SUPREME COURT OF THE UNITED STATES

October Term, [illegible]

No. [illegible]

COLUMBUS BOARD OF EDUCATION, et al.,

Petitioners,

vs.

GARY L. PENICK, et al.,

Respondents.

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

PETITIONERS' REPLY BRIEF

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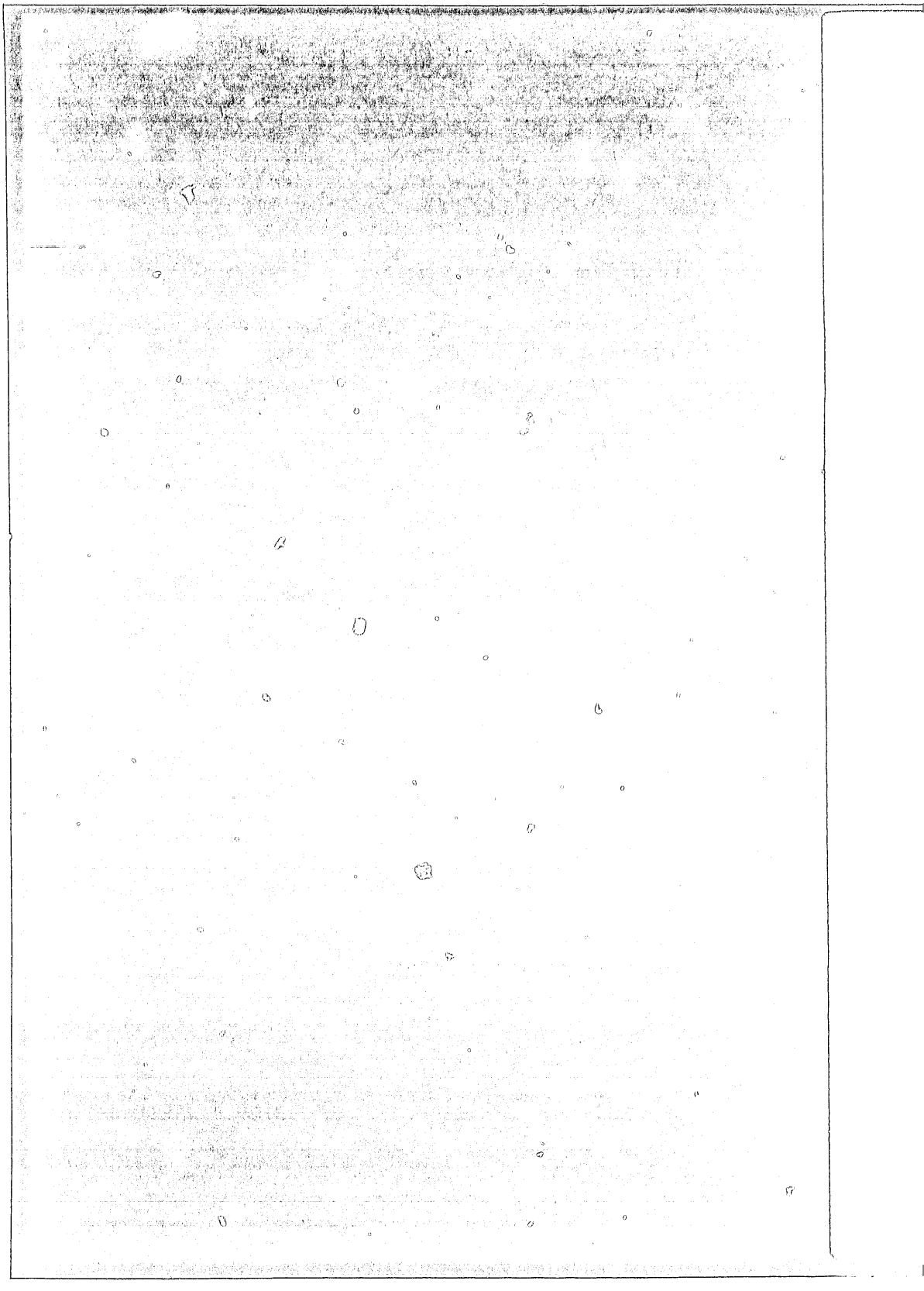

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This reply brief is confined to addressing matters raised in Respondents' Brief concerning the scope of this Court's review of the judgments below, the proper application of burden-shifting principles, and the relevance and weight of social science opinion on the legal issues presented here for review.

