consideration of the issues

of constitutional violation and incremental segregative effect.

A Note on References to the Record

At the time of the preparation of this brief the appendix was in the process of assembly and printing. Accordingly, there are no references in this brief to the merits appendix. All references are to the appendix which was filed in support of the petition for certiorari and are cited "Pet. App.," e.g., Pet. App. 14-16.

THE FINDINGS AND ORDERS OF THE DISTRICT COURT

"Duality" in 1954

In its opinion of March 8, 1977 the District Court found that when *Brown I* was decided in 1954 the Columbus Board of Education had caused five schools to be "overwhelmingly black." [Pet. App. 11.] They were located in "an enclave . . . on the near-east side of Columbus." [*Ibid.*] The Court also found that black children had attended racially mixed schools in Columbus as long ago as 1879 [Pet. App. 8.], in the first decade of the twentieth century [*ibid.*], in the 1920's and 1930's [*id.*, 9.], and that in 1954 there was "substantial racial mixing of both students and faculty in some schools." [*Id.*, 10.] Notwithstanding the presence of racially mixed schools, the Court concluded that because of the five segregated schools "there was not a unitary school system in Columbus." [*Id.*, 11.]

Post-Brown Segregative Incidents

The Court found that between 1954 and the time of trial in 1976 the Columbus School Board violated its constitutional duty by failing to pursue alternatives which would eliminate or lessen racial imbalance. [Pet. App.

19-20.] The incidents from which the Court drew its inference of segregative intent were the following:

1. Gladstone Elementary School could have been located somewhat northerly of its chosen site, with more integrative effect. [*Id.*, 21-22.]

2. The boundary lines for Sixth Avenue Elementary School could have been drawn east-west rather than north-south with better integrative effects. [*Id.*, 22-24.]

3. The "near-Bexley" optional zone (in effect from 1959 to 1975) allowed about 25 elementary age white children to attend predominantly white schools instead of all-black schools. [*Id.*, 26-29.]

4. In four west side elementary schools different decisions on boundary lines and optional zones could have enhanced racial balance. [*Id.*, 29-33.]

5. A discontiguous attendance area for Moler Elementary School (in effect from 1963 to the time of trial) allowed about 70 mostly white elementary pupils to attend "whiter" Moler rather than the school closest to their homes. [*Id.*, 33-34.]

6. A discontiguous attendance area which terminated twelve years prior to trial allowed pupils living on three streets in a predominantly white neighborhood to attend a "whiter" school (Fornoff) instead of the one closest to their homes. [*Id.*, 34-35.]

7. The Board built a new elementary school (Innis) in an area served by an overcrowded racially mixed school, Cassaday. The Board elected to provide grades K-6 in each school rather than to put grades K-3 in one and 4-6 in the other one. Although it knew that the latter structuring would be more integrative, it opted to adhere to its basic policy of providing K-6 services in each elementary building. [*Id.*, 35-42.]

8. Of the five schools mentioned above which were "overwhelmingly black" in 1954, one was closed in 1974 [Pet. App. 60.], and the other four remained identifiably black at the time of trial. All were in the central area of the city, the historic center of the black community. [*Id.*, 25.]

The District Court did not find any constitutional violation in the assignment of teachers at the time of trial. [*Id.*, 15-16, 59.] It found:

> The number of black teachers in each school almost compares to the ratio of black and white teachers in the total system. [Id., 59.]

The Court found that the plaintiffs had failed to prove any discriminatory intent respecting student transfers, the assignment of nonteaching staff, the assignment of substitute teachers, or special educational programs. [Pet. App. 20, footnote 2.]

The District Court's Remedial Requirements

In June, 1977 there were 167 schools. [*Id.*, 101-102.] Columbus proposed to close five, leaving 162. Of these, 37 were identifiably black. [Pet. App. 103.] In the June 10, 1977 plan which Columbus developed to comply with the Court's March 8, 1977 order, those 37 schools were neutralized. Each was brought within plus or minus fifteen percent of the district-wide average of 32.5% black. [*Id.*, 103-104.] This left 22 schools on the periphery of the district which were identifiably white. [*Ibid.*] Even though the plan placed all black children in statistically desegregated schools, and even though the Court had previously held that the remedy "should provide black school children with the *Brown I* promise of an integrated education," [Pet. App. 74, 75.], the District Court held that the existence of 22 identifiably white schools was "constitutionally unacceptable." [*Id.*, 102-105.]

The District Court's Refusal to Ascertain Incremental Segregative Effect

The Columbus School Board submitted its original remedial plan on June 10, 1977. On June 27, 1977 the United States Supreme Court announced its decision in

Dayton Board of Education v. Brinkman, 433 U.S. 406. The District Court addressed the significance of *Dayton* in a memorandum filed July 7, 1977. In pertinent part it stated:

> The Court is of the opinion that the litigants in the present case and the community . . . are entitled to know whether the *Dayton* decision alters the law applicable to this proceeding. * * *
>
> * * * In my view, the hope that the *Dayton* case would provide new and clear instructions for trial courts has not been realized. I do not view these principles as any different from those under which the litigants were operating when this case was tried.
>
> * * *
>
> * * * Viewing the Court's March 8 findings in their totality, this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administered. These were not the facts of the *Dayton* case.
>
> Systemwide liability is the law of this case pending review by the appellate courts. 429 F. Supp. at 266. Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which the defendants owe no responsibility. This they did not do, 429 F. Supp. at 260.
>
> [Pet. App. 92-95.]

