No. 89-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT R. FREEMAN, *et al.*,

Petitioners,

—v.—

WILLIE EUGENE PITTS, *et al.*,

Respondents.

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

RESPONDENTS' BRIEF

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STATEMENT OF FACTS AND HISTORY OF THE CASE

A. Prior To 1954 And From 1954 To 1966, The DeKalb County School System (DCSS) Maintained Totally Segregated Schools

DCSS admits that prior to and for 12 years after this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), declaring segregated schools unconstitutional, it maintained totally segregated schools. Pet.Br. at 2; Pet.App. 7a; J.A. 202, 209.

B. From 1966 To 1969, DCSS Did Not Desegregate Its Schools

In 1966, DCSS instituted a "freedom of choice" plan. J.A. 209. This plan "did not dismantle the dual systems." J.A. 210; Pet.App. 7a; Pet.Br. at 3. Thus, it was not until it was sued, 15 years after *Brown*, that DCSS finally agreed to desegregate.

C. The 1969 Court Order Did Not Desegregate DCSS Schools

In 1969, the district court ordered DCSS to desegregate. J.A. 61-70. By its terms, the court order did not contemplate that desegregation would be complete in 1969 and, when the 1969 school year began, DCSS was not, in fact, desegregated by student assignment or other facets of the school system.

The 1969 order contained a number of provisions that were applicable only to the school year 1969: (1) student assignment zones were set for that year only, J.A. 64-65; (2) school closings were set for that year only, J.A. 65; (3) the faculty assignment standard was to ensure only that black teachers were present in every school for 1969, J.A. 66. Other provisions of the 1969 order contemplated future action by the court and/or annual modifications: (1) it was contemplated that

assignment zones for future years might have to be modified and DCSS was required to report assignment patterns by race so that they could be reviewed annually, J.A. 68; (2) after the school board achieved the goal set for the first year of assuring that black faculty be present in every school, it was directed in subsequent years to "establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in school," J.A. 67; (3) faculty assignment was to be reviewed annually to determine if modification of faculty assignment was necessary, J.A. 67-68; (4) future design and siting of new schools, as well as expansion of existing schools, were subject to review by the court to ensure that they were done "with the objective of eradicating segregation and perpetuating desegregation," J.A. 66, 68; (5) DCSS was to provide "remedial education programs which permit students . . . who have previously attended segregated schools to overcome past inadequacies in their education," J.A. 70. Furthermore, the court retained jurisdiction "for the purpose of implementing this order." J.A. 70.

The order, as implemented, left many schools racially identifiable because of student, faculty, and staff assignment. During the 1969 school year, there were 73 elementary schools in DCSS. The percentage of black students in the elementary school population as a whole was 6.2%. J.A. 269-359. By any measure, there was extreme separation of the black and white elementary school students:

	No. schools	**% B's**	**% W's**
Majority black	2	35%	1%
20% B or more	7	59%	6%
12.4% B or more	15	83%	14%
less than 1% B	46	1%	69%
All white	33	0%	50%

% B's means the percentage of all black students attending those schools
% W's means the percentage of all white students attending those schools

J.A. 269-359. Thus, in 1969, 64% of all schools were either all white or had more than twice as many black students as the systemwide average (12.4% is twice the systemwide average of 6.2%).[1] A majority of black students were in the 7 (10%) blackest schools.

There was similar separation of black and white high school students in 1969. J.A. 360-80. At the time, there were 19 high schools and black students were 4.8% of the high school population. J.A. 360-80. 59% of all black high school students, and 13% of all white students, were assigned to the four (21%) blackest high schools (more than 10% black) while only 3% of the

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[1] A school need not necessarily be all black or even majority black to be identifiable as a black school. The most common measure of a racially identifiable school requires the court to look not just at student assignment, but also faculty and staff assignment, the history of the school, distribution of resources, and other factors. However, with respect to student assignment, this Court has approved and the lower courts have routinely applied a standard that condemns any school that varies widely from the systemwide average percentage of black students. For example, if the systemwide average is 30% black, courts will apply a standard referred to as "plus or minus 15%" that marks as possibly racially identifiable any school that is greater than 45% or less than 15% black. *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 455 & n.3 (1979); *Little Rock Sch. Dist. v. Pulaski City Special Sch. Dist.*, 839 F.2d 1296 (8th Cir.), *cert. denied sub nom. Arkansas Bd. of Ed. v. Little Rock Sch. Dist.*, 488 U.S. 869 (1988)(± 6%); *Kelley v. Metro. Co. Bd. of Ed.*, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 459 U.S. 1183 (1983)(±15%); *Morgan v. Nucci*, 831 F.2d 313, 320 (1st Cir. 1987); *U.S. v. South Bend Community Sch. Corp.*, 511 F.Supp. 1352 (N.D.Ind. 1981), *aff'd*, 692 F.2d 623 (7th Cir. 1982)(±15%). Obviously, if the systemwide average percentage of black students is very small, as it was in DeKalb in 1969, a school with a smaller variance would be seen as racially identifiable and thus the percentage of permissible variance should be less.

black high school students, and 44% of the white students, were assigned to the seven (37%) whitest high schools (less than 1% black). J.A. 360-80.

Although the 1969 court order required complete desegregation of DCSS, DCSS largely failed to implement those aspects of the order dealing with faculty and staff assignment and remedial education. Black faculty continued to be disproportionately assigned to schools that were identifiably black by student assignment. Seven (10%) of the elementary schools had no black faculty at all, contrary to the court's order. J.A. 279, 281, 288, 290, 303, 318, 332. Four of those schools had no black students. J.A. 279, 281, 318, 332. The system-wide percentage of black teachers was 7%. J.A. 269-359. 21% of the black teachers and 10% of the white teachers were assigned to the 7 elementary schools that were more than 20% black by student assignment. J.A. 269-359. Again, high schools showed a similar pattern. 28% of the black teachers and 16% of the white teachers were assigned to the 4 blackest high schools. J.A. 360-80. Thus, from the outset, DCSS reinforced the racial identity of the schools by its faculty assignments, over which it had complete control. There is no evidence that any remedial education was ever provided as ordered by the court.

D. From 1969 To 1975, Prior To The Major Demographic Change In DeKalb County, The School District, By Assignment Of Faculty, Staff, And Students, And By School Openings And Closings, Reinforced The System Of Segregated Schools

1. Student Assignment

The largest change in the demographic population in DeKalb County occurred between 1975 and 1980. J.A. 259, 260, 214-15; Tr. July 6, 1987 at 52-54. However, it was between 1969 and 1975, prior to the massive demographic change, that the primary increase in racial

segregation in DCSS schools occurred. J.A. 253. Between 1969 and 1975, using various measures of racial identifiability, the number of racially identifiable elementary schools (of the between 73 and 82 total schools) dramatically increased:

	'69	'70	'71	'72	'73	'74	'75
90%+ B	0	1	1	2	3	4	5
50%+ B	2	2	3	5	8	12	12

90%+ B means schools with more than 90% black students

50%+ B means schools with more than 50% black students

J.A. 269-359.

High schools showed similar changes. J.A. 360-80. By 1972, one high school was over 70% black, J.A. 368, in a system that was then 7.6% black. J.A. 360-80. By 1974, there were two majority black high schools. J.A. 368, 380. The number of white (less than 1% black) high schools remained roughly constant at 6-8. J.A. 360-80.

The percentage of students who attended racially identifiable schools also increased dramatically between 1969 and 1975:

Elementary Schools

	'69	'70	'71	'72	'73	'74	'75
%B/MB	35	34	44	55	64	74	73
%W/MB	1.3	0.8	0.8	1.6	2.6	3.7	2.6

High Schools

	'69	'70	'71	'72	'73	'74	'75
%B/MB	0	0	0	39	40	53	51
%W/MB	0	0	0	1.2	0.6	1.8	1.3

%B/MB means the % of all black students in

majority black schools
%W/MB means the % of all white students in majority black schools

J.A. 269-380.

In short, by 1975, prior to the large-scale demographic changes that petitioners now rely on as their principal defense, segregation in DCSS schools was more extreme than it had been in 1968 under the failed "freedom of choice" plan. DCSS's principal expert witness offered a measure of segregation/desegregation called the relative exposure index. J.A. 629-30. This index is a "measure . . . of the interracial contact or the exposure of one group to another . . . ." J.A. 575. According to DCSS's expert, an index of 100 marks a totally segregated school system; an index of 0 marks a totally desegregated school system. By this index, the vast majority of the increase in segregation in DCSS occurred in 1969-1975. During this period, the relative exposure index increased from 22.7 to 57.2, which is 3 points worse than its pre-1969 level of 53.9. J.A. 253; *see also* J.A. 255, 258.

Similarly, under the failed freedom of choice plan in effect in 1968, 68% of the black elementary school students attended majority black schools. J.A. 209-10; Pet. App. 7a; Pet.Br. at 3; D.Exh. 193. By 1974, 5 years after the order was issued, 74% of black elementary school students attended majority black schools. J.A. 269-359.