I

The Respondents' extensive discussion of the evidence in this case, largely devoted to matters which were not the subject of findings by the district court, is apparently based upon an assumption that the lower courts' ultimate findings of systemwide liability and remedy can be affirmed if supported by any evidence of further alleged instances of discriminatory conduct which were not the subject of specific findings by the trial court. Although not so characterized by either court below, Respondents repeatedly insist upon characterizing the findings of the trial court as mere "examples" of allegedly numerous instances of unconstitutional conduct. The Respondents' attempt to supplement the trial court's findings of remote and isolated instances of unconstitutional conduct must be rejected.

If the trial court's findings of isolated violations are insufficient to support its ultimate conclusions, this Court cannot be asked to search the record and to analyze the evidence anew in order to supply the findings which the trial court failed to make:

> "It may be that adequate evidence as to these matters is in the present record. On that we do not pass, for it is not the function of this court to search the record and analyze the evidence in order to supply findings which the trial court failed to make."
>
> *Kelley v. Everglades Drainage District*, 319 U.S. 415, 421-22 (1943).

Indeed, the primary reason for the requirement of findings of fact and conclusions of law, Rule 52, Fed. R. Civ. P., is to insure that trial judges carefully state the process by which they reach their ultimate conclusions. Cf. *United States v. Merz*, 376 U.S. 192, 199 (1964). Specific findings are also essential for meaningful appellate review. As a consequence, it is a well recognized require-

ment that findings of fact must be made in sufficient detail and exactness "to indicate the factual basis for the ultimate conclusion" reached by the trial court. *Kelley v. Everglades Drainage District, supra,* 319 U.S. at 422. See also, *Hatahley v. United States,* 351 U.S. 173, 182 (1956); 5A MOORE, FEDERAL PRACTICE ¶¶ 52.05[1], 52.06[1] (1977); 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 2579 (1971). This requirement is even more critical in a school desegregation case, where trial courts are admonished that their findings must be supported "by factual proof and justified by a reasoned statement of legal principles." *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 410 (1977).

Consequently, the judgments below cannot be affirmed on the assumption that the record might support findings of additional instances of discrimination which were not the subject of specific findings by the trial court.[1] If the specific findings of remote and isolated violations are insufficient to support the judgments below, the judgments should be reversed or vacated, and the case remanded for the required findings.

While Respondents urge an improperly broad view of the Court's ability to supplement the findings of the trial court, they urge an improperly narrow view of the Court's power to review the findings challenged by Petitioners, asserting that these findings are insulated from

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[1]This is especially true in this case, where the evidence which Respondents urge in support of their claim of additional constitutional violations was met by extensive rebuttal evidence in each instance. For example, the Respondents' claim that certain optional zones and discontiguous attendance areas, not discussed in the trial court's opinion, were also discriminatorily motivated, or had a discriminatory effect, is rebutted by extensive evidence. *See* Pet. Br. pp. 26-34. Although the trial court made no findings concerning the use of rental facilities, boundary changes, and transportation for overcrowding, Respondents allege that these practices were also discriminatory in intent and effect, although there was extensive evidence to the contrary. *See* Pet. Br. pp. 34-36.

meaningful review by the "clearly erroneous" rule, Rule 52, Fed.R.Civ.P., and the "two court" rule. *See* Resp. Br. p. 4 n. 3. In fact, however, neither rule limits this Court's review of the findings challenged by Petitioners.

In the first place, the "two court" rule does not apply to findings of fact which determine constitutional questions. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404 (1940); 5A MOORE, FEDERAL PRACTICE, ¶ 52.12 (1977).

Furthermore, both the "two court" rule and the "clearly erroneous" rule apply only to findings of fact which are untainted by an erroneous view of the law. If a finding of fact is induced by or results from a misapprehension of controlling substantive principles, the "clearly erroneous" provision of Rule 52 does not limit this Court's review. Rather, the Court is essentially reviewing a question of law, and the scope of review is therefore plenary. *United States v. General Motors Corp.*, 384 U.S. 127, 141 n. 16 (1966); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 193 (1963); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). Likewise, a finding of fact resulting from a misapplication of controlling legal principles is not within the application of the "two court" rule. *Keyes v. School District No. 1*, 413 U.S. 189, 198 n. 9 (1973).