At remedial hearings on July 11, 1977 counsel for both the state and Columbus defendants moved the Court to determine the incremental segregative effect of the violations which it had found. Their motions were denied. [Transcript of July 11, 1977 hearing, pp. 4-42.]

The Remedial Orders

On July 29, 1977 the Court filed an order assessing the remedial plans proposed by the defendants. [Pet. App. 97-121.] It held that the Columbus Board's plan of June 10, which left 22 identifiably white schools, was "constitutionally unacceptable," [*id.*, 105], as was the Columbus Board's July 8 plan. [*Id.*, 99-102.] Under the State Board's plan each school in the system would reflect district-wide racial averages, plus or minus fifteen percent, except for four schools on the western edge of the city. The Court held that this was constitutional. [*Id.*, 106.]

On August 31, 1977 the Columbus Board filed its third plan. [*Id.*, 125.] On the same day the State Board of Education and Superintendent of Public Instruction concurred in that plan's pupil reassignment component. [*Id.*, 126.] On September 13, 1977 the plaintiffs concurred in it [*id.*, 127], and on October 4, 1977 the District Court approved it. [*Ibid.*] As finally approved by the District Court the remedial decree requires every school in the system to be racially balanced within fifteen percent of the district's overall racial composition. Approximately 42,000 children will be reassigned to schools in different geographic areas. Those reassignments will involve the cross-town transportation of over 37,000 students. The incidental pairing and clustering will alter the grade structures of nearly every elementary school in the district.

THE OPINION OF THE COURT OF APPEALS

The Court of Appeals approved the District Court's conclusion that "in 1954 there was not a unitary school system in Columbus" [Pet. App. 153] because of the existence of five segregated schools in that year. "This is the legal predicate for the District Judge's finding of a dual school system." [*Id.*, 160.] The Court of Appeals held:

> Under these circumstances, the Columbus Board of Education has been under a constitutional duty to desegregate its schools for twenty-four years.[1]
>
> [*Ibid.*]
>
> * * *
>
> We recognize, of course, that racial separation based upon facts and circumstances beyond the control of school boards may constitute de facto segregation without necessarily representing violation of the Fourteenth Amendment. However, we have previously pointed out that the District Judge on review of pre-1954 history found that the Columbus schools[2] were de jure segregated in 1954 and, hence, the Board had a continuing constitutional duty to desegregate the Columbus schools.[3] The pupil assignment figures for 1975-76 demonstrate the District Judge's conclusion that this burden has not been carried. On this basis alone (if there were no other proofs), we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation.
>
> [Pet. App. 165.]

The Court of Appeals held that because there was segregation of five schools in 1954, the school board was under a duty thereafter to desegregate not just those schools but all the Columbus schools – the entire system. When it spoke of "desegregating" it meant ending racial separation, wherever and however it was caused, just as if Columbus was a statutory dual system of the type struck down in *Brown*.

The Court of Appeals continued:

> Of course, this Northern school case is distinguished from the classic Southern school cases in two important respects: first, Ohio did not, after 1887, require dual school systems by state law; and second, some

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[1]Note "its" schools, not the five segregated schools.

[2]Note "the Columbus schools," not the five schools which were found to be segregated.

[3]Note "the Columbus schools," not the five schools.

> black students did go to school in Columbus in 1954 in largely white schools.[4] Since, however, a substantial portion of black students . . . were intentionally segregated in 1954, we do not believe these two distinctions serve to invalidate the District Judge's findings of a de jure dual school system.
>
> [Pet. App. 165.]

The Court of Appeals noted that between 1954 and the filing of the complaint in 1975 Columbus "grew enormously in boundaries (from 40 to over 173 square miles) and in public school population from 46,352 to 95,998." [Pet. App. 168.] One hundred three schools were built between 1950 and 1975. [*Ibid.*] Of those, 87 opened with "racially identifiable" student bodies, and 71 remained racially identifiable at the time of trial. [*Ibid.*][5] The Court of Appeals held that this alone "requires a very strong inference of intentional segregation." [Pet. App. 1973.]

The Court of Appeals' Construction of "Incremental Segregative Effect"

In construing this critical term the Court of Appeals stated that if a school district had more than one hundred schools, and evidence disclosed a constitutional violation in one of them, the proper remedy would be "an order to take effective means to desegregate that school." [Pet. App. 197.]

> The remedy might affect one or more nearby schools. The isolated single violation obviously would not call for a systemwide desegregation order.
>
> [Ibid.]

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[4]The District Court found "substantial racial mixing of both students and faculty in some schools" in 1954. [Pet. App. 10.]

[5]A school was considered to be "racially identifiable" or "imbalanced" if the racial mix of its pupils exceeded the district-wide average by plus or minus fifteen percent. [Pet. App. 78.]

The Court said there should be an effort to determine the "incremental segregative effect" of each violation:

> It is clear to us that the phrases 'incremental segregative effect' and 'systemwide impact' employed in the *Dayton* case require that the question of systemwide impact be determined by judging segregative intent and impact *as to each isolated practice, or episode.* [Emphasis supplied.]
>
> [Ibid.]

This says plainly that a court should look at the effect of each violation, and it implies that after all the incremental effects have been measured a court can then determine whether there has been a systemwide impact requiring a systemwide remedy, or whether more limited remedies would be appropriate.

In the next two sentences, however, the Court of Appeals abandoned what it had just declared. It stated that if there are "fifty" segregative practices or episodes, the impact of each need not be measured.

> *Dayton* does not, however, require each of fifty segregative practices or episodes to be judged solely upon *its* separate impact on the system. [Italics are the Court's.] 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.
>
> [Ibid.]

This obscure language suggests that in a case of multiple violations it is not necessary to make the incremental segregative effect analysis mandated by *Dayton.* The Court failed to explain what a district court should examine if it need not measure the impact of each violation.

The Court of Appeals' Findings of Violations and the Systemwide Effects Thereof

The Court of Appeals refused to remand the case to the District Court for further findings on incremental segregative effect, as the defendants had requested. [Pet. App. 199.] Instead, it made its *own* findings on incremental segregative effect.

> *We* now turn to the consideration of the *incremental segregative effect* of the major constitutional violations found by the District Judge. [Italics supplied.]
>
> [Pet. App. 198.]

It found that five violations of the Columbus Board of Education had "systemwide impact" justifying a racial balance remedy for every school. The first of these was:

> (1) The pre-1954 policy of creating an enclave of five schools intentionally designed for black students and known as 'black' schools, as found by the District Judge, clearly had a 'substantial' — indeed, a systemwide — impact.
>
> [Pet. App. 198.]

(While the District Judge found that those five schools were maintained in violation of the Constitution, he made no finding that they had a systemwide impact).

The second "major constitutional violation" found by the Court of Appeals was:

> (2) The post-1954 failure of the Columbus Board to desegregate the school system in spite of many requests and demands to do so . . . .
>
> [Pet. App. 198.]

(This assumes a constitutional duty to produce racial balance in a school system if part of the system was segregated in 1954, something which this Court has not held).

The third "major constitutional violation" with systemwide impact found by the Court of Appeals was:

> (3) . . . the Columbus Board's segregative school construction and siting policy. . . .
>
> [Pet. App. 198.]

(The District Judge had found one instance of segregative site selection – Gladstone Elementary School. See Pet. App. 21-22).

The fourth "major constitutional violation" found by the Court of Appeals was the Board's –

> (4) . . . student assignment policy which, as shown above, produced the large majority of racially identifiable schools as of the school year 1975-76.
>
> [Pet. App. 198.]

(The student assignment policy was the policy of assigning children to their neighborhood schools. This Court has not held that such a policy offends the Fourteenth Amendment. While the Board's policy had systemwide application, it was not a constitutional violation).

The final "major constitutional violation" which the Court of Appeals found was:

> (5) The practice of assigning black teachers and administrators only or in large majority to black schools . . . .
>
> [Pet. App. 198.]

(This overstates the findings of the trial court. The District Judge found that at the time of trial "The number of black teachers in each school almost compares to the ratio of black to white teachers in the total system"). [Pet. App. 59.]

The Court of Appeals concluded:

> Each such policy or practice also added an increment to the sum total of the constitutional violation found.

> Beyond doubt the sum total of these violations made the Columbus school system a segregated school system in violation of the Fourteenth Amendment and thoroughly justified the District Judge in ordering a systemwide remedy.
>
> [Pet. App. 198-199.]

SUMMARY OF ARGUMENT

The Court of Appeals erred in not requiring the District Court to make specific findings concerning the incremental segregative effect of the violations which the District Court found. Such findings were clearly required by this Court's decision in *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977). The refusal of the Court of Appeals to remand for such findings on the ground that *Dayton* is distinguishable from the present case is without merit. The distinctions asserted by the Court of Appeals are unpersuasive.

The Court of Appeals not only failed to give effect to the *Dayton* mandate. It misconstrued *Dayton.* Its construction of the concept of "incremental segregative effect" was inconsistent, muddied, and not commensurate with the intention which *Dayton* expressed. The plain teaching of *Dayton* is that remedial decrees may be shaped to correct the effects of segregative action by school officials but may not go farther to require school officials to overcome conditions of racial imbalance in schools which are merely the result of demographic influences in society at large.

In any proceeding in a district court concerning the incremental segregative effect of school officials' violations, the burden of proof as to such issue remains with the plaintiffs as part of their continuing obligation to prove all the material elements of their cause of action *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189

(1973) does not warrant imposing on school officials the burden of proving the *non*-effect of constitutional violations.