Furthermore, the racial identifiability of schools increased more quickly than the increase of black students during this critical period from 1969-1975. From 1969 until 1975, the percentage of black elementary students in the school district increased from 6.2 to 19.6. J.A. 253. The percentage of black elementary school students in majority black schools increased at a much faster rate, from 35% to 73%. J.A. 269-359. Similarly, the percentage of black high school students went from

4.8% to 13.9%. J.A. 253. The increase of black high school students in majority black high schools from 0% to 51% was also more rapid than their increase in the system. J.A. 360-80.

2. Faculty And Staff Assignment

In 1976, the district court found that DCSS had never sufficiently desegregated faculty and staff and ordered DCSS to utilize reassignment of teachers and principals to achieve that goal. J.A. 75-76 ("Those schools with the highest percentage of black teachers generally also have the greatest predominance of black students"); J.A. 85, 94, 96-97, 226-27.

There is no question that faculty segregation tracked student segregation:

Elementary Schools

	'69	'70	'71	'72	'73	'74	'75
Black sch.	2	2	3	5	8	12	12
White sch.	46	47	51	45	41	38	33
BT/B sch.	9	10	9	20	25	55	42
WT/B sch.	3	3	4	6	10	12	12
BT/W sch.	52	45	44	31	34	19	25
WT/W sch.	64	63	63	57	53	50	42

High Schools

	'69	'70	'71	'72	'73	'74	'75
Black sch.	0	0	0	1	1	2	2
White sch.	7	6	6	7	8	7	6
BT/B sch.	0	0	0	23	15	42	29
WT/B sch.	0	0	0	4	4	5	6
BT/W sch.	39	27	20	15	25	11	16
WT/W sch.	40	36	36	37	43	39	31

Black sch. means the number of black (majority) schools

White sch. means the number of white (less than 1% black) schools
BT/B sch. means the % of black teachers in the black schools
WT/B sch. means the % of white teachers in the black schools
BT/W sch. means the % of black teachers in the white schools
WT/W sch. means the % of white teachers in the white schools

J.A. 269-380. Thus, at a time when the percentage of black teachers systemwide was increasing (in the elementary schools from 7% to 13%), the percentage of black elementary school teachers assigned to black schools increased four-fold and the percentage of black teachers assigned to white elementary schools decreased by half. J.A. 269-359.

Further, the evidence shows that in many instances, DCSS disproportionately assigned black teachers to schools in a self-fulfilling prophecy that the school was about to become black by student assignment. For example, the large increase in the percentage of black students in Gresham Park Elementary School from 1971 to 1972 was preceded by a large increase in black faculty assigned to that school from 1970 to 1971. J.A. 298. In 6 of the 7 elementary schools that became majority black by 1975, and for which complete data exists, there was a large increase in the number and percentage of black faculty in the year or two prior to the large increase in the percentage of black students. J.A. 295, 298, 310, 320, 342, 351. *But see* J.A. 285. The same phenomenon occurred in the high schools. For example, the large increase in black students in Walker High School was preceded by a more than doubling of the number of black teachers. J.A. 380.

3. Facilities

Between 1969 and 1975, DCSS opened 13 new elementary schools. J.A. 269-359. Despite the court's 1969 order that "in locating and designing new schools" DCSS "do so with the objective of eradicating segregation and perpetuating desegregation," J.A. 66, DCSS's school opening and closing of schools had precisely the opposite effect. The elementary schools opened in that period include 5 of the 8 schools that are now less than 5% black: Austin, 1%; Livsey, 2%; Vanderlyn, 3%; Kingsley, 3%; Rockbridge, 4%. J.A. 272, 311, 316, 353, 337, 269-359. (In 1975, these 5 schools had a total of 4 black students.) The elementary schools opened from 1969 to 1975 also include 3 of the 18 schools that are now 90% or more black. J.A. 274, 282, 333, 269-359. Thus, of the 13 elementary schools opened after the court order, 8 are either virtually all white or virtually all black. J.A. 269-359. Not one of the 13 schools opened between 1969 and 1975 has become nonracially identifiable (defined as a school that is plus or minus 20% from the average percent black systemwide; for 1986, nonidentifiable elementary schools would be those with between 34.9% and 74.9% black students). Of the two high schools opened between 1969 and 1975 (none was closed), one is now 2% black (the whitest high school in DCSS); the other is now 92% black, one of five high schools now more than 90% black. J.A. 367, 361, 360-80.[2]

In 1976, the district court found that two school openings perpetuated and even accelerated segregation. J.A. 76-79. Cedar Grove Elementary School and Cedar Grove High School opened in 1975 and 1972 respective-

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[2] DCSS closed 10 elementary schools between 1969 and 1975. J.A. 269-359. The schools that were closed were often located in the center and eastern parts of the county. Those opened were located on the periphery of the county, and thus certain to remain racially identifiable.

ly. J.A. 77-79. During the next several years, DCSS siting and boundary decisions created new white schools adjacent to old and now black schools. In reviewing this phenomenon, the district court wrote:

> the influx of black families and departure of white families accounted for some of the increase. But the redrawing of attendance lines . . . must have contributed somewhat to this dramatic increase. Additionally, it must be said that the total effect of the horizontal boundary lines drawn to accommodate these three elementary schools was to ensure that one predominantly white school, Cedar Grove, would remain predominantly white for a number of years . . . [It] perpetuat[ed] a dual system.

J.A. 89.[3] The court further found that DCSS had less segregative alternatives for at least some of the attendance boundary changes it instituted, and had "not adequately met the heavy burden of explaining the alternatives chosen which tended to hinder, rather than further, desegregation." J.A. 91.[4]

In short, from 1969 to 1975, DCSS not only did not desegregate the schools but, through faculty and staff assignment, school openings and closings, and student as-

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[3] Cedar Grove Elementary School remained predominantly white until 1978, at which time Clifton and Meadowview were over 80% black. J.A. 282, 285, 320. Cedar Grove High School remained predominantly white until 1979, at which time both Gordon and Walker were over 90% black. J.A. 361, 368, 380.

[4] The district court at the time refused to take action because it said "an injunction against . . . [the boundary changes] at this point in time would be meaningless" and because it believed the segregation caused by DCSS had become more difficult to cure. J.A. 78, 79, 92. A biracial committee was set up to oversee future boundary changes. J.A. 92.

signment policies, actively perpetuated and expanded the amount of segregation in DCSS schools. Thus, at the time the greatest demographic change began, DCSS already had 12 majority black elementary schools that contained 73% of the black elementary students. It had 2 majority black high schools that contained 51% of the black high school students. Teachers and staff were disproportionately assigned on the basis of race.

E. From 1976 To 1985, When The Major Demographic Change Occurred In DeKalb County, DCSS Reinforced The Segregated System It Had Perpetuated And Expanded

1. Student Assignment

Between 1975 and 1980, the most significant residential demographic change involving race occurred in the school district. J.A. 259, 260, 215; Tr. July 6, 1987 at 52-54. In southern DeKalb, where the racially identifiable black schools were located, the black population increased and the white population decreased. J.A. 259, 215. For the first time, the number of white residents decreased in the entire district while the number of black residents increased at an even greater rate than in prior years. J.A. 259-60. From 1975 until 1985, the percentage of black students increased from 17 to 45. D. Exh. 193.

Despite these demographic changes, the percentage of all black students attending majority black schools, which had increased dramatically from 1969 to 1975, remained relatively constant from 1975 to 1985:

	'69	'75	'76	'77	'78	'79	'80	'81	'82	'83	'84	'85
E	35	73	78	79	75	83	81	81	78	78	76	75
H	0	51	70	66	68	69	74	81	76	72	68	63

E means the % of all black elementary students in majority black schools

H means the % of all black high school students in majority black schools

J.A. 269-380.

The relative exposure index, which had increased so dramatically from 1969 to 1975, barely changed. It went from 57.2 in 1975 to 57.8 in 1980, and thereafter began to decline. J.A. 253.

However, because the number of black students increased from 1976 to 1986, the number of black schools increased:

	'76	'77	'78	'79	'80	'81	'82	'83	'84	'85
90% B	8	10	12	15	15	15	18	12	1	23
50% B	17	18	20	26	27	29	29	30	30	32

90% B means schools with more than 90% black students

50% B means schools with more than 50% black students

J.A. 269-380.

In addition, the segregation deepened as more black students attended the increasing number of schools that were at least 90% black:

	'69	'75	'76	'77	'78	'79	'80	'81	'82	'83	'84	'85
E	0	41	49	57	53	58	54	51	59	60	58	60
H	0	31	28	24	39	53	49	47	43	40	35	49

E means the % of all black elementary students in schools more than 90% black

H means the % of all black high school students in schools more than 90% black

J.A. 269-380.

In short, the most dramatic demographic changes, which occurred between 1975 and 1985, did not cause DCSS's schools to become segregated; they were

already segregated. The changes did further cement the vestiges of segregation.