The opinions below are replete with examples of findings infected with legal error. For example, the finding that Columbus was a dual system in 1954, despite the existence of many schools with racially mixed student bodies, was premised upon an erroneous legal presumption arising from the existence of five predominantly black central city schools at that time. *See* Pet. Br. pp. 67-74. Legal error also infected the trial court's findings that isolated post-1954 actions were intentionally discriminatory due to the misapplication of legal principles governing proof of discriminatory intent. *See* Pet. Br. pp. 81-95. Finally, the lower courts' use of legal presumptions and shifting bur-

dens of proof to reach ultimate findings of systemwide liability, and the requirement of a systemwide remedy, is yet another example of findings induced by a misapprehension of controlling legal principles. *See* Pet. Br. pp. 52-79. The "two court" rule and the "clearly erroneous" rule therefore do not limit the scope of this Court's review of these findings.

II

In our main brief, we have argued against the use of presumptions and shifting burdens of proof as a substitute for the detailed factual inquiry required of district courts in school desegregation cases. We do not intend to reiterate that argument here. However, because of the arguments raised by Respondents and various amici concerning the operation of burden shifting principles in the context of the trial of a desegregation case, Petitioners are compelled to address the nature of the defendants' burden if it can be assumed that, through the application of a presumption or through the plaintiffs' proof of a prima facie case, the "burden of proof" shifts to the defendants.

Respondents argue that, under *Keyes v. School District No. 1,* 413 U.S. 189 (1973), when the plaintiffs' proofs in a desegregation case have reached a certain level, the trial court may find that a prima facie case of discrimination has been made out, or that a legal presumption of discriminatory intent and effect is justified. Whether plaintiffs' proofs are characterized as a prima facie case, or as triggering a presumption, Respondents argue that once plaintiffs show intentionally segregative action in a substantial portion of the school system, the burden shifts to the defendants to prove (1) that the existence of other segregation within the district is "not adventitious", *i.e.,* that it is not the result of other discriminatory acts, and (2) that their intentionally segregative acts have not created a dual school system. Resp. Br. pp. 119-120. See also, *Keyes, supra,* 413 U.S. 189, 201, 208 (1973).

Petitioners have already discussed the application of the *Keyes* presumptions to this case, and have demonstrated that the plaintiffs' proofs never rose to the level justifying a shift in the burden of proof to the defendants. Assuming that they did, however, what was the nature of the defendants' burden?

The concept of "burden of proof" in a lawsuit really encompasses two distinct burdens: (1) the burden of production of evidence on a fact in issue (burden of going forward), and (2) the burden of persuading the trier of fact that the alleged fact is true (risk of nonpersuasion). 9 J. WIGMORE, EVIDENCE §§ 2485, 2487 (3d ed. 1940).

The burden of going forward is associated with the risk that a dismissal or directed verdict may result if the party on whom the burden falls fails to sustain it. *Id.*, § 2487. On the other hand, the risk of nonpersuasion is the risk that, even though the plaintiff has produced evidence sufficient to meet his burden of initial production, the trier of fact may not be persuaded that the plaintiff is entitled to a relief by a preponderance of the evidence. *Id.*, § 2485.

The risk of nonpersuasion remains with the party who has the burden of pleading (generally, the plaintiff) and does not shift during or after the trial. *Id.* § 2489 p. 285. On the other hand, the burden of production (burden of going forward), may shift from one party to another during the course of trial.

This shift in the burden of going forward may occur in two situations. The first is where the plaintiff has adduced evidence from which reasonable men could not help but draw the inference of the fact to be proved. This level of proof is usually characterized as a prima facie case, and the plaintiff may be entitled to a directed verdict unless the defendant comes forward with some evidence in rebuttal. *Id.* § 2494 p. 299.

Presumptions are legal fictions which accomplish a similar shift in the burden of going forward. In logical

terms, if proof of fact A is introduced and a presumption exists to the effect that fact B may be inferred from fact A, the party denying the existence of fact B must come forward with some evidence or risk a verdict being directed against him.

As is the case where the plaintiff makes out a prima facie case, a presumption has the effect of shifting the burden of production to the defendant. It does *not* shift the burden of persuasion:

> ". . . a presumption imposes upon 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 risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.*"
>
> Rule 301, FED. R. EVID. (emphasis added). *See also*, WIGMORE, *supra*, §§ 2489, 2491.

Once there has been a shift in the burden of production, the defendant must come forward with evidence to rebut the presumption. Under the prevailing view, once the defendant has satisfied this burden of production, the presumption is spent. The plaintiff must then carry his burden of persuasion if he is to prevail on his claim. WIGMORE, *supra*, § 2487 pp. 280-81, § 2491 pp. 289-90.

These evidentiary principles apply with equal force in school desegregation cases. In such a case, the plaintiff has the burden of pleading and proving (1) actions by school officials with a segregative purpose (intent), and (2) that these actions resulted in a currently segregated condition (causation or effect). *Keyes, supra*, 413 U.S. at 198.

Although the plaintiff bears both the burden of production of evidence and the risk of nonpersuasion on these issues, *Keyes* also speaks of shifting the "burden of proof" to the defendants on both intent and effect, once the

plaintiffs prove intentional segregation in a substantial portion of the school system.[2] However, the lower courts in this case mistakenly viewed *Keyes* as authorizing a shift in both the burden of production *and* the risk of nonpersuasion to the defendants. As a consequence, despite substantial evidence rebutting the plaintiffs' allegations of intentional discrimination and systemwide effect, the lower courts found that the defendants had failed in shouldering their "burden of proof". See, e.g., *Penick v. Columbus Board of Education,* 429 F. Supp. 229, 260 [Pet. App. 60-61]; *Penick v. Columbus Board of Education,* 583 F.2d 787, 798-99. [Pet. App. 160.] See also, *Brinkman v. Gilligan,* 583 F.2d 243, 251, 253-54, 258 (6th Cir. 1978). [Pet. App. 233, 237, 239, 246.]

Assuming that the use of presumptions and shifting burdens of proof was appropriate in the first instance,[3] both courts erred in shifting the risk of nonpersuasion to the defendants. Under Rule 301, and generally applicable evidentiary principles, only the burden of production should have been shifted.

By thus equating a prima facie case or presumption with conclusive proof of a constitutional violation, both courts below committed the same error as was criticized by this Court in two recent employment discrimination

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[2]Whether this shift in the burden of proof results from the proof of a prima facie case, or from the application of a legal presumption, appears to be immaterial. *Keyes* spoke of both concepts, and treated them as interchangeable. 413 U.S. at 208.

[3]As demonstrated in our main brief, this Court's insistence in *Dayton* upon factual proof of intent and effect implicitly rejected the avoidance of the "complex factual determination" through presumptions and shifting burdens of proof. Furthermore, assuming that shifting the burden of proof may be appropriate in some circumstances, Respondents in this case never made the threshold showing of intentional discrimination in a substantial portion of the school district at the time of trial, as required by *Keyes.*

cases. *Furnco Construction Co. v. Waters*, ... U.S. ....., 57 L.Ed.2d 957 (1978); *Board of Trustees of Keene State College v. Sweeney*, ... U.S. ....., 58 L.Ed.2d 216 (1978).

In *Furnco*, the Court was concerned with the operation of burden shifting principles when a plaintiff makes out a prima facie case of a discriminatory refusal to hire in violation of Title VII of the Civil Rights Act of 1964. The Court noted that proof of a prima facie case merely raises a strong inference of discrimination:

> "A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based upon consideration of impermissible factors. [Citation omitted.] And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with *some* reasons, based his decision on an impermissible consideration such as race."
>
> *Furnco*, ... U.S. at ....., 57 L.Ed.2d at 967.

Nonetheless, proof of a prima facie case merely shifts the burden of production to the defendant, who can rebut it by introducing evidence of a legitimate, nondiscriminatory reason for his actions:

> ". . . it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race . . . To dispel the adverse inference from a prima facie showing . . ., the employer need only 'articulate some legiti-

> mate nondiscriminatory reason for the employee's rejection' [citation omitted]."
>
> *Id.*, ... U.S. at ....., 57 L.Ed.2d at 967-68.

Although the defendant offered evidence of legitimate motive, the court of appeals nonetheless found that the defendant had failed in its burden of proof, "apparently equating a prima facie showing with a discriminatory refusal to hire." *Furnco*, ... U.S. at ....., 57 L.Ed.2d at 967. This misapplication of burden shifting principles compelled reversal of the court of appeals' judgment.