Both lower courts erred in holding that the existence of some de jure segregation in the Columbus school district in 1954 transformed it into a "dual" school system of the type invalidated by *Brown I*. Both held that the existence of some segregation in Columbus in 1954 imposed a constitutional duty on the Columbus school system to achieve racial balance in all of the schools of the system thereafter. In a school desegregation case, the issue is not whether unlawful segregation existed in 1954, or any other year, but whether there are *present effects* from present or past violations.

Both lower courts erred in holding that there is a constitutional duty to achieve racial balance in unitary school systems. There is no duty to achieve racial balance except to correct previous constitutional violations. The essence of the Equal Protection duty is to refrain from discrimination.

The Court of Appeals' presumption of segregative intent arising solely out of school officials' inaction on racial imbalance is inconsistent with the requirement of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) that there be a "sensitive inquiry" into *all* relevant factors before any judicial determination is made concerning discriminatory intent. The Sixth Circuit's presumption of discriminatory intent fails to give any weight to the racially neutral factors a board of education may evaluate in judging the extent to which racial balancing actions might be taken.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN NOT REQUIRING THE DISTRICT COURT TO MAKE SPECIFIC FINDINGS CONCERNING THE INCREMENTAL SEGREGATIVE EFFECT OF THE VIOLATIONS WHICH IT FOUND.

This Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), mandates findings on the segregative effect of constitutional violations which a lower court may find. *Dayton* held that 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 . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.
>
> 433 U.S. at 420.

The District Court firmly declined to make that determination. Both the state and city boards moved the Court on July 11, 1977 for findings on incremental segregative effect. The motion was argued at length by counsel. (See the transcript of remedy hearings, July 11, 1977, pages 4-42). The Court denied those motions. [*Id.*, 42.] Its views on the meaning of *Dayton* were initially expressed in its order of July 7, 1977 [Pet. App. 90-96.], in which it stated that the Supreme Court failed to "provide new and clear instructions for trial courts." The District Judge said:

> I do not view these principles as any different from those under which the litigants were operating when this case was tried.
>
> [Pet. App. 93.]

Dayton did more than rehash old doctrine. It emphasized that school officials were responsible for rectifying the effects of *their* constitutional violations, not the larger effects of social forces which can produce racial imbalances in schools.

This had been suggested in some of the earlier decisions. For example, the Chief Justice noted in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 22 (1971):

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage.
>
> * * *

Mr. Justice Powell's concurring opinion in *Keyes v. School District No. 1,* 413 U.S. 189 (1973), expressed the recognition that not all racially imbalanced schools should be regarded as the product of discrimination by school authorities:

> Rather, the familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns . . . . [*Id.,* 222-223.]
>
> * * *
>
> Indeed, as indicated earlier, there can be little doubt that principal causes of the pervasive school segregation found in the major urban areas of this country, whether in the North, West, or South, are the socio-economic influences which have concentrated our

> minority citizens in the inner cities while the more mobile white majority disperse to the suburbs. [*Id.*, 236.]

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) had disapproved an order which obligated school authorities to achieve better racial balance in their schools when there was no evidence that the existing imbalance was caused by them. And in *Austin Independent School District v. United States*, 429 U.S. 990 (1976) three members of the Court cautioned that remedial decrees should not "exceed that necessary to eliminate the effect of any official acts or omissions."

Dayton held flatly that remedial decrees should extend no farther than the incremental segregative effect of the violations of *school authorities*. Writing for a unanimous court Mr. Justice Renquist noted:

> It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact, without more, of course, does not offend the Constitution. *Spencer v. Kugler*, 404 U.S. 1027 (1972); *Swann, supra*, at 24.
>
> [*Id.*, 417.]
>
> * * *
>
> In effect, the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court, taking those findings of violations in the light most favorable to the respondents.
>
> [*Id.*, 418.]
>
> * * *
>
> The power of the federal courts to restructure the operation of local and state governmental entities 'is not plenary.' It 'may be exercised only on the basis of a

constitutional violation.' [Citations omitted.] Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.' [Citations omitted.]

[*Id.*, 419-420.]

* * *

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.*

* * *

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, supra,* at 213.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as 'cumulative violation' than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

[*Id.*, 420.]

Subsequent to *Dayton* a remedy concerning pupil reassignments may not be ordered without findings by a

district court defining the incremental segregative effect of the school board's violations. Those findings must express the differential between the "racial distribution of the school population as presently constituted" and the distribution which would have existed had school officials not been guilty of their unlawful acts.

The District Court refused to make the mandated findings. [Pet. App. 199; transcript of remedy hearing, July 11, 1977, p. 42.] The Court of Appeals erred in permitting the District Court to avoid its *Dayton* responsibility. The case should be remanded to the District Court with instructions to make the findings which *Dayton* requires.

The Court of Appeals' reasons for refusing to remand are without merit. None of the "distinctions" it drew between *Dayton* and this case can justify its refusal to give *Dayton* the acceptance it is entitled to. The "distinctions" were:

(1) That Columbus was a "dual" system in 1954 whereas in Dayton "mandatory segregation by law of the races has long since ceased." (But such was also the case in Columbus, where mandatory segregation by law had also long since ceased by virtue of the identical Ohio statute in 1887).

(2) That *Dayton* involved "only three isolated constitutional violations," whereas the District Judge here had found "many more." [Pet. App. 199.] (*Dayton's* principle was not confined to cases involving a few violations).

(3) That *Dayton* did not present systemwide violations, whereas this case did. (But this presupposes that which the incremental effect analysis is intended to disclose — the *scope* of the violations' effect).

(4) That the lower courts in this case had an opportunity to consider the *Dayton* standard, whereas in *Dayton*

the lower courts' rulings antedated the Supreme Court's definition of the standard. (This is just a correct statement of chronological fact, not a distinction of any substance).

The Court of Appeals erred in failing to remand to the District Court for findings on incremental segregative effect, in conformance with the letter and spirit of this Court's *Dayton* decision.

II. THE COURT OF APPEALS MISCONSTRUED DAYTON AND THE CONCEPT OF INCREMENTAL SEGREGATIVE EFFECT.

The Court of Appeals' discussion of incremental segregative effect is remarkable for its inconsistency and obscurity.

> . . . the equitable remedy should be fashioned to fit the actual Fourteenth Amendment violations which were found. The most deliberate and willful violation of the Constitution in one of over a hundred schools would therefore call for an order to take effective means to desegregate that school. The remedy might affect one or more nearby schools. The isolated single violation obviously would not call for a systemwide desegregation order.
>
> It is clear to us that the phases 'incremental segregative effect' and 'systemwide impact' employed in the *Dayton* case require that the question of systemwide impact be determined by judging segregative intent and impact as to each isolated practice, or episode. Each such practice or episode inevitably adds its own 'increment' to the totality of the impact of segregation. *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.
>
> [Pet. App. 197.]

We agree that a violation in *one* school may call for an order to desegregate *that school.*

We also agree that "the question of systemwide impact [should] be determined by judging segregative intent and impact *as to each isolated practice, or episode.*" Once violations have been found, the district court must determine the contemporary segregative effect of each one. The temporal focus is the present because the action seeks a present remedy, and any remedial decree necessarily operates in the present. We do not suggest that past violations are immaterial. They may have continuing effects which are felt in the present, and if that is the case they may be remedied now.

We also agree with the Court of Appeals that each violation may add its increment to the totality of segregation. We would caution, however, that the effects of some violations disappear with changing circumstances, so that at present there may be no segregative effect from certain past violations.

Beyond this point we are unable to understand the Court of Appeals. It went on to say:

> *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. [Pet. App 197.]

The Court did not explain why each of fifty segregative episodes should not be evaluated in terms of its segregative effect. In principle, each of these episodes is no different than the one out of a hundred hypothesized by the Court in its first illustration. There is no reason why a

district court should be required to measure the effect of one but not the others. Indeed, unless measurement is made of the individual effects it is impossible to say what their totality is.

The Court's confusion appeared to increase during its discussion of incremental segregative effect in *Dayton IV*. There it held:

> The word 'incremental' merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is 'incremental' in that it occurs *gradually over the years instead of all at* once as in the case where segregation was mandated by state statute or a provision of a state constitution.
>
> [Pet. App. 244-245; italics supplied.]

The concept of "incremental" as something which is *attenuated* "instead of all at once" has no basis in either the common meaning of the word or the decisions of this Court in school desegregation cases. Anyone familiar with the evolving case law has to understand "incremental segregative effect" as the effect of constitutional violations by *school officials*. This is distinguished from the influences in society at large which have caused some of the residential concentrations of racial and ethnic groups which result in racial imbalance in public schools. This Court's opinion in *Dayton* dealt with segregation caused by *school officials* as distinguished from other influences. It held that remedial decrees could properly extend to the correction of the segregative effects of those official actions, but not farther.

The Court of Appeals erred in its interpretation of "incremental segregative effect." Since this was one of the key concepts of *Dayton* it led inevitably to further error in failing to give to *Dayton* the effect which the Supreme Court intended.

III. THE BURDEN OF PROOF RESPECTING INCREMENTAL SEGREGATIVE EFFECT REMAINS WITH THE PLAINTIFFS.

The issue of who carries the burden of proving the incremental segregative effect of constitutional violations did not arise in the present case. It did arise, however, in *Dayton IV*. The Sixth Circuit's view on that subject is now a matter of record, and since it is erroneous we address it here so that the lower courts may be provided with appropriate guidance by this Court in view of the further findings which must be made below.

The Sixth Circuit held in *Dayton IV:*

> Secondly, the District Court erred in allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific incremental effect of that discrimination.
>
> [Pet. App. 246.]

In coming to this conclusion the Court of Appeals erred. The District Court was correct as a matter of law in holding:

> [T]here is a burden upon plaintiffs to establish by a preponderance of evidence both a segregative intent and an incremental segregative effect in order to establish a violation of the Equal Protection Clause of the Fourteenth Amendment.
>
> [Pet. App. 222.]

It is a fundamental rule of civil procedure that one who asserts a cause of action is required to prove its material elements. The elements of a cause of action against a school board for violation of the Equal Protection Clause of the Fourteenth Amendment are: a constitutional duty, breach thereof by the defendant, and resulting injury to the plaintiffs. The breach of a constitutional duty which

does not produce any contemporary injurious effect is not a matter for which equitable relief may be decreed. For a plaintiff class to obtain a remedial decree in such a case, it must establish not only a duty, and a violation, but also the contemporary segregative effect of the violation. These are the basic elements of the plaintiffs' cause of action as to which the plaintiffs must carry the burden of proof.

The presumption of segregative intent enunciated in *Keyes*[6] does not alter the foregoing principles. *Keyes* cannot be read as working a shift in the burden of proof with respect to all of the elements of the plaintiffs' cause of action.[7] It simply expresses the reasonable notion that where the plaintiffs prove intentional segregation by school officials in a substantial portion of a school district, the inference arises that segregation existing elsewhere in the district may well have been brought about by the same improper attitudes. The *Keyes* presumption shifts to the school board the burden of going forward with the evidence. It becomes the school board's burden to *meet* the presumption that racial imbalance elsewhere in the system is the product of its discriminatory intent. If the evidence discloses that racial imbalances which exist outside the segregated area have not been caused by them, the presumption will have been met.

Keyes dealt only with the presumption of *segregative intent*. It did not deal with the incremental segregative effect of official misconduct. Nor can the *Keyes* presump-

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[6]*Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973).

[7]Rule 301, Fed. Rules of Evidence, states: "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

tion reasonably relate to the incremental effect analysis. The presumption of *intent* arises out of the existence of facts which demonstrate the existence of discriminatory intent at work in a meaningful portion of the school district. Those facts suggest that invidious intent may also be operating in other portions of the school district. The school board is therefore required to go forward with evidence to exculpate itself of discriminatory intent in such other areas. If the trial court finds that the inference of discriminatory intent has not been rebutted by the school board and that racial imbalances in other sectors of the school district have been caused by the Board's segregative action, the court must then discharge its duty under *Dayton*. It must make findings concerning the incremental segregative *effect* of the school board's violations. The scope of those effects is something the plaintiffs must prove as part of their continuing obligation to prove the material elements of their cause of action.

In this respect a school case is no different than a tort case or a contract case or any other case entitling the plaintiff to a remedy. Once the plaintiff proves breach of a duty, he must go on to prove the magnitude of the injury. Similarly, in a school desegregation case once the plaintiffs prove a violation they must prove the contemporary segregative effect.

The Court of Appeals erred in holding that *Keyes* shifts the burden of proof on this matter to the defendant, and that it is the defendant's burden to prove the absence of segregative effects. It would be just as wrong in a rear-end collision case to shift to the negligent defendant the burden of proving the absence of injury to the plaintiff. The violation may be clear, in the automobile case as well as in the equal protection case, but in *both* cases the burden of proof remains on the plaintiff to prove the scope of the injurious effect.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE EXISTENCE OF SOME UNLAWFUL SEGREGATION IN A UNITARY SCHOOL SYSTEM MAKES IT A "DUAL" SYSTEM WITHIN THE MEANING OF *BROWN*.

The Court of Appeals approved the District Court's unitary/dual dichotomy. As the District Court put it:

> It is essential that one know the 1954 racial picture of the system — whether it was unitary (no unlawful racial segregation) or dual (unlawful racial separation), and how it became what it was.
>
> [Pet. App. 7.]

The Court of Appeals approved this definition. [Pet. App. 155.] It also affirmed the District Court's conclusion that because there was some unlawful racial separation in the district in 1954 "there was not a unitary school system in Columbus." [*Id.*, 153]

The basis of the District Court's conclusion about the "duality" of the Columbus system in 1954 was the existence of five nearly all black schools in that portion of the district in which the black population was concentrated. [*Id.*, 11, 13, 25.] The Court also found that there was "substantial racial mixing of both students and faculty in some schools" [*Id.*, 10] and that black children had attended racially mixed schools since 1879. [*Id.*, 8, 9.]

Notwithstanding the existence of five segregated schools in 1954, the Columbus district was not a "dual" school system as that term has been expressed in this Court's decisions. A unitary school system, such as Columbus, may be marked by some unlawful racial separation. But that does not make it a dual school system in the sense of *Brown*. It just makes its administration *pro tanto* unlawful. So long as black and white children may and do attend racially mixed schools in a school system, there is no warrant for characterizing it as "dual."

In *Milliken v. Bradley*, 418 U.S. 717, 737 (1974) the Chief Justice said:

> The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils. This duality and racial segregation were held to violate the Constitution . . . .

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 5-6 (1971) the Chief Justice wrote:

> This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown v. Board of Education* was all about.

In the dual school systems the local board of education provided two educational establishments – one for blacks, the other for whites. The race of the pupil was the litmus test. It alone determined which school could be attended. Dismantling a dual system to create a unitary system produces an amalgam of schools, teachers, administrators, facilities and services available to all students without regard to race.