2. Faculty And Staff Assignment

Between 1975 and 1985, DCSS continued its pattern of assigning black teachers and staff to black schools and white teachers and staff to white schools, in spite of the court's second order to the contrary and repeated reminders by the black community of the need to correct the situation. J.A. 660-61, 697-98. Again, faculty assignment by race correlated perfectly with student assignment by race. For every single year, the percentage of all black teachers assigned to black schools was greater than the percentage of all white teachers assigned to those black schools. J.A. 269-380.

Further, the evidence again shows that in many instances, DCSS disproportionately assigned black teachers to schools in a self-fulfilling prophecy that the school was about to become black by student assignment. For example, DCSS signaled that Fairington was to become a black school from 1977 to 1978 by increasing the number of black teachers; Fairington began a large increase in the percentage of black students the following year. J.A. 293. In Indian Creek, the 1977 to 1978 increase in black teachers was followed by a 1978 to 1979 increase in black students. J.A. 307. Towers High School's large increase in the percentage of black students (1976-1977) was preceded by a large increase in the number and percentage of black teachers (1975-1976). J.A. 378. *See also* J.A. 271, 280, 361, 376.

3. Facilities

Despite the massive demographic changes that occurred from 1976 to 1986, there was only one elementary school opened, J.A. 269-359, while eight were closed. J.A. 269-359. Thus, 72% of all elementary school openings and closings occurred before the demographic changes occurred. The location of DCSS's facilities was

largely fixed prior to 1976.

4. Actions Taken By DCSS That Purported To Be Desegregative

a. Majority To Minority Transfer Program. In 1972, DCSS unilaterally instituted a transfer program, in violation of the 1969 order that prohibited all transfer programs. J.A. 65-66, 80. The DCSS transfer program permitted transfers that were supposed to have a desegregative effect and is referred to as an "M to M" [majority to minority] program because it permits only transfers of students from schools where they are in the racial majority to schools where they are in the minority. J.A. 216. By 1975, it was affecting only 94 (one tenth of one percent) of the 82,526 students. J.A. 75. In that year, the district court found that three of the rules DCSS set to govern the M to M program imposed "impermissible burdens upon those students wishing to take part in the program, discouraging widescale use of this desegregation tool." J.A. 80. It ordered substantial changes in the program and it was only after these court ordered changes that the program began to affect more students. J.A. 92.

Even by 1986, however, the M to M program only involved the transfer of 4194 students (6%) of whom 4167 (99.4%) were black and 27 (0.6%) were white. J.A. 216-17, 253, 473-75. Almost the entire burden of the desegregation caused by the M to M program has been borne by black students. J.A. 473-75, 571, 593, 668, 704. The M to M program has not made the blackest schools less black,[5] J.A. 668, and at best only very mar-

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[5] Q. Isn't it fair to say though that basically for all the kids in the southwest area of the county [racially identifiable black schools] they have two choices, a segregated education or getting on an M-to-M bus?

(continued...)

ginally affected the whitest schools. J.A. 665-67, 810-11, 869. Further, although white and black bus drivers equally drove regular students in the district, drivers assigned to drive the black M to M students were disproportionately black. J.A. 659.

b. Magnet Program. In the 1980's, DCSS began a magnet program that, as of the time of trial, affected portions of only seven schools and fewer than 1% of the system's students. Pet.App. 24a, n.16; J.A. 217. The magnet program was a direct result of actions of the district court. J.A. 689. DCSS at trial promised future magnet programs, but had previously refused requests that the magnet program be expanded further. J.A. 217, 705.

c. Inaction. The district court found in 1988 that DCSS "might have been able to do something more" to desegregate and had not achieved "maximum practical desegregation" with respect to student assignment. J.A. 221, 224. It nonetheless refused to issue additional orders in light of DCSS's promise to take further desegregative acts and because "the cut-off date for evidence . . . would be the 1986-87 school year." J.A. 224.

F. At The Time Of Trial, In 1986, DCSS Was A Totally Segregated School System

The facts found by the district court and affirmed by the court of appeals illustrate that DCSS today has disproportionately assigned black students, black faculty, and black administrative staff to one set of schools. The same set of schools have higher teacher turnover, less experienced teachers, fewer library books, and have been

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[5] (...continued)

A. I guess you could say that.

J.A. 668 (testimony of Mary Durr, DCSS administrator of the M to M program).

given fewer resources than the other set of schools that are white by student, faculty, and staff assignment.

1. Student Assignment

As described by the district court:

> (1) 47% of the students attending the DCSS are black; (2) 50% of the black students attended schools that were over 90% black; (3) 62% of all the black students attended schools that had more than 20% more blacks than the systemwide average; (4) 27% of white students attended schools that were more than 90% white; (5) 59% of the white students attended schools that had more than 20% more whites than the systemwide average; (6) of the 22 DeKalb County high schools, five have student populations that are more than 90% black, while five other schools have student populations that are more than 80% white; and (7) of the 74 elementary schools in the DCSS, 18 are over 90% black, while 10 are over 90% white.

J.A. 208, 786-87; Pet.App. 4a.

2. Faculty And Administrative Staff Assignment

The district court and the court of appeals found that as of the time of trial and in every preceding year, DCSS violated the requirements of the law and the court's 1969 and 1976 orders by assigning faculty in a manner that identified some schools as "'intended for Negro students or white students.'" J.A. 226-31, 425, 530-35, 543-44, 745-48, 751-52, 837; Pet.App. 5a, 17a. Teacher segregation that identified schools as black or white schools had worsened over the prior three years. J.A. 226-31. The court further found that assignment of principals and administrators was racially skewed. J.A. 231-34, 843-44; Pet.App. 4a-5a. Those findings were cor-

rect[6] and are not challenged in this Court. J.A. 483.

3. Equality Of Education

The district court found that DCSS consistently assigned to black schools teachers with less teaching experience and fewer advanced degrees than white schools. J.A. 243, 511-18, 538-39, 737-39, 749-50, 758-760, 855-56; Pet.App. 5a. The court also found that black schools had more teacher turnover than white schools.[7] J.A. 244, 519-22, 538-39, 740-41, 750-51, 756-57. The court found that black school libraries had fewer books than white school libraries.[8] J.A. 245, 523-24, 538-39, 741-42. The court found that DCSS spent less per pupil at the black schools. J.A. 247-48, 525, 538-39, 742-43; Pet.App. 6a; *see generally* J.A. 733-85. Moreover, DCSS had been aware of these disparities and done nothing to correct them.[9] J.A. 701-04.

This disparity in resources on the basis of race was not apparent in 1976. J.A. 74-75. By 1979, it was, J.A. 716-17. By 1986, it was uniform and striking. Thus, DCSS responded to the increasing segregation in its

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[6] For example, in elementary schools that are more than 80% black by student attendance, 60% of the administrators are black. In elementary schools that are less than 20% black by student assignment, 5.7% of the administrators are black. J.A. 483. The same pattern exists in high schools. Those more than 80% black have 63% black administrators and those less than 20% black have 15% black administrators. J.A. 483. Charts dramatically showing the disparity in faculty assignment and staff are contained at J.A. 530-35.

[7] The court found that in 1986 DCSS began a program to try to control this factor and ordered no relief. Pet.App. 68a.

[8] The court excused this disparity as "not the result of purposeful conduct by the defendants." Pet.App. 68a.

[9] The evidence at trial showed that $341 per year more was spent for each student in the white schools, a difference of 13.7%. In an elementary school with 800 children, this differential totals almost $275,000 -- enough to fund ten extra teachers.

schools by decreasing resources provid
schools and students and increasing resou
to white schools and students.

SUMMARY OF ARGUMENT

In *Board of Ed. v. Dowell*, ___ U.S. ___
630, 637-638 (1991), this Court said that a
quiry should be used to determine if a scho
desegregated sufficiently to be relieved o
sponsibility to desegregate: First, did the s
comply in good faith with the court order;
do there remain vestiges of segregation?

The undisputed holdings of the district
court of appeals are that DCSS has not n
this Court's *Dowell* tests. In particular, D
complied with the desegregation order of 1
the easiest parts of a school system to des
cause they are largely under the control o
system, are faculty and staff assignment.
almost 20 years have passed, and despite t
the district court, DCSS has still not desegre
and staff. Furthermore, it has not only pr
rate schools, but unequal schools, taking re
expertise out of the schools it identified as
faculty and staff assignment and putting
schools it identified as white. In addition,
vestiges of segregation, at least in the are
and staff assignment and unequal education.