In *Keene State College, supra,* the Court found that the court of appeals in that employment discrimination case had erred in requiring the defendant to "prove" the absence of a discriminatory motive in failing to hire the plaintiff:

> "While words such as 'articulate,' 'show,' and 'prove,' may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive' . . . . [In *Furnco*] we made it clear that the former will suffice to meet the employee's prima facie case of discrimination. Because the Court of Appeals appears to have imposed a heavier burden on the employer than Furnco warrants, its judgment is vacated and the case is remanded for further reconsideration in light of Furnco."
>
> *Keene State College,* ..... U.S. at ....., 58 L.Ed.2d at 218-219.

The same misapplication of burden shifting principles has occurred in this case. Although the defendants "articulated legitimate nondiscriminatory reasons" for the actions challenged by plaintiffs, both courts required defendants to conclusively prove the absence of discriminatory mo-

tive.[4] Similarly, although defendants offered evidence tending to show the absence of a systemwide effect from the isolated instances of discrimination found, both courts insisted that defendants conclusively prove the absence of systemwide effect.

This Court should therefore reject Respondents' argument that the judgments below should be affirmed because Petitioners failed in their burden of proof. Rather, the judgments should be reversed, and the lower courts instructed to insist upon proof, not presumption, in the trial of a school desegregation case.

III

As a final matter, Petitioners must take issue with the Respondents' attempt to bolster their arguments concerning the asserted reciprocal effect between racial composition of schools and racial composition of neighborhoods with a position paper signed by a number of "social

[4]A compelling example of this error can be found in the opinion of the court of appeals. When plaintiffs urged that defendants' school construction policies were intentionally discriminatory, the defendants demonstrated that schools were constructed in conformity with recommendations contained in a series of building studies performed by The Ohio State University. [Px 59, 60, 61, 62, 63, 64.] Race was not a factor in these studies [A. 577, 598-99], a fact conceded by plaintiffs' expert witness Dr. Foster. [A. 541.] The district court found that these studies were "comprehensive, scientific and objective", and that the Columbus Board constructed new facilities and additions to existing facilities "in substantial conformity" with the recommendations contained in the building studies. 429 F.Supp at 237-38. [Pet. App. 13-14.] Despite this extensive evidence of legitimate, nondiscriminatory reasons supporting the Board's school construction practices, the Court of Appeals found that the "gross statistics" concerning the racial composition of new schools, "requires a very strong inference of intentional segregation", and that on the sole basis of the 1975-76 pupil enrollment statistics, "we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation." 583 F.2d. at 800, 804. [Pet. App. 165, 173.]

scientists," attached as an appendix to Respondents' Brief.

At the outset, Petitioners must disagree with the assertion that the views expressed in the position paper are impartial, or that they are supported by "broad scholarly agreement." But this is really beside the point. The opinion testimony contained in the position paper is not a part of the record in this case, and therefore cannot be considered as evidence supporting the judgments below. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-58 n. 16 (1970). Nor can the opinions expressed in the paper be characterized as matters of general knowledge subject to judicial notice. *Muller v. Oregon*, 208 U.S. 412, 419-21 and n. (1908). *See also*, R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 717 (5th ed. 1978).

An even more fundamental objection concerns the appropriate weight to be accorded to social science opinion even where it has been properly received into evidence. Although social science opinion can often serve to illuminate questions presented to a court for adjudication, courts must hesitate to accept theories advanced by social scientists as being "truths" of sufficient reliability to be incorporated into rules of law.[5] This is especially true where, as in the case here, the theory in question is fiercely debated among social scientists, and where the positions taken in that debate are often imbued with the particular political or social biases of the participants.[6]

[5]D. Moynihan, *Social Science and the Courts*, 54 THE PUBLIC INTEREST 12 (1979).

[6]The debate among social scientists concerning the existence of a reciprocal effect between the racial compositions of schools and neighborhoods is outlined in Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63 (1977).

The purported impartiality of the Respondent's position paper can also be properly questioned on grounds of bias. Among the subscribers of the paper are individuals who have testified on behalf of plaintiffs in other school desegregation cases. Both Dr. Robert L. Green and Dr. Karl Taueber testified on behalf of the plaintiffs in this case. *See also*, Moynihan, n. 6 *supra* at 19.

Consequently, Petitioners urge the Court to decline the Respondents' invitation to stray beyond the record and governing legal principles by deciding this case upon inconclusive and partisan social science theory.

IV

CONCLUSION

Petitioners respectfully request that the Court grant the relief requested at the conclusion of their main brief.

Respectfully submitted,

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