School systems in Ohio are unitary. They have been since 1887, when the Ohio General Assembly repealed a statute which allowed local boards of education to organize separate schools for black children. [Pet. App. 8.] The Columbus school system is a unitary system. As the District Court found, black children have attended racially mixed schools in Columbus since 1879, and in 1954 there was "substantial racial mixing of both students and faculty in some schools." [*Id.*, 10.]

Regardless of whether Columbus school officials were guilty of segregative intent with respect to five schools in 1954, Columbus was not a "dual" system in that year. A

school system is dual, within the meaning of *Brown, Green, Swann*[8] and all of the other decisions of this Court concerning the dismantling of dual systems, only if it provides two educational establishments, one for blacks, the other for whites. Columbus did not do this. It was therefore not a "dual" system in 1954, and both lower courts erred in holding that it was.

V. THE CONSTITUTIONAL DUTY OF SCHOOL ADMINISTRATORS IS TO REFRAIN FROM RACIAL DISCRIMINATION IN THE PROVISION OF EDUCATIONAL SERVICES. THERE IS NO CONSTITUTIONAL DUTY TO ACHIEVE RACIAL BALANCE IN THE SCHOOLS EXCEPT TO CORRECT CONSTITUTIONAL VIOLATIONS.

The constitutional duty of public school administrators under the Equal Protection Clause of the Fourteenth Amendment is to abstain from racial discrimination in the provision of educational services. It is not to maintain racial balance in the pupil population. *Washington v. Davis*, 426 U.S. 229, 239 (1976) held:

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.

Swann held

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even

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[8]*Brown v. Topeka Board of Education*, 347 U.S. 483 (1954) (*Brown I*); *Green v. County School Board*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S 1. (1971).

> when those problems contribute to disproportionate racial concentrations in some schools.
>
> 402 U.S. at 23.

The District Court found that "there is residential segregation in Columbus" – a fact about which there was no disagreement between the parties. [Pet. App. 13.] It found housing segregation in Columbus –

> . . . 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 and restrictive covenants, zoning and annexation, and income of blacks as compared to whites.
>
> [Pet. App. 57.]

The District Court found as a fact one of the inescapable realities of life in American cities:

> Given segregated residential patterns, not all schools can be built in an integrated setting.
>
> [*Id.*, 24.]

It is precisely that reality which confronts the administrators of urban school systems. The pupil populations of many city schools are imbalanced racially and ethnically. Racial imbalance in the urban school district is a *given* in the United States today.

A key question which this case presents is: What does the Constitution require school administrators to *do* about that imbalance?

Although the District Court paid passing deference to the statements of this Court that racially imbalanced schools are not *per se* offensive to the Constitution, it was clearly the opinion of the District Court that the Columbus Board was under a constitutional duty to "desegregate" its

schools ever since 1954, and it implied that this involved the attainment of racial balance in the pupil distribution. If the function of a remedial decree is to restore victims of constitutional violations to the position they would have occupied but for the violations (*Milliken I*, 418 U.S. 717, 746) the District Court's requirement of a racial balance remedy involving *all* schools of the district is the ultimate proof of its opinion that racial balance is what the Constitution required in Columbus since 1954.

The Court of Appeals expressed the same view. It stated that "the Columbus Board of Education has been under a constitutional duty to desegregate its schools for twenty-four years." [Pet. App. 160.] To "desegregate," in the lexicon of the Sixth Circuit, is to "diffuse" the races throughout the system in a way which approximates statistical balance. As it said in *Dayton IV*:

> Instead of meeting their affirmative duty to disestablish the dual school system extant at the time of *Brown I and to diffuse black and white students throughout the Dayton school system,* defendants pursued a policy of containment through school construction and site selection practices.
>
> [Pet. App. 242; italics supplied.]

The diffusion which the Court of Appeals considered constitutional for Dayton required each school to "be brought within fifteen percent of the black-white population ratio of Dayton . . . ." [*Id.*, 221.]

Both lower courts erred in holding that the existence of some segregation in 1954 warrants restructuring the system today to achieve racial balance. In *Dayton* this Court held that the remedy for a constitutional violation is the correction of the *segregative effect* of the violation. The lower courts exceeded this limitation when they held that the Columbus Board had to achieve systemwide racial balance because some imbalance was due to segregative intent in 1954.

1954 is not a talismanic moment. Conditions obtaining in that year are not invested with magical qualities which invoke far ranging legal consequences. The issue in a school desegregation case is not whether unlawful action occurred in 1954 or in any other given year. It is whether there are *present effects* from present or past constitutional violations which result in the exclusion of minority children from schools or services to which they would have had access but for the violations. If the plaintiffs prove the existence of such present effects, they are entitled to a remedial decree which will cure them.

School administrators have no constitutional duty to provide a racially balanced mixture of pupils in all their schools. The Constitution necessarily permits variation and diversity. It does not require racial balance except to remedy violations, and only to the extent of restoring that degree of balance which would have existed if the violation had not occurred. As *Swann* held:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.
>
> 402 U.S. 1, 24 (1971).

Milliken I held:

> . . . desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each school, grade or classroom.
>
> 418 U.S. 717, 741 (1974).

Pasadena held that racial imbalances arising out of normal patterns of human migration were not condemned by the Constitution. 427 U.S. 424, 435-436 (1976). And *Dayton* held:

> It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact, without more, of course, does not offend the Constitution.
>
> 433 U.S. 406, 417-418.

American society is characterized by a plurality of races, religions, interests and associations. It is an evolving, highly mobile society. Its communities, like all human societies, wax and wane. There will be inevitable concentrations of racial, religious, ethnic, and economic groups in American communities. School administrators cannot be expected to play a continuous balancing act in opposition to the forces of demographic change to make each school reflect, within prescribed statistical limits, the district's overall makeup. Their constitutional duty is not to provide statistical balance among the heterogeneous groups which make up the urban districts. Their obligation is to provide educational services to all those groups without discrimination.

VI. THE SIXTH CIRCUIT'S PRESUMPTION OF SEGREGATIVE INTENT, BASED SOLELY ON SCHOOL BOARD INACTION IN THE PRESENCE OF RACIAL IMBALANCE, IS UNREASONABLE AND INCOMMENSURATE WITH *ARLINGTON HEIGHTS* AND *WASHINGTON V. DAVIS*.

In determining whether the Columbus Board acted with segregative intent, the District Court employed a presumption which had been fashioned by the Sixth Circuit. [Pet. App. 43.] The District Court stated:

> . . . The law of the Sixth Circuit is applicable in the case at bar.

In *Oliver v. Michigan State Board of Education*, 508 F. 2d 178, 182 (Sixth Cir., 1974), *cert. den.* 421 U.S. 963 (1975), the Sixth Circuit held:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.
>
> [Pet. App. 48.]

In *Oliver* the Court of Appeals had held:

> A finding of de jure segregation requires a showing of three elements: (1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools.
>
> [Pet. App. 43.] 508 F. 2d 178, 182.

Under this test, as understood and applied in the Sixth Circuit, de jure segregation exists if there is (1) inaction by school officials, (2) with segregative purpose, (3) which results in continued racial imbalances and concentrations in public schools. Under the *presumption* of segregative intent referred to above, if the continuation of racial imbalances or concentrations is the foreseeable result of inaction, the presence of the first and third elements (inaction plus continued separation) gives rise to a presumption that segregative intent exists.

In the urban school district the continuation of racial imbalances in many schools is unquestionably foreseeable unless major reassignment and transportation is ordered by school authorities. Consequently, inaction by school officials in such a situation becomes presumptively tainted by segregative purpose under the presumption adopted

by the Court of Appeals. The effect of this presumption is to create a substantive constitutional duty to achieve racial balance. Failure to take action to overcome imbalance creates a prima facie case of an equal protection violation.

The Sixth Circuit's presumption is not in harmony with *Washington v. Davis*, 426 U.S. 229 (1976), which held that disproportionate impact alone would not support an equal protection claim. There must be more than mere disproportion. There must be more than continuing imbalance. There must be proof of discriminatory intent. Mere imbalance is not so suggestive of discriminatory intent that it rises to the level of probability warranting a presumption of such intent.

The Sixth Circuit's presumption is also plainly at odds with *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), where this Court held that proof of discriminatory intent in any equal protection case demands "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Writing for the Court, Mr. Justice Powell listed a variety of factors which that inquiry ought to consider. *Arlington Heights* teaches that the determination of discriminatory intent in equal protection cases requires careful and balanced consideration of all relevant factors. The Sixth Circuit's presumption of segregative intent, based solely on inaction and foreseeable racial imbalances, fails far short of the "sensitive inquiry" *Arlington Heights* demands.

The presumption is also unreasonable. It is illogical to *presume* discriminatory intent from decisions which can and do proceed from non-discriminatory reasons. School officials are faced with many demands on their resources which they must reconcile and balance. Their means are finite. Decisions concerning the distance pupils should be required to travel to their assigned schools, the extent to which schools nearest to children's homes should be util-

ized, and the appropriateness of investing in major transportation facilities all involve the management of the school board's resources. All such decisions are grounded in considerations of efficiency, economy, and good educational practice. A decision by a school board to forego measures to redistribute the pupil population to achieve racial balance in the schools of the system cannot fairly be *presumed* to proceed from discriminatory intent.

The Sixth Circuit's presumption of segregative intent is neither fair, reasonable, nor consistent with this Court's decisions in *Washington v. Davis* and *Arlington Heights, supra,* and it contributed to the errors of both of the Courts below.

CONCLUSION

For the foregoing reasons, the Ohio State Board of Education and Franklin B. Walter, Superintendent of Public Instruction, respectfully pray that the judgment of the Court of Appeals be reversed and that the cause be remanded to the District Court for further findings and consideration of the issues of liability and, if appropriate, the incremental segregative effect of the constitutional violations which it may find.

Respectfully submitted,

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