Because DCSS cannot escape these fin
gues that they are irrelevant. To do so, it m
guments, both of which must be accepted in
cape the conclusion that, under *Dowell*, DCS
tinue its efforts to eliminate segregation
branch." First, DCSS asserts that the so-
factors, used by this Court for two decade
vestiges of prior segregation, *see Green v. C*

Board, 391 U.S. 430 (1968), are unrelated to each other and can be remedied separately. That argument is contrary to this Court's holdings. *Keyes v. School District*, 413 U.S. 189, 213-14 (1973). On numerous occasions, this Court has emphasized the interrelatedness of the *Green* factors in recognition of the common sense notion that when a school district identifies a school as a black school or a white school by one of the *Green* factors (such as faculty or staff assignment or resource allocation), that racial identification will have an effect on other factors (such as student assignment). The facts of this case illustrate that the *Green* factors did operate together in DeKalb County. Nevertheless, the district court failed even to consider the possibility that the *Green* factors might be operating in a related fashion. The proper question in this case is thus not that posed by DCSS -- whether it was legal error to consider the *Green* factors separately, but the exact opposite -- whether it was legal error to refuse to consider them together.

Second, DCSS argues that, in looking at the factor of student assignment in isolation, a school district may be relieved of its duty ever to desegregate if it can stall long enough so that it can then argue that intervening residential demographic change in the district has broken the causal link between current racial separation and past intentional segregation. DCSS relies on a factual finding of the district court that that is what occurred in this case. Not only was the district court's factual finding tainted by its failure to consider the interrelated nature of the *Green* factors, it was also tainted by the court's failure to conduct the analysis required by this Court's decisions in determining whether vestiges of segregation remain. In particular, the court failed to place the burden of proof on the school district, failed to apply the court's presumption that current segregation was caused by prior segregation, failed to give any weight to -- much less apply the required presumption to -- the all black and all white schools in DeKalb, required a showing of

intentional segregation, failed to require DCSS to meet any affirmative duty to desegregate, failed to consider inaction as evidence of continuing violations, excluded from consideration remedial measures approved by this Court, and failed to examine carefully school construction and siting. Only because it rejected virtually all of the principles established by this Court for school desegregation cases was the court able to reach its factual conclusion that current student assignment had been caused by demographic change rather than school segregation. And, because its analysis was flawed, its conclusion was simply wrong.

The sad truth is that today, as in 1954 and in 1968, DCSS's schools are both separate and unequal. Due to DCSS's student and faculty and staff assignment decisions, black students attend schools that are identifiably black schools. DCSS assigns those black schools less money per pupil and fewer other resources than the schools that are white by student, faculty, and staff assignment. Furthermore, DCSS has never been fully desegregated. Notwithstanding DCSS's frequent intimations to the contrary, neither the district court nor the court of appeals found that DCSS had desegregated the schools in 1969 or subsequent years sufficiently to meet its constitutional obligations, even with respect to student assignment. J.A. 211, Pet.App. 23a. DCSS's long delay in complying with its constitutional obligations ought not to be rewarded. It is long past time that DCSS must be required to provide a constitutional school system.

ARGUMENT

I. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY FOUND THAT DCSS HAS NOT COMPLIED IN GOOD FAITH WITH ITS CONSTITUTIONAL OBLIGATIONS OR THE DECREES IN THIS CASE

In *Bd. of Ed. v. Dowell*, 111 S.Ct. at 637-38, this Court held that there were two inquiries to be made in determining whether a school district had "made a sufficient showing of constitutional compliance." The first inquiry is whether the school district complied in good faith with its court imposed obligations. *Id.* In at least three areas -- faculty assignment, staff assignment, and resource allocation -- the uncontested findings are that DCSS did not. Moreover, where matters are totally within a school system's control, they provide a revealing measure of a system's good faith or lack thereof. *United States v. Montgomery Co. Bd. of Ed.*, 395 U.S. 225, 232 (1969); *Jacksonville Branch, NAACP v. Duval Co. Sch. Bd.*, 883 F.2d 945, 951 (11th Cir. 1989). Here, the evidence overwhelmingly shows that DCSS has not complied in good faith with the district court's desegregation orders.

First, the 1969 order required that there be black teachers in every school in 1969. J.A. 66. There were no black teachers in 10% of the schools in 1969. J.A. 279, 281, 288, 290, 303, 318, 332. The 1969 order required that in future years, "the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in school." J.A. 67. In 1976, the district court found that DCSS had "not taken adequate steps to utilize reassignment of teachers to reduce the racial identifiability of faculty . . . ." J.A. 85. The court found that the reason for DCSS's failure to comply with its 1969 order was "the reliance on the replacement process, and the avoidance of reassignments . . . ." J.A. 85. It

ordered that "reassignment of teachers must be utilized" to achieve compliance with the 1969 order that teacher assignment not be used to create or perpetuate racially identifiable schools. J.A. 85-86, 94. In 1986, the court again found that DCSS had not complied with the 1969 order and was still assigning teachers in a manner that identified some schools as black schools and other schools as white schools. J.A. 226. It further found that DCSS had not complied with the 1976 order: "There was no evidence . . . that after . . . the order . . . defendants reassigned their teachers . . . DCSS has continuously relied upon the replacement process" to achieve desegregation. J.A. 227-28. The facts fully support that conclusion, J.A. 269-359, 425, 530-55, 543-44, 745-48, 751-52, 837; the court of appeals affirmed it; and DCSS does not contest it here. Pet.App. 5a, 17a.

Second, the 1969 order required that staff be "reassign[ed] . . . to eliminate the effects of the dual school system." J.A. 67. In 1976-1977, the district court found that staff had not been reassigned to eliminate the effects of the dual school system and ordered again that DCSS do so. J.A. 96-97. In 1986, the district court found that staff assignment, including principals and other senior administrative staff, still served to identify schools as black schools or white schools. J.A. 231-34. The facts fully support that conclusion, J.A. 96-97, 231-34, 843-44; the court of appeals affirmed it; and the DCSS does not contest it here.

Third, the 1969 order required that DCSS not discriminate against black students and that schools be equalized in every area. J.A. 64, 69.[10] The district court

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[10] The order required equalization of formerly all black schools, all of which were closed. J.A. 69, 65. However, rather than viewing that portion of the order as "[bearing] no relation to DCSS," *see* Pet.Br. at 4 n.5, it should be read, as the district court apparently did, in con-
(continued...)

found that DCSS discriminatorily assigns greater resources to white schools and fewer resources to black schools. J.A. 243. The facts fully support that conclusion. J.A. 511-18, 519-25, 538-39, 737-43, 749-51, 756-60, 855-56; it was affirmed by the court of appeals; and DCSS does not contest it here. Pet.App. 5a.

Fourth, the 1969 order required remedial education to students previously educated in all black schools. J.A. 69. There is no evidence that DCSS has ever complied with this portion of the order. *See also* J.A. 669-72.

Thus, in a number of respects, the uncontested findings of the district court, affirmed by the court of appeals, are that DCSS has not complied in good faith with the 1969 order to desegregate, or with the 1976 order repeating portions of the 1969 order.

DCSS has also defied this Court's orders. In *Green v. County School Board*, 391 U.S. 430, this Court held that "[i]n determining whether respondent School Board met that command [to dismantle well-entrenched dual systems] . . . it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a 'prompt and reasonable start.'" *Id.* at 437-38. In this case, DCSS delayed a year longer than the school board in *Green* even in adopting the "freedom of-choice" plan found in-

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[10] (...continued)
junction with the anti-discrimination clause, J.A. 64, and the purposes of the decree to prohibit assignment of unequal resources on the basis of race to any school. Thus, the district court found that DCSS's current practice of providing fewer resources to black schools was a violation of the obligation created by *Brown* and the 1969 order. J.A. 248. DCSS no longer contests that finding. Pet.Br. at 17 n.19. Respondents agree with petitioners that DCSS's efforts since the trial to cure the inequalities found by the district court, like the efforts to cure discriminatory faculty and staff assignment, are before the district court. *Id.* Respondents sharply disagree that, since 1986, DCSS has cured those violations.

adequate there and here. J.A. 202, 209-10. It was only when HEW applied serious pressure and the district court entered an order, that DCSS even purported to adopt a serious desegregation plan. J.A. 61, 202. "This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system." *Green*, 391 U.S. at 438.[11]

Measured by the first of the *Dowell* factors, good faith compliance with the court orders, DCSS must surely be found wanting.[12]

II. THERE REMAIN VESTIGES OF SEGREGATION IN DCSS

A. There Are Vestiges In Areas Other Than Student Assignment

In *Dowell*, this Court held that:

> In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but "to every facet of school operations -- faculty, staff, transportation, extra-curricular activities, and facilities." *Green*, 391 U.S., at 435. *See also Swann*, 402 U.S. at 18 ("[E]xisting policy and practice with regard to fac-

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[11] It is also surely relevant that the duty to desegregate faculty and staff was clear at least as of 1965, *Bradley v. School Bd.*, 382 U.S. 103 (1965); *Rogers v. Paul*, 382 U.S. 198 (1965); and that the duty to provide equal education was clear even before *Brown*. J.A. 244.

[12] In this section, respondents discuss only those areas of noncompliance specifically found by the district court or undisputed. Other areas of noncompliance with the 1969 order and the commands of the Constitution abound, but the district court's findings in those areas were tainted by its legal errors and, where contrary, were generally incorrect. *See* sections II.B.2-B.4, *infra*.

> ulty, staff, transportation, extra-curricular activities, and facilities" are "among the most important indicia of a segregated system.")

111 S.Ct. at 638. As noted, the district court found that two of these five facets of school operations, faculty assignment and staff assignment, remain vestiges of a segregated system. The district court also found that the unequal education now being provided by DCSS to students in black schools is a vestige of a segregated system.[13] Thus, apart from student assignment, by at least three of the most important indicia of a segregated system, DCSS is a segregated school system today.

B. There Are Vestiges In The Area Of Student Assignment

1. Students In DCSS Today Are Racially Separate

The Constitution "does not require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971). However, in the context of remedy, the Court has always begun its inquiry into the vestiges of segregation by looking at the separateness of the assignment of black and white students. Thus, in *Swann*, the Court concluded that a "free transfer" plan had failed to eliminate vestiges of segregation, after noting only that the plan

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[13] Respondents agree that it is unnecessary to determine whether this unequal education should be considered a new factor in addition to the six identified in *Green* or as part of one or more of the *Green* factors. J.A. 237, n.14; Pet.App. 14a. All parties agree that it is appropriate to consider the equality of education as one factor in determining whether all vestiges of segregation have been eliminated. J.A. 206, 237; Pet.App. 14a. Respondents also agree, and DCSS appears to now concede (after previously arguing that providing vastly greater resources to white students was irrelevant unless plaintiffs could show that it affected learning), that "[w]hether a racial skew of resources affects a child's learning potential is irrelevant . . . ." Pet.App. 67a.

left two-thirds of the black students in black schools. 402 U.S. at 7. Similarly, one of the primary reasons in this case for concluding that the "freedom of choice" plan failed to eliminate vestiges of segregation was that it left most black students in black schools. J.A. 210. *See also Green*, 391 U.S. at 433; *Raney v. Board of Education*, 391 U.S. 443, 446 (1968); *Monroe v. Board of Commissioners*, 391 U.S. 450, 457 (1968); *Wright v. Council of Emporia*, 407 U.S. 451, 464 (1972).

66% of all black elementary students attend majority black schools, J.A. 269-359;[14] 50% of all black students attend virtually all black schools, J.A. 208; 62% of all black students and 59% of all white students attend schools whose percentage of black students is either 20% more or 20% less than the systemwide average, J.A. 208.

The district court nevertheless cited the racial separation of DeKalb students dismissively in a section describing plaintiffs' contentions, "[p]laintiffs improperly place great emphasis on the concept of racial balance," and not again thereafter. J.A. 207-08. Respondents agree that "[t]he fact that a school board's desegregation plan leaves some disparity in racial balance . . . does not alone make that plan unacceptable." *Wright*, 407 U.S. at 464. However, it was surely error to conclude, as the district court did, that it is irrelevant to determining whether vestiges of segregation remain in a school district that is under court order to desegregate. *Id.* at 464 (*some* disparity . . . does not *alone* . . .")(emphasis added); *Swann*, 402 U.S at 26 ("there is a presumption against schools that are substantially disproportionate . . . .").

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[14] In 1968, under the "freedom of choice" plan that DCSS admits was unsuccessful in desegregating the schools, 63% of the black elementary school students attended majority black schools. D.Exh. 193.

2. The District Court's Finding That The Current Racial Separation Is Not A Vestige Was Wrong Because It Ignored The Interrelatedness Of The Factors That Contribute To Segregation

Because racial separation does not automatically establish that vestiges of a prior segregated system continue to exist, the district court was correct in looking further. J.A. 211. However, the district court erred in looking at student assignment in isolation and ignoring the interrelatedness of the factors that contribute to segregation.

In *Keyes v. School District*, 413 U.S. 189, the Court held that a school board must show:

> that its policies and practices with respect to school-site location, school size, school renovations and additions, student attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc. *considered together* . . . were not factors in causing the existing condition of segregation in these schools.

Id. at 213-14 (emphasis added). The district court in this case did not even consider the possibility that the factors cited by this Court operated together.

The interconnectedness of the various facets articulated in *Green* is vividly illustrated by the concept of a racially identifiable school. A desegregated school system is one "without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442. Schools are not black schools or white schools based solely on student assignment patterns. A school that is disproportionately black by student assignment may or may not be a "black school" within the meaning of *Green*. *Swann*, 402 U.S. at 26. It is also necessary to look at such factors as "the racial composition of teachers and staff, the

quality . . ." and community attitudes. *Id.* at 18; *Keyes*, 413 U.S. at 196. Those factors must be considered not just because they can make a school racially identifiable, but because in making a school racially identifiable, they have an impact on student assignment.

This Court has frequently held that the factors that lead to racially identifiable schools (the *Green* factors) are closely interconnected. In *Columbus Bd. of Ed. v. Penick*, 443 U.S. at 461, the Court approved the district court's finding that "assigning black teachers only to those schools with substantially black student populations" "'aggravated rather than alleviated' racial separation in the schools." Similarly, in *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 536 (1979), the Court quoted the findings of the court of appeals that the district court had erred when it "ignored . . . the significance of purposeful segregation in faculty assignments in establishing the existence of a dual school system." This Court acknowledged "the relevance of segregated faculty assignments as one of the factors in proving the existence of a school system that is dual for teachers and students." *Id.* at 536 & n.9.

Just as "discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system . . .", *Milliken v. Bradley*, 433 U.S. 267, 283 (1977), discriminatory faculty and staff assignment patterns and unequal allocation of resources can manifest and breed other inequalities contributing to perpetuation of a dual system. Indeed, factors such as faculty and staff segregation and unequal quality can not only affect student assignment patterns directly by signaling one school as black and thus encouraging white students to leave, but can do so indirectly because a school that is racially identifiable affects the racial composition of the neighborhood housing. *Keyes*, 413 U.S. at 202 (". . . the assignment of faculty and staff, on racially identifiable bases, has 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 neighborhoods . . . thereby causing further racial concentration within the schools.")[15]. *See also United States v. Yonkers Bd. of Ed.*, 624 F.Supp. 1276, 1467 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181, 1199-1201 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

The interconnected nature of the *Green* factors is so evident that plaintiffs need not "prove with respect to each individual act of discrimination precisely what effect it has had on the current patterns of segregation." *Dayton*, 443 U.S. at 540. Plaintiffs seeking to establish liability need not "bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system." *Keyes*, 413 U.S. at 200. "[P]roof 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 . . . a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious." *Id.* at 203, 208. Although the *Keyes* presumption was based on segregation in one geographic portion of the school district, the same rationale applies even more strongly to segregation in one facet of a school system. It defies

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[15] This Court has consistently refused to define the violation identified in *Brown* as separate pieces. In *Milliken v. Bradley*, 433 U.S. at 283, the Court declined to accept the argument that "since the constitutional violation . . . was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments." The violation was a segregated school system and the remedy could be as broad as necessary to cure the violation. *See also Bradley v. School Bd.*, 382 U.S. at 105; and *Rogers v. Paul*, 382 U.S. 198, 200 (1965).

common sense to suppose that a school district, like DCSS, that for 20 years has engaged in bad faith defiance of the district court's orders in some areas, has during that same time been acting in good faith to totally disestablish all vestiges of segregation in student assignment through all practical means.[16]

The *Keyes* holding that courts must consider the various facets of a school system together, the *Dayton* holding that plaintiffs need not distinguish the causal effects of each of the facets separately, the Court's various holdings that the facets are interconnected, and the *Keyes* presumption that the facets do operate in concert, all acknowledge that the various facets of a school system should ordinarily be viewed together because they act together. Respondents do not suggest that this is an irrebuttable presumption. *Keyes*, 413 U.S. at 203. For example, in *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 436 (1976), the Court said that the question of inadequate faculty hiring, as opposed to faculty assignment, may be viewed separately from student assignment. This is because faculty hiring plays a much less

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[16] Social scientists have confirmed this Court's findings that the various facets of a school system are closely interrelated. U.S. Commission on Civil Rights, "Racial Isolation in the Public Schools," (GPO, Washington D.C.)(1967) at 67; Social Science Expert Statement attached to Resp.Br., *Columbus Bd. of Ed. v. Penick*, 7a-8a, 10a-11a ("[t]he racial composition of a school *and its staff* tends to stamp that identity on the surrounding neighborhood . . . ." (emphasis added). A number of studies of individual school districts have found that racial assignment of students "combined with segregative assignment of teachers, have combined to cause, enhance, and maintain the racial identifiability of schools and neighborhoods . . . ." Karl Taeuber, "Housing Schools, and Incremental Segregative Effects," Annals of the American Academy of Political and Social Science 444:157, 164-65 (1979); Gary Orfield, *Must We Bus? Segregated Schools and National Policy* (Brookings, 1978), at 369, 322, 284 (Cleveland; Indianapolis; Ferndale, Michigan; Penn Hills, Pennsylvania; Wichita, Kansas). Indeed, it is the correlation among the factors that unmistakably marks a school as a black school or a white school.

significant role in racially identifying schools than faculty and staff assignment or allocation of resources. *See also Morgan v. Nucci*, 831 F.2d 313 (faculty hiring). However, in this case, the court never even inquired into the possible interconnectedness of the various facets, much less made a finding that DCSS had met its burden of showing that there were no connections.

Indeed, the only factual findings by the district court support the interconnectedness of the various facets in this case. The district court acknowledged that faculty assignment patterns have a critical effect on student assignment. J.A. 225 ("As long as schools have faculties that are identifiably of one race, it is unlikely that the schools will be able to successfully assimilate students of another race.") *See also* J.A. 232. It found that black faculty are not just segregated, they are segregated in schools that are black by student assignment and staff assignment. J.A. 234. Schools that are racially identifiable as black by all of these factors are those schools that receive the fewest resources; white schools that are racially identifiable as white by all these factors receive the most resources. Indeed, as the court of appeals noted, if there were not still black schools and white schools in DeKalb, it would not be possible "to distribute resources in a racially imbalanced fashion." Pet.App. 23a. Finally, the community perceives the black schools as inferior. J.A. 712; Tr. July 15, 1987, at 62.

The error of the district court was in failing to consider the interconnectedness of the various facets of DCSS's school system and to apply to that consideration the standards set by this Court. This error was similar to that identified in *Keyes*. Applying the *Keyes* holding to this case:

> Although the petitioners had already proved the existence of [vestiges in one part of the school system], this crucial finding was totally ignored when attention turned to [other

> parts]. Plainly, a finding of [vestiges] as to one portion of a school system is . . . highly relevant to the issue of the board's [vestiges] with respect to other [parts of] the system.

413 U.S. at 207. In effect, the district court turned the inquiry upside down and presumed that the *Green* factors were totally separate. The Court should not permit this method of analysis to stand.

First, if the various *Green* factors are seen as totally independent of each other, it is possible, and in this case certain, that the victims of a segregated system will never achieve a fully desegregated system. In *Brown v. Board of Education*, this Court held that school boards must "effectuate a transition to a racially nondiscriminatory *school system*," 349 U.S. at 299 (emphasis added). In *Green*, 391 U.S. 430, the Court repeated the duty created by *Brown*. The Court held that "*Brown II* was a call for the dismantling of well-entrenched dual *s*ystems . . . ." 391 U.S. at 437; *Raney v. Board of Education*, 391 U.S. at 449 (goal is a "desegregated, nonracially operated *system*"); *Wright v. Council of Emporia*, 407 U.S. 451, 463 (1972)("*Brown II* promised . . . a school *system* in which all vestiges of enforced racial segregation have been eliminated;" *Swann*, 402 U.S.at 22 ("The remedy commanded was to dismantle dual school *systems*"); *Keyes*, 413 U.S. at 213 (1973)(". . . School Board has the affirmative duty to desegregate the entire *system*"); *Milliken*, 433 U.S. at 282 ("The 'condition' offending the Constitution is Detroit's *de jure* segregated *school system*")(emphases added).

Even accepting the facts as DCSS portrays them, they desegregated student assignment for one year in 1969; they continued to segregate faculty assignment and staff assignment as student assignment "resegregate[d]," J.A. 210; they assigned fewer resources to the schools that are identifiably black by faculty and staff assignment; and now, 15 years later, when black and white stu-

dents receive very separate and unequal education, they propose to desegregate faculty and staff assignment and equalize resources for one moment in time. In no way will it be possible to say that DCSS's black students have ever had the desegregated school system that the Constitution requires. *See Wright v. Council of Emporia*, 407 U.S. at 466 ("The message of this action, coming when it did, cannot have escaped the Negro children . . . .").

Second, if this Court allows the principle that school districts can desegregate on a piecemeal basis, without careful examination of the interaction of the various facets of the school system's operation, it is difficult to see what would prevent that principle from being extended. Indeed, DCSS in this case argued for a further extension of the principle it now seeks to establish in this Court. DCSS argued that it could have "incrementally" desegregated the faculty if each school at some time in its history had a desegregated faculty. J.A. 231 n.12. The district court rejected that argument as "ludicrous" by noting that it would permit compliance if only some schools were desegregated and others weren't. *Id.* Similarly, if DCSS's principles are accepted, school districts can be expected to seek to remove geographic sections of a district from court order after they are "desegregated" in violation of the logic behind the *Keyes* presumption or to remove certain grades as they are "desegregated." *See Dowell*, 111 S.Ct. 630. The DCSS proposal would introduce enormous uncertainty of this kind into this Court's previously clear holdings that it is the school system that must be desegregated.

Third, if student assignment is viewed totally in isolation from the other *Green* factors, the only way to measure compliance will be strict adherence to racial quotas. This Court has often held that "racial imbalance" in schools alone does not violate the Constitution. *Keyes*, 413 U.S. at 209; *Milliken*, 433 U.S. at 280 & n.14; *Swann*, 402 U.S. at 24. It is racially identifiable schools,

as measured by a constellation of factors including a history of discrimination, student assignment patterns, facility decisions including construction, siting and closing, faculty assignment, staff assignment, resource assignment and other factors that are the mark of a school system that has not desegregated. *Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 18; *Dowell*, 111 S.Ct. at 638. However, if student assignment is separated from the other factors, the only way to measure whether there has been sufficient desegregation will be to look at racial balance.

The district court in this case failed to follow this Court's commands in *Keyes* and *Dayton* and other cases that it consider the impact of the various facets of the school system on each other in the context of a legal presumption, and common sense, that they are interconnected. The court did so even in the face of its own findings that the various facets of the DCSS school system were interconnected. That was legal error that profoundly infected its factual findings.

3. The District Court's Factual Finding Was Wrong Because It Failed To Apply The Legal Structure Required By This Court

Even if the court could look at student assignment in isolation without considering the school district's bad faith, nor the clear vestiges of segregation in other areas of the school system and their interrelationship with student assignment, the district court's finding that the current racial segregation in DCSS is not a vestige of prior segregation was wrong because it ignored the legal structure established by this Court to ensure that the court look carefully and closely to determine if vestiges remain.

> We have made it clear, however, that a connection between past segregative acts and present segregation may be present even when not apparent and that close ex-

> amination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

Keyes, 413 U.S. at 211.

As the court of appeals correctly found, "a previously segregated school system is under an 'affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" J.A. 180, *quoting Columbus Bd. of Ed. v. Penick*, 443 U.S. at 459; and *Green*, 391 U.S. at 437-38. Pet.App. 3a, 12a. In order to assure that the required "close examination" is done and the segregation is eliminated "root and branch," this Court has set forth a structured legal analysis that the district court did not follow in this case.

First, the burden of proof is on the school district. DCSS asked the district court to hold that it had completed the process of fully desegregating the schools. In such a proceeding, the burden of proving that the desegregation process has been fully completed is on the school district. *Swann*, 402 U.S. at 26; *Keyes*, 413 U.S. at 210, 211 & n.17; J.A. 152. This Court has described this burden as a "heavy burden." *Wright v. Council of Emporia*, 407 U.S. at 467, *quoted in Dayton Bd. of Ed. v. Brinkman*, 443 U.S. at 538. This burden remains until "it is clear that state imposed segregation has been completely removed." *Green*, 391 U.S. at 439.

Some portions of the district court's opinion pay lip service to this principle, J.A. 204, 206, 237, but in its discussion of the evidence, the district court did not place the burden on the school district. Indeed, it appeared to place the burden on plaintiffs: "There is no evidence that the school system's previous unconstitutional conduct may have contributed to this segregation." J.A. 221-

22; "The court was presented with no evidence that these schools are a vestige of the dual system." J.A. 212.

Second, in a formerly segregated school system, there is a presumption that current segregation was caused by prior segregation.[17] "The systemwide nature of the violation furnished *prima facie* proof that current segregation . . . was caused at least in part by prior intentionally segregative acts." *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. at 537, 540; *Swann*, 402 U.S. 26. Where there has been intentional segregation in the past, it is a "factor in creating a natural environment for the growth of further segregation." *Keyes*, 413 U.S. at 209, 211 & n.17;[18] ("plaintiffs in a school desegregation case are not required to prove 'cause' in the sense of 'nonattenuation'").

"[[I]n a system with a history of segregation . . . [there is also] a presumption against schools that are substantially disproportionate in their racial composition . . . [School authorities] have the burden of showing that such school assignments are genuinely nondiscriminatory." *Swann*, 402 U.S. at 26. In DeKalb, 50% of black students attend schools that are over 90% black. J.A. 208. A majority (59%) of white students attend schools that are disproportionately white; a majority of black students (62%) attend schools that are disproportionately black. J.A. 208. The presumption against those schools is applicable in this case and the burden was on the school district to justify those schools. As noted, the district court not only did not apply the *Swann* presump-

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[17] If this is true at the liability stage when plaintiff has the burden of proof, it must be true, *a fortiori*, when defendant is seeking relief from a court order requiring desegregation.

[18] Remoteness in time is irrelevant. In *Dayton*, 443 U.S. at 537, this Court expressly held that proof of intentional segregation in Dayton twenty-five years earlier properly shifted the burden of proof to school officials. *Keyes*, 413 U.S. at 210.

tion, it viewed the cited statistics as irrelevant.

Third, effectiveness in achieving desegregation, not intent in continuing it, is the relevant standard. *Wright v. Council of Emporia*, 407 U.S. at 460-62; *Dayton*, 443 U.S. at 526-38 ("continuing duty to eliminate the effects of the system"); *Davis*, 402 U.S. at 35, 37("[t]he measure of any desegregation plan is its effectiveness."); *Green*, 391 U.S. at 434 (the court must assess "the effectiveness of a proposed plan in achieving desegregation."); J.A. 181, 205.[19] Again, the district court paid lip service to this principle, J.A. 206, but also required plaintiffs to demonstrate intentional discrimination after 1969. J.A. 205, 236-37.

Here, it is clear that DCSS never achieved effective desegregation. Even the district court, though it misapplied the law, balked at such a conclusion. The court held, in essence, that DCSS had been ineffective in desegregating even with respect to student assignment, but that it couldn't have been effective. "[T]he court agrees that the DCSS has become largely resegregated since the 1969-1970 school year . . . [but] has achieved maximum practicable desegregation as of the 1986-87 school year." J.A. 210, 223. This conclusion rests on faulty legal premises and cannot be sustained. A school district must "do more than abandon its prior discriminatory purpose." *Dayton*, 443 U.S. at 538.

It has an affirmative duty to desegregate. "Each instance of a failure or refusal to fulfill the affirmative

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[19] *See also* Title VI, 42 U.S.C. §2000d; 34 C.F.R. §§100.3(b)(3), 100.3(b)(6)(i). J.A. 47. The district court judge in this case has persisted in requiring plaintiffs to prove intentional discrimination. J.A. 159 ("plaintiffs have failed to show any invidious discriminatory intent . . . ."); J.A. 166 ("[i]n reviewing this matter, the court must examine whether defendants' actions were unlawfully motivated . . . ."); *rev'd*, J.A. 174-82 ("[It] was error for the district court to hold that [school board action] could be enjoined only if it was motivated by discriminatory intent"). J.A. 181.

duty continues the violation of the Fourteenth Amendment." *Columbus Sch. Bd. v. Penick*, 443 U.S. at 459; J.A. 163.

In *Columbus*, this Court found fault with the Columbus Board of Education because it did nothing "to prevent the increase in segregation" caused by demographic change in the district. *Id.* at 463. At best, DCSS failed to act just as the Columbus board failed to act. Not only is such inaction insufficient as a remedy in a previously segregated system, it can be used to find intentional discrimination justifying a finding of liability. *Id.* at 465. "Adherence to a particular policy or practice 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.'" *Id.* (citation omitted).

The "particular policy or practice" to which the DeKalb schools adhered was neighborhood schools, which this Court has held is insufficient if it fails to achieve maximum feasible desegregation. *Swann*, 402 U.S. at 28; *Columbus*, 443 U.S. 449; *Keyes*, 413 U.S. 189. "In *Swann*, it should be recalled, an initial desegregation plan had been entered in 1965 and had been affirmed on appeal. But the case was reopened and in 1969 the school board was required to come forth with a more effective plan." *Columbus*, 443 U.S. at 459-60[20]

DCSS argues that it took 170 actions to change school attendance boundaries between 1969 and 1986 and all but eight had no effect on segregation or deseg-

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[20] The district court's insistence on taking the neighborhood school assignment system as an unalterable given led it to require plaintiffs to show that DCSS could have altered *housing* segregation. J.A. 222. That is, of course, not the proper inquiry. Instead, the question is whether DCSS carried its burden of showing that it achieved maximum *school* desegregation.

regation. J.A. 424, 590. There is considerable reason to doubt the accuracy of this analysis. DCSS's expert found no segregative effect in boundary changes that the district court explicitly and contemporaneously held did have a segregative effect. J.A. 91, 424. However, even crediting this evidence, it amounts to an admission by DCSS that, in violation of the 1969 order, it did not take draw attendance boundaries "so as to disestablish the dual school system." J.A. 64-65, 706 (school board member says "there's not been any discussion . . . of using attendance line changes as a means for providing for further desegregation"). *See also* J.A. 66, 236-37 (despite court order, portable classrooms not used to desegregate).

DCSS argues that there have been slight improvements in segregation since the mid-70's. However, their principal expert attributed any improvements exclusively to court ordered changes in the M to M program and demographics. He did not point to a single thing the school district did to affect the segregated schools. J.A. 580-82. Plaintiffs' expert concurred; DCSS did not do anything to minimize segregation. J.A. 794-95.

Finally, DCSS and the district court point to the M to M program and the magnet program. *See, e.g.*, J.A. 223. The magnet program involves only portions of some schools and fewer than 1% of all children Pet. App. 24a, n.16. The M to M program involves bussing 6% of the students, virtually all of whom are black, to white schools. J.A. 216-17, 253, 473-75. In *Green*, 115 black students (9%) were bussed to white schools and the court found that ineffective. 391 U.S. at 431, 441. It is difficult to understand why the district court was impressed with a lesser showing than this Court unanimously found unacceptable.[21]

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[21] The district court found that such transfer programs affect more (continued...)

In addition, the district court, over the years, found that DCSS was taking actions that had the effect of segregating the schools. It found that DCSS's M to M policies had segregative effects. J.A. 80, 92. It found in 1983 that DCSS was still impermissibly restricting the M to M program. J.A. 160-61. It found that shifts in school attendance boundaries had segregative effects. J.A. 89. It also found that less segregative alternatives were available, J.A. 89, a finding that this Court has used to find segregative intent in the context of liability. *Columbus*,

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[21] (...continued)
than the 6% who transfer. They affect white students at the receiving school as well and thus up to 19% of DeKalb's students were affected by the program. J.A. 219-20. By this method of analysis, 27% of the *Green* students benefitted from that program. This, of course, still leaves the black schools unaffected.

The district court also found that DCSS had not utilized all available techniques to desegregate, even in the area of student assignment. J.A. 222. Specifically, the district court held that there were at least three actions DCSS could have taken, but did not take, that would have furthered desegregation. First, DCSS could have established a magnet school program (as opposed to the few magnet classrooms it has). J.A. 224. ("Plaintiffs argue that further desegregation may be accomplished . . . . The court agrees . . . ."). The court found that magnet school programs were considered ineffective in the mid-70's, J.A. 219, but gives no explanation for DCSS's failure to adopt them as of 1986. Second, the court found that DCSS could have established a "grade reorganization plan" and that if it did so, it would have a desegregative effect. J.A. 224. The court did not even discuss DCSS's failure to use that technique prior to 1986. Third, the court found that DCSS could at any time have used bussing which would have had a desegregative effect, but excused its failure to do so only by saying it was "not considered a viable option" and that no party wanted it. J.A. 223. This Court has held that failure to consider this particular option is error. *See Davis v. Bd. of Sch. Comm.*, 402 U.S. 33, 38 (1971) (failure to give adequate consideration "to the possible use of bus transportation and split zoning" was error); *Swann*, 402 U.S. at 29-31. It was the court's failure to properly consider these alternatives in addition to other errors that led it to the perplexing conclusion that maximum practical desegregation had been achieved though more desegregation could be accomplished. J.A. 223-24.

443 U.S. at 462-63 & nn.11, 12 (intent inferred "when alternatives were available which would have eliminated or lessened racial imbalance").

School construction in DeKalb had similarly segregative effects. This Court has condemned

> clos[ing] schools which appeared likely to become racially mixed . . . [and] building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races.

Swann, 402 U.S at 21. *See also Dayton*, 443 U.S. at 540; *Columbus*, 443 U.S. at 460. That is precisely what DeKalb did. Schools were closed in the western and central parts of the district and opened on the eastern periphery of the district. Despite the court order requiring that school construction be done "with the objective or eradicating segregation and perpetuating desegregation," every one of the schools opened since 1969 is currently racially identifiable. *See* Statement of Facts, D, J.A. 66.

In short, the district court's failure to apply the proper legal standards and to examine closely the vestiges of segregation led it to conclude erroneously that no vestiges of segregation with respect to student assignment still existed in DCSS.

4. The District Court's Failure To Follow The Proper Method Of Legal Analysis Led It To The Clearly Erroneous Factual Finding That Demographics Alone Caused The Current School Attendance Segregation

In addition to the errors already discussed, the district court's failure to follow the proper method of legal analysis led it to an important factual error. The segregation in DCSS schools today were not caused by the demographic changes in the school district.

Contrary to DCSS's suggestion, the district court did not find that DCSS was sufficiently desegregated even with respect to student assignment viewed in isolation in the years after the 1969 order.[22] The district court ex-

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[22] The district court did find that DCSS was desegregated on student assignment in the single year of 1969. J.A. 210. That finding was tainted by the court's legal errors, was contrary to the law of the case, and was clearly erroneous.

The 1969 order recites the history of negotiations between the school board and HEW and says that those parties had developed "what was to be a final and 'terminal' plan of desegregation," Pet.App. 73a. The court did not describe its own order that way. The express limit on attendance zones restrictions to 1969, the changing standards for faculty assignment, prospective orders in such areas as future construction, annual reporting requirements, the retention of jurisdiction, as well as future actions by the district court and the court of appeals (*see, e.g.*, J.A. 71, 174) all belie DCSS's suggestion that this was a final order.

On its face, the 1969 order required prospective relief even with respect to student assignment, in 1969, to achieve the "objective of eradicating segregation." J.A. 66. Under DCSS's formulation, if they had been desegregated with respect to student assignment in 1969, the court would have had no jurisdiction to issue these orders and would not have done so.

If there were any doubt that the district court in 1969 impliedly held that DCSS was not fully desegregated, even with respect to student assignment in 1969, the district court explicitly so held a few years later.
(continued...)

plicitly held that DCSS had not met its constitutional obligation to desegregate even with respect to the single factor of student assignment in the years after 1969. J.A.

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[22] (...continued)
J.A. 82-83. DCSS made exactly the same argument then that it now makes in this Court -- that it had been desegregated with respect to student assignment in 1969 and that pursuant to *Spangler*, the court could order no further relief in that area. The court explicitly held that DCSS had not been desegregated in 1969 even with respect to student assignment:

> this court has never made any finding that defendants are operating a unitary system, and finds instead that the [student assignment] regulations . . . perpetuate[d] the vestiges of a dual system . . . [changes are necessary] to eliminate the vestiges of a dual system in DeKalb County . . . .

J.A. 82-84. That holding, which was not appealed, is the law of this case. *See also Armour v. Nix*, Civ. No. 16708 (N.D.Ga. Sept. 24, 1979), *summ. aff'd*, 448 U.S. 908 (1980)(one of DCSS's schools "was not desegregated" in 1969)(slip op. at 10); J.A. 203 n.1; Pet.App. 8a; J.A. 71-161; J.A. 176; J.A. 61-70, 82, 96, 98, 101, 104, 117, 127, 132, 138, 151, and 178-79. *See Spangler v. Pasadena City Bd. of Ed.*, 611 F.2d 1239, 1243 (9th Cir. 1979)(Kennedy, J., concurring); *Morgan*, 831 F.2d at 330.

In 1984, the district court did hold that DCSS had become desegregated in 1969. J.A. 162. That holding was explicitly reversed by the court of appeals. J.A. 178-80. DCSS did not file a petition for a writ of *certiorari* with this court. Thus, the law of this case as established by the court of appeals is that DCSS was not fully desegregated in 1969.

DCSS argues that in *Spangler* this Court held that one year of "desegregation" with respect to student assignment was sufficient to prohibit a district court from ordering further relief in the area of student assignment. The author of the *Spangler* opinion expressly rejected such an interpretation holding that *Spangler* meant only that the court could not readjust student attendance in perpetuity. *Vetterli v. United States District Court*, 435 U.S. 1304, 1308 (1978)(Rehnquist, J.)(in chambers).

DCSS also argues that closing the black schools was desegregative. It was, but not even the district court thought it was sufficient to comply with DCSS's constitutional obligations.

214.

A school district must not only achieve maximum feasible desegregation, it must maintain desegregation for at least some period. ("[o]ne swallow does not make a spring," J.A. 211, *quoting Lemon v. Bossier Parish School Bd.*, 444 F.2d 1400 (5th Cir. 1971)) The United States explicitly concedes this principle and DCSS does not appear to dispute it. J.A. 214. That agreement is unsurprising in light of this Court's explicit holdings that desegregation must be achieved and maintained. *Dowell*, 111 S.Ct. at 637 (compliance must be maintained for a "reasonable period of time"); *Raney v. Board of Education*, 391 U.S. at 449 ("the better course would be to retain jurisdiction until it is clear that disestablishment has been achieved"); *Dayton*, 443 U.S. at 538; *Columbus*, 443 U.S. at 460 (school board actions may not "perpetuate or reestablish the dual school system"); *Swann*, 402 U.S. at 21 ("it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system"); *Green*, 391 U.S. at 438 & n.4.

The courts of appeals have adopted a "three year" rule to measure whether desegregation has been maintained. *Youngblood v. Bd. of Ed.*, 448 F.2d 770 (5th Cir. 1971); *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 752 (5th Cir. 1989); *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 227 (5th Cir. 1983); *Morgan*, 926 F.2d at 91; *Vaughns v. Bd. of Ed.*, 758 F.2d 983 (4th Cir. 1985). Thus, a school system must be desegregated for at least three successive years before it will be considered to have met its constitutional obligation to achieve and maintain desegregation. The United States endorses this three year rule and DCSS does not appear to contest it. *See* Brief for United States at 11, n.6.

Applying this principle, the district court in this case held even if DCSS was desegregated with respect to stu-

dent assignment in 1969, "[t]here was insufficient evidence presented to this court from which it can make a determination, as defendants urge, that implementation of the 1969 order resulted in full eradication of the vestiges of the dual system that would entitle them to a declaration of unitary status on this issue [student assignment]." J.A. 214. *See also* Pet.App. 9a, *Pitts v. Freeman*, 755 F. 2d 1423 (11th Cir. 1985).

Thus, a fair reading of the district court's holding is that by 1975, the school district had not met the constitutional command to desegregate even with respect to student assignment. However, by 1975, the segregated student assignment system that now exists had been established through school board action and inaction. Most of the demographic change, on which the district court and DCSS place such emphasis, occurred after 1975. Indeed, the district court so held:

> Between 1975 and 1980, approximately 64,000 black citizens moved into southern DeKalb County . . . . Meanwhile, approximately 37,000 white residents moved from southern DeKalb County to surrounding counties . . . From the period of 1976-1986, at the elementary level, the DCSS experienced an enrollement (sic) decline of 15%, and within this change, an increase in black student enrollments of 86%. At the high school level, during the same period, DCSS experienced an enrollment decline of 16%, while the number of black students rose by 119%.

J.A. 215.

The percentage of black students attending majority black schools and the relative exposure index increased dramatically from 1969 to 1975 (from 35% to 73% and from 22.7 to 57.2) and then remained stable from 1975

to 1980 when the demographic change was at its greatest. J.A. 214-15, 253, 259, 260, 269-380. 73% of all school opening and closing occurred from 1969 to 1975. J.A. 269-380. The demographic change thus aggravated, but did not cause the segregation caused by DCSS's failure to follow the command of the Constitution. Statement of Facts, D and E.

The district court made this clearly erroneous finding precisely because it failed to apply the legal standards required by this Court, *see* sections I, II.A., II.B.1-3, *supra*, and because it failed to give the careful attention to the facts this Court has required. *Keyes*, 413 U.S. at 211.

Finally, even if demographics contributed to the vestiges of the current segregation, DCSS cannot escape responsibility. This Court always understood that demographics would change during the process of desegregation and that such change would not excuse a failure to desegregate.

> The failure of local authorities to meet their constitutional obligations aggravated the massive problems of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes . . . .

Swann, 402 U.S. at 14.

School segregation affects as well as is affected by housing segregation. *Id.* at 20-21 ("[P]eople 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 develop-

ment . . . ."); *see also Columbus* 443 U.S. at 465 & n.13.

For this reason, if a school district has not desegregated, it cannot avoid its constitutional obligations by pointing to housing segregation that mirrors the segregated pattern of educational services. *Dowell*, 111 S.Ct. at 638; *Davis v. East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1435 (5th Cir. 1983); *Lee v. Macon Co. Bd. of Ed.*, 616 F.2d 805, 810 (5th Cir. 1980); *Vaughns v. Bd. of Ed.*, 758 F.2d 983, 988 (4th Cir. 1985); *Swann*, 402 U.S. at 20-21 (school segregation impacts residential segregation creating a "loaded game board" that the court must eliminate); *Columbus*, 443 U.S. at 459-61, 465 & n.13 (same); *Keyes*, 413 U.S. at 201-04 (same); *Kelley v. Metro. Co. Bd. of Ed.*, 687 F.2d 814.

DCSS simply has not fulfilled its constitutional obligation to desegregate even with respect to student assignment. The district court's conclusion that it need not do so, because no vestiges of segregation remain in student assignment, was so tainted by its misapplication of this Court's holdings that it was clearly erroneous.

CONCLUSION

Upon reviewing the record in this case, the court of appeals found that "DCSS . . . refuses to take affirmative action [to desegregate] and seeks to justify its inaction with frivolous and long rejected arguments." It then held:

> After twenty years of court supervision, the DCSS continues to operate racially identifiable schools. The DCSS has never achieved unitary status and it retains the duty to eliminate all vestiges of the dual school system.

Pet.App. 24a.

Respondents respectfully submit that the decision of the court of appeals is correct and should be affirmed.

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