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

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF AMICUS

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was established in 1963 at the request of President Kennedy to help assure civil rights to all Americans by affording legal services otherwise unavailable to minorities and the poor pursuing claims for equal treat-

ment under the law. The Lawyers' Committee is a non-profit private corporation that has enlisted the services of thousands of members of the private bar in cases involving voting, education (including school desegregation), employment, housing, municipal services, the administration of justice and law enforcement.

The Lawyers' Committee has a long history of direct support of and participation in cases in the federal courts furthering school desegregation. This Court's decision will undoubtedly have significant implications in other school desegregation cases. *Amicus* submits that its experience in school desegregation litigation enables it to provide a perspective different from the parties and other *amici* on the issues before this Court.

SUMMARY OF ARGUMENT

The DeKalb County public schools were segregated in 1954. They were segregated in 1969, when this case began, and they remain segregated today. At no time has petitioner school board fulfilled the obligation imposed on it by *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), and *Green* v. *New Kent County School Bd.*, 391 U.S. 430 (1968), to achieve a unitary school system. Contrary to what it would have this Court believe now, it is not operating a school system overwhelmed by demographic changes that frustrated its efforts to achieve "a unitary system in which racial discrimination would be eliminated root and branch." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). It made no such efforts. To the contrary, as the Court below said (887 F.2d at 1440-41):

> Despite our [previous] admonishments [in this case], the district court ruled that the DeKalb County School Board ("DCSS") is under no affirmative duty to take steps to desegregate an acknowledged segregated system in the area of student assignment because the DCSS closed all of its *de jure* black schools in 1969.

* * * *

> Black students constitute 47 percent of the DCSS population. Despite the system's racial balance, 50 percent of the black students attend schools with black populations of more than 90 percent. Similarly, 27 percent of the DCSS's white students attend schools with white populations of more than 90 percent. The DCSS operates a segregated school system.

Under these circumstances the district court was plainly wrong, under the decisions of this Court, in denying any further relief to plaintiffs except in the limited area of faculty reassignments, and in refusing further supervision of the school board other than in that regard. The Court below accordingly was plainly right in reversing the district court and requiring it to see to it that the school board continue to take all practicable steps to achieve a unitary system. As this Court recently said, the inquiry was properly directed to the question "whether [the school board has] complied in good faith with the desegregation decree since it was entered," which it clearly has not, and "whether the vestiges of past discrimination [have] been eliminated to the extent practicable," which certainly has not happened. *See Board of Educ. of Oklahoma City* v. *Dowell*, ____ U.S. ____, 111 S. Ct. 630, 638 (1991).

Petitioner seeks to avoid the force of the application of these principles in two ways. The first, as the Court below noted, is by reliance on its action of closing the black schools of its dual system in 1969, thus taking a preliminary step towards the elimination of racial student assignments. In this way petitioners persuaded the district court to treat the matter of student assignments as a closed book that could not be reopened despite the overwhelming evidence of racial segregation in the system, and despite petitioner's admitted failure to eliminate the vestiges of *de jure* segregation in other facets of school operations, such as faculty, staff, and facilities. *See Green* v. *New Kent County School Bd.*, *supra*, 391 U.S. at 435; *Board of Educ. of Oklahoma City* v. *Dowell*, *supra*, 111 S. Ct. at 638. Secondly, petitioner relies on the evidence of concededly large population moves into the county in the

past decade and a half, causing significant changes in the size and racial composition of the school population.

Neither of these factors should be held to excuse petitioner from its well-established duty to eliminate vestiges of *de jure* racial segregation and achieve a unitary system in which racial discrimination is eliminated root and branch.

With regard to the first point, the decisions of this Court since *Green*, *supra*, have consistently required school boards and supervising district courts to treat the task of eliminating the vestiges of racial discrimination in terms of the entire school system rather than its component parts. *De jure* segregation is a system-wide constitutional violation. The remedy requires examining and treating all aspects of the school system as one problem, needful of coordinated attention. *See Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*); *Green*, *supra*; *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *See also Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Bradley* v. *School Bd.*, 382 U.S. 103, 105 (1965); *United States* v. *Montgomery Bd. of Educ.*, 395 U.S. 225, 231 (1969). Thus in *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), the Court expressly applied a presumption that discriminatory action in a particular aspect of the system would necessarily spread to and affect other components of the system. *Id.*, 413 U.S. at 196, 201-2, 214. *See also Dayton Bd. of Educ.* v. *Brinkman* (*Dayton II*), 443 U.S. 526 (1979); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 467 (1979). The system approach was reiterated in *Dowell* this year. *See Dowell*, *supra*, 111 S. Ct. at 636, 638. Here petitioner's failure to deal with its whole system in a unitary fashion is admitted. *See* Point I, *infra*.

Wholly apart from this Court's repeated insistence on system-wide analysis and treatment, the incremental approach urged by petitioner and embraced by the district court will not work in practice. Achievement of a unitary system means elimination, to the extent practicable, of racially identifiable schools. It is common experience that racial segregation in faculty and staff, such as that petitioner has permitted to persist in this case, along with disparities in facilities and resources, contributes to the perception of schools as

"black" or "white." Thus, the need for system orientation, rather than an incremental, piece-by-piece approach, is recognized and endorsed by the extensive literature on school desegregation. *See* Point I, *infra.*

The extensive demographic changes that have taken place in DeKalb County since the entry of the judgment in this case in 1969 do not diminish the legal and constitutional obligations of petitioner. The school authorities did not cause the onrushing tide of people into DeKalb County. But during this period of influx the schools remained racially identifiable because of the decisions of the DeKalb County school board which never eliminated faculty and staff segregation and, notwithstanding purportedly racially neutral student assignment practices in 1969 and 1970, assigned black students predominantly to those schools where black faculty and staff were located. Given that "people gravitate toward schools," as this Court has recognized, the school authorities cannot walk away from their responsibility for the persistence of racially identifiable schools whose racial stamp encouraged, and was reinforced by, the diversion of the flow of people into two streams—white and black. *See* Point II, *infra.*

Petitioner thus remains responsible for taking all practicable steps to remedy existing racial identification of the DeKalb County schools—including in the area of student assignments—until all vestiges of *de jure* segregation have been eradicated. Throughout the transition to a unitary system, the DeKalb County school board is also obligated to take no action, with respect to any aspect of the school system, that would impede the completion of the transition. The Court below correctly left the question of exactly what steps are necessary to eliminate completely the dual system to the school board itself, and, in the event of default by school authorities in that responsibility, to the discretion of the district court. *See* Point II, *infra.*

ARGUMENT

I

THE AFFIRMATIVE OBLIGATION TO ELIMINATE THE VESTIGES OF *DE JURE* SEGREGATION AS FAR AS PRACTICABLE EXTENDS TO ALL ASPECTS OF A SCHOOL SYSTEM, AND CANNOT BE ACCOMPLISHED OR REVIEWED ON AN INCREMENTAL BASIS

Since *Brown* v. *Board of Education*, this Court has consistently reaffirmed the affirmative duty of school boards to complete the transition from a *de jure* segregated school system to a system in which the vestiges of past discrimination have been eliminated to the extent practicable. This Court has recognized that various discriminatory acts or omissions in a single school system have interrelated effects that cause and perpetuate the vestiges of *de jure* segregation, including racially identifiable schools, and that discrimination in one particular component of the system cannot be considered in isolation. Thus the Court has consistently applied system-wide remedies to address the system-wide nature of the constitutional violation. This Court's decision in *Board of Educ. of Oklahoma City* v. *Dowell* reiterated these principles and set forth the workable standards for determining when a formerly *de jure* segregated school system has been brought into compliance with the Constitution—and thus when court jurisdiction in a desegregation case can properly be withdrawn.

As demonstrated below, however, incremental findings of "unitary" status—and with them incremental terminations of court authority to impose remedies addressing particular facets of a school system—would effectively preclude the type of review of school *systems*, and of "every facet of school operations," mandated by *Dowell* and the prior decisions of this Court. Such incremental "unitary" findings would require district courts, based on the implementation by a school board of particular non-discriminatory practices, to sequentially "carve out" discrete areas of the school system from further judicial consideration—notwithstanding that

central vestiges of discrimination affecting those discrete areas, including the racial identity of schools, had never been remedied. Such incremental reviews of unitary status would certainly inhibit the ability of district courts to determine, as *Dowell* now requires, whether at a given point in time all vestiges of past discrimination have been eliminated from the school system to the extent practicable.

Incremental reviews of "unitary" status also would inevitably prove unworkable in practice. Such reviews would require district courts to treat in isolation facets of school systems that are, as educators and social scientists have recognized, integrally related in fact. Such findings could also preclude the use of such remedies as magnet schools or majority-to-minority transfer programs that necessarily require court consideration of various facets of the school system—facets that may already have been "carved out" from the remedial power of the district court by an earlier finding of "unitariness." Moreover, the opportunity for such incremental findings can only be expected to give rise to repeated and protracted litigations, as school boards continually seek to narrow the scope of district court review even before the transition to a "unitary" system has been completed.

This Court should instead reaffirm the principles articulated in *Brown* and all subsequent cases: only the transition to a racially nondiscriminatory school system can cure the constitutional violation of *de jure* segregation and justify the removal of judicial jurisdiction over the school district.

A. Incremental determinations of "unitary" status would be inconsistent with all prior decisions of this Court.

1. *Dowell* set forth the workable standards that do not allow an incremental approach to determining when a school *system* has achieved "unitary" status.

In *Board of Educ. of Oklahoma City* v. *Dowell*, ____ U.S. ____, 111 S. Ct. 630 (1991), this Court reiterated that a school desegregation decree can be dissolved only when a school board has "made a sufficient showing" that "a school system . . . has been brought into compliance with the command of the Constitution." *Id.*, 111 S. Ct. at 636, 638. This

Court set forth the inquiry necessary to determine whether such compliance has been achieved: district courts should consider "whether [a school board has] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination [have] been eliminated to the extent practicable." *Id.* at 638.

This Court then explained in plain terms the standard for determining whether the vestiges of *de jure* segregation have in fact been eliminated as far as practicable. Reiterating that every facet of the school system must be free from those vestiges, this Court instructed that:

> 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, 88 S. Ct., at 1693. *See also Swann*, 402 U.S., at 18, 91 S. Ct., at 1277 ("[E]xisting policy and practice with regard to faculty, staff, transportation, extra-curricular activities, and facilities" are "among the most important indicia of a segregated system").
>
> *Id.* at 638.

Dowell thus embodies fundamental tenets, articulated in *Green*, *Swann* and the other precedents of this Court, requiring a school board to demonstrate that the school "*system* . . . has been brought into compliance with . . . the Constitution"—consistent with the constitutional mandate that all vestiges of the *de jure* system be eliminated to the extent practicable. This constitutional mandate would be seriously undermined if district courts were incrementally denied the power, with regard to particular facets of the school system, to consider appropriate and practicable remedies to ensure a complete transition to a unitary system in which racial discrimination would be eliminated root and branch.

2. This Court has consistently recognized that the racial identification of schools results from interrelated features of a single system that cannot be isolated from each other or subject to divisible remedy.

The constitutional violation addressed in *Brown*, as in all subsequent cases through *Dowell*, was the operation of racially segregated systems, and not merely the existence of particular discriminatory policies in discrete areas. This Court thus anticipated *systemic*, rather than incremental, remedies: district courts were instructed to apply remedies that "may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown I*]." *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294, 300 (1955).

Green v. *New Kent County School Bd.*, 391 U.S. 430 (1968), reiterated in unambiguous terms that the constitutional violation of *de jure* segregation is system-wide and that even a facially non-discriminatory student assignment plan can be rendered ineffective by vestiges of *de jure* segregation in other facets of the system. The "*Green* factors" reflect how in *de jure* segregated systems, "[r]acial identification of the system's schools was complete, extending not just to the composition of student bodies at the . . . schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." *Green*, 391 U.S. at 435. In *Green*, the New Kent County school board's sole reliance on a student assignment plan thus "ignored the thrust of *Brown II*" by failing to address the school system as an integrated whole. In remanding *Green*, the Supreme Court expressly instructed the district court to consider, for example, student assignments "in light of considerations respecting other aspects of the school system such as the matter of faculty and staff desegregation." *Id.* at 442 n.6.

This consideration of school *systems*, rather than an incremental focus on discrete aspects of a school district, reflected earlier Court decisions that had recognized the interrelated effects of discrimination in such discrete areas as faculty and student assignments. In *Rogers* v. *Paul*, 382 U.S. 198 (1965) (per curiam), for example, the Court held that students have

standing to challenge discriminatory faculty assignments not only because "racial allocation of faculty denies [students] equality of educational opportunity," but also because a segregated faculty can "*render[ ] inadequate* an otherwise constitutional pupil desegregation plan." *Id.* at 200 (emphasis added). Similarly, in *Bradley* v. *School Bd.*, 382 U.S. 103, 105 (1965) (per curiam), the Court recognized "the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans." *See also United States* v. *Montgomery Bd. of Educ.*, 395 U.S. 225, 231-32 (1969) (desegregation of faculty and staff is "a goal that we have recognized to be an important aspect of the basic task of achieving a public school *system* wholly free from racial discrimination") (emphasis added). Indeed, in *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971), this Court reiterated the general principle that it constitutes reversible error to treat particular areas of a school district "in isolation from the rest of the school system."

In light of the system-wide nature of the constitutional violation, this Court since *Green* has consistently approved system-wide, rather than incremental, remedies to achieve the mandates of the Fourteenth Amendment. District courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of past as well as bar like discrimination in the future," *Green*, 391 U.S. at 438 n.4. This Court has reiterated that the interaction among, and the combined effect of, discrimination in various components of a school system causes and can perpetuate the vestiges of *de jure* segregation.

Swann, emphasizing a district court's "broad power to fashion a remedy that will assure a unitary school *system*," thus explained that the quality of school buildings and equipment, or the organization of sports activities, for example, can contribute to a school's racial identification—notwithstanding non-discriminatory student assignment practices. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (emphasis added). In particular, the failure to integrate faculty and staff will normally perpetuate such racial identity: "[i]ndependent of student assignment, where it is possible to identify a 'white school' or a 'Negro school'

simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Id.* at 18.

Keyes similarly highlighted the extent to which the various facets of a school system must be evaluated together to determine whether the school district has fulfilled its affirmative constitutional obligation. As the Court explained, "[i]n addition to the racial and ethnic composition of a school's student body, *other factors, such as the racial and ethnic composition of faculty and staff* and the community and administration attitudes toward the school, *must be taken into consideration.*" *Keyes* v. *School District No. 1*, 413 U.S. 189, 196 (1973) (emphasis added). The Court in *Keyes* recognized the interrelationship of the various "*Green* factors" in perpetuating the unconstitutional racial identification of schools: "*the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition.*" *Id.* at 201-02 (emphasis added). On remand, the school board in Denver District No. 1 thus bore the burden of showing that school board actions affecting various aspects of the school system, "*considered together,*" were "not factors in causing the existing condition of segregation in these schools. *Id.* at 214 (emphasis added).

Similarly, in Dayton, the school board had failed to remedy the segregated school system by allowing the interplay of various facets of the district—including faculty assignment, attendance zones, school construction and grade structure—to perpetuate the racial identity of the schools. *See Dayton Bd. of Educ.* v. *Brinkman* (*Dayton II*), 443 U.S. 526 (1979). This Court placed particular emphasis on the Dayton school board's failure to integrate faculty and staff: the district court had erroneously "ignored . . . the significance of purposeful segregation in faculty assignments in establishing the existence of a dual school system." *Id.* at 536 (citation omitted). Explaining that such "purposeful segregation of faculty by race was inextricably tied to racially motivated student assignment practices," this Court remained unwilling to

"deprecate 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 (emphasis in original). *See also Columbus Bd. of Educ.* v. *Penick*, *supra*, 443 U.S. at 467 (1979) ("[t]he practice of assigning black teachers and administrators only or in large majority to black schools . . . served as discriminatory, system-wide racial identification of schools").

This Court's decisions have thus consistently required that the system—and not isolated, discrete parts—be rid of the vestiges of *de jure* segregation and its perpetuation. Nothing in the Court's decision in *Spangler* suggests or should allow a different result. *See Pasadena Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976). There, this Court considered whether a district court properly refused to modify a desegregation decree which provided that, in perpetuity, no Pasadena school could have "a majority of any minority" students; this Court concluded that the district court "exceeded its authority" by "enforcing its order so as to require annual readjustment of attendance zones." *Id.* at 432, 435. That decision, however, did not bar the district court from continuing to provide appropriate and practicable remedies necessary to complete the constitutionally mandated transition to a unitary system. Indeed, to the extent this Court even considered the issue, it observed that "an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained equitable relief." *Id.* at 437 (quotation omitted).

3. This Court's decisions are in full accord with the empirical findings of educators and social scientists.

Rejecting the "view that schools are relatively static constructs of discrete variables," education specialists have generally recognized that schools are "dynamic social systems made up of interrelated factors." S. Purkey and M. Smith, "Effective Schools—A Review," 83(4) *Elementary School Journal* 440 (1983). *See also* A. Bryk, V. Lee and J. Smith, "High School Organization and its Effects on Teachers and

Students," in *Choice and Control in American Education*, Vol. I (W.H. Clune and J.P. White, eds.) 139 (1990). Thus, effective desegregation has required a system-oriented, rather than incremental, approach. As one educator has observed:

> Too often schools seem to focus on only one goal or strategy to achieve effective desegregation. It seems important to stress the need to develop comprehensive plans and strategies. Generally speaking, the attainment of one goal will enhance the possibilities of achieving another.

W.D. Hawley, "Equity and Quality in Education: Characteristics of Effective Desegregated Schools," in *Effective School Desegregation* 298-99 (W.D. Hawley, ed.) (1981).

Studies have consistently shown that student assignments alone do not eliminate the racial identity of schools, and that effective (or ineffective) desegregation results from the interplay of such student assignments with other factors. *See, e.g.*, G. Forehand and M. Rogasta, "A Handbook for Integrated Schooling," U.S. Dept. of Health, Education and Welfare 11-12 (1976) (desegregation is a multi-dimensional process affected by the various facets of the system). *See also* Sheehan, "A Study of Attitude Changes in Desegregated Intermediate Schools," 53 *Sociology of Education* 51-59 (1980); R. Scott and J. McPartland, "Desegregation as National Policy: Correlates of Racial Attitudes," 19 *Amer. Educ. Research J.* 397-414 (1984); Hughes, Gordon and Hillman, *Desegregating America's Schools* (1980) (noting various measures of inequality within schools that must be reviewed to develop an effective desegregation plan).

Among other things, educators and social scientists alike have concluded that faculty and staff integration are essential components of effective school desegregation. After studying school districts in various cities, the United States Commission for Civil Rights concluded in 1967 that the maintenance of faculty and staff segregation perpetuates schools' racial identifiability. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 67 (1967) ("[t]he racial identity of Southern schools is maintained in a variety of ways"

including "continued segregation of teaching staff").* A 1976 report prepared by the Education Testing Service for the Department of Health, Education and Welfare similarly considered the inclusion of racial minorities on faculty and administrative staffs to be "perhaps . . . our most important recommendation." *See* G. Forehand and M. Ragosta, "A Handbook for Integrated Schooling," *supra*, at 11-12. *See also* W.D. Hawley, et al., *Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies*, Vanderbilt University Study (Vol. I) 86 (1981).

B. Incremental findings of unitary status would frustrate the transition to unitary school systems mandated by *Brown* and all subsequent decisions of this Court.

1. Incremental findings of unitary status would allow vestiges of *de jure* segregation to survive the termination of court jurisdiction in a school district.

Because incremental reviews of unitary status focus only on whether isolated discriminatory practices have been eliminated from a particular facet of the school system during some period of time, such incremental inquiries by definition disregard those vestiges of *de jure* segregation—including, in particular, the racial identification of schools—that result from the interrelated effects of the various forms of discrimination in the school system. Where such incremental findings

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* The Civil Rights Commission later reiterated that "[a]dequate minority representation on the school staff is critical to integrated education." *Fulfilling the Letter and Spirit of the Law: Desegregation of the Nation's Public Schools* 122 (1976). *See also* Tauber, "Housing, Schools, and Incremental Segregative Effects," 441 *Annals of the American Academy of Political and Social Science* 157-67 (1979) (manipulation of student assignment process, "combined with segregative assignment of teachers, have combined to cause, enhance, and maintain racial identifiability of schools . . . in Milwaukee"); G. Orfield, *Must We Bus? Segregated Schools and National Policy* 369 (1978) (in Cleveland, "[t]he racial identity of the schools was reinforced by intense faculty segregation"); Billingsley, et al., "School Segregation and Residential Segregation: A Social Science Statement," in *School Desegregation: Past, Present, and Future* 235-36 (W.G. Stephan & J.R. Feagin, eds.) (1980).

are permitted, school boards can sequentially demonstrate that particular discriminatory practices affecting particular facets of the school system have been eliminated, while vestiges of *de jure* segregation—particularly the racial identification of schools—continue to operate. If particular discriminatory practices are considered incrementally and in isolation, the sum of the parts of the system will be less than the constitutionally mandated whole—a school system cleansed of the vestiges of *de jure* segregation.

This means, in turn, that after a particular facet of the school system would be "carved out" from further judicial review based on the implementation of particular non-discriminatory practices, vestiges of *de jure* segregation could continue to operate so that even those non-discriminatory practices could soon be rendered ineffective. This is precisely what this Court has always sought to avoid, as this Court has recognized that the continuing vestiges of prior discrimination in such areas as faculty assignments and funding can render even non-discriminatory student assignment policies inadequate to remedy violations of the Fourteenth Amendment. *Green*, *supra*, 431 U.S. at 439-42. *See also Rogers* v. *Paul*, *supra*, 398 U.S. at 200 (segregated faculty can "render[ ] inadequate an otherwise constitutional pupil desegregation plan"); *United States* v. *Montgomery Bd. of Educ.*, *supra*, 395 U.S. at 231.

At the same time, if particular facets of the school system were to be carved out from further judicial consideration, a school board could presumably become free to take actions in those discrete areas that actually have the effect of impeding the transition to a unitary system—so long as these actions do not otherwise constitute new violations of the Fourteenth Amendment. *Cf. Dowell*, 111 S. Ct. at 638 (if the Oklahoma City School board achieved unitary status in the city school system, further school board actions would be judged under "appropriate equal protection principles"). Such a result would plainly impede the constitutionally mandated transition to a system in which vestiges of *de jure* segregation have been eliminated to the extent practicable. It would also disregard that "[p]art of the affirmative duty imposed by [this Court's] cases, as . . . decided in *Wright* v.

Council of Emporia, 407 U.S. 451 (1972), is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects." *See Dayton*, *supra*, 443 U.S. at 538. *See also United States* v. *Scotland Neck Bd. of Educ.*, 407 U.S. 484 (1972); *Columbus*, 443 U.S. at 460; *Swann*, 402 U.S. at 20-21.

Ultimately, this would mean that at whatever point in time a school board will have finally succeeded in obtaining sequential "unitary" findings for all facets of the school system, remaining vestiges of *de jure* segregation may already have operated to re-establish segregation in those areas where incremental unitary findings have been made. At this point, it would become virtually impossible to conduct any meaningful inquiry as to whether the school board had in fact taken all practicable steps to eliminate all vestiges of prior discrimination—the very inquiry *Dowell* prescribed.

2. Incremental unitary findings would preclude future use of programs that implicate several facets of the school system.

In many cases, incremental findings of unitary status would also preclude the use of remedies, such as optional transfer programs and magnet schools, that would otherwise be the most practicable means of completing the transition to a school system in which the vestiges of *de jure* segregation have been eliminated.

Remedies such as optional majority-to-minority transfer programs have "long been recognized as a useful part of every desegregation plan." *See Swann*, 402 U.S. at 26. Such plans allow members of the majority racial group of a particular school to transfer to other schools where they will be in the minority. While this Court has explained that transfer provisions are "an indispensable remedy for those students willing to transfer . . . in order to lessen the impact on them of the state-imposed stigma of segregation," *Swann*, 404 U.S. at 26, such optional transfer plans—that require adjustment of student assignments, faculty assignments, transportation, or the allocation of school resources—would be

precluded in any district where any of those implicated facets of the school system had already been declared "unitary".

A similar result would follow in the case of magnet school programs, which draw students with particular qualifications from throughout the district to a particular school. *See Clark* v. *Board of Educ.*, 705 F.2d 265, 272 (8th Cir. 1983) (directing establishment of magnet schools to promote "equal educational opportunity"); *Adams* v. *United States*, 620 F.2d 1277, 1296-97 (8th Cir. 1980) (endorsing magnet schools as a "technique[ ] to ensure students . . . will receive equal educational opportunities"). Implementation of magnet school plans plainly implicates the allocation of school resources, student assignments, faculty assignments, and, in some cases, transportation. The use of such magnet school remedies, however, would be precluded where any of those facets of the school system had already been "carved out" from further judicial consideration.*

3. Incremental review of unitary status would give rise to repeated and protracted litigation.

In a regime allowing incremental "unitary" findings, district courts could remove from further judicial consideration particular facets of the educational system, notwithstanding that the school system has not yet been brought into compliance with the Constitution. It is not difficult to contemplate the annual or even more frequent litigation that would ensue, as school boards could continually seek to "carve out" more and more components of the educational process.

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* Ironically, the circumstances in DeKalb County are a plain illustration of this result. If, indeed, it was appropriate to "carve out" the area of student assignments from further district court consideration, then presumably such an incremental finding could have been made as early as 1972—after the school board had purportedly implemented a racially non-discriminatory student assignment policy for several years. Such an incremental finding of "unitary" status, however, would have precluded the implementation in subsequent years of the very majority-to-minority transfer programs and magnet school programs that the district court considered necessary to effectuate the transition to a school system rid of the vestiges of *de jure* segregation. *See* J.A. 216 (majority-to-minority transfer program adopted in 1972); J.A. 217 (magnet school program adopted in 1980's).

Without having to establish that the racial identity of schools, or any other vestiges of the *de jure* system, had been eliminated, a school board could ask a district court to find that practicable steps had been taken to eliminate discrimination in some discrete area. School boards could be expected subsequently to seek one such "carve out" after another, as such relief would self-evidently provide a means to limit the school board's obligations in the transition to a unitary system. At the same time, individual litigations over the alleged "unitary" status of each facet of a school system could require protracted factual inquiry in each case—including expert testimony, or documentary and other evidence concerning developments in the school district.

There is, moreover, no reason to believe that school boards would seek only to "carve out" the six general facets of school systems identified in *Green*. Rather, motions could be made for "unitary" findings with respect to particular portions of a school district, particular schools, or even particular facets of a single school. Indeed, no limit could easily be placed on the extent to which motions for incremental "unitary" findings might be narrowly focused.

These scenarios by no means represent mere hypothetical speculation. In the First Circuit, where incremental findings of unitary status are permitted, *see Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987), the Boston school board has already sought such incremental unitary findings for small fragments of the system, including discrete groups within the system's overall teaching staff. *See Morgan* v. *Burke*, 926 F.2d 86, 92 (1st Cir. 1991) (school board sought to "fragment" progress in desegregation into "very small parts" and proposed subdividing faculty and staff into blacks and other minorities, a proposal considered similar to subdividing student assignments on a school-by-school basis).

C. The vestiges of *de jure* segregation in DeKalb County have had interrelated segregative effects, and cannot be considered in isolation.

The interrelated effects of the vestiges of discrimination in various aspects of a school system are vividly illustrated in

this case. Here, the DCSS argues that it implemented a purportedly neutral student assignment plan for some period beginning in 1969.* Yet even during this period—as before and at all times thereafter—schools in DeKalb County retained their racial identity as a result of school board action in such areas as faculty and staff assignments. Indeed, it is undisputed that faculty and staff in DeKalb County have never been desegregated. This meant that the implementation of the DCSS's neighborhood student attendance plan, even from 1969 to 1972, in fact resulted in black students being assigned predominantly to schools where the black faculty and staff were located—thereby rendering ineffective on its face a desegregation plan that under other circumstances might have served to limit racial identifiability.

The DCSS's own explanation for the continued segregation of its faculty and staff illustrates the interrelated effects of the vestiges of discrimination. The DCSS has attributed faculty and staff segregation largely to faculty and staff preferences to work in schools located near their residences. *See* J.A. 76; J.A. 230. This explanation makes plain that school construction, abandonment and expansion policies—viewed by the DCSS and the district court as generally falling within the purview of student assignment policies—have a significant effect on determining the effectiveness of steps in the area of faculty assignment.

In this case, moreover, the DCSS took actions during the life of the desegregation decree that served to exacerbate the interrelated effects of these perpetuated vestiges. The DCSS built and expanded existing schools and drew attendance zones in a manner that guaranteed racial homogeneity, both of students and faculty, rather than racial integration. Thus in 1976 the district court had found that the DCSS had drawn attendance zones in such a way as to increase segregation within the system. J.A. 89-92. The following year, in the context of considering an expansion of the Flat Shoals elementary school, the district court specifically advised the DCSS to consider "alternatives to further construction, such

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* The district court, however, was itself unable to determine how long even these steps in the area of student assignments had been purportedly effective. J.A. 214.

as alterations in attendance zones, and, possibly, some form of busing, in order to remedy the overcrowding which is bound to occur and to promote desegregation in the county schools." J.A. 122. Moreover, "in considering additions to other predominantly black schools in the county," the DCSS was "admonished to keep this in mind." The district court's admonition has gone unheeded.

The racial identities of schools were locked in place by the DCSS's continued resistance to effective minority transfer and magnet schools programs. The DCSS consistently placed arbitrary restraints on the number of black students able to transfer to white schools, notwithstanding this Court's instruction in *Swann* that in order for a minority transfer program to be effective, "space must be made available in the school in which [the transferring student] desires to move." *Swann*, 402 U.S. at 26-27. Thus, in 1976, the district court found that "the regulations imposed under the M-to-M program perpetuate the vestiges of the dual system." J.A. 83. In 1979, the district court once again was forced to preclude modifications sought by the DCSS to restrict the numbers of black students able to transfer to white schools. J.A. 138-50.

The interrelated effects of the vestiges of discrimination in the various facets of school operations collectively determined, and have perpetuated, the racial identities of the schools in DeKalb County. While vestiges of the *de jure* system remain, various facets of the school system have been subject to their interrelated effects.

II

THE DEKALB COUNTY SCHOOL SYSTEM REMAINS UNDER AN AFFIRMATIVE DUTY TO REMEDY, TO THE EXTENT PRACTICABLE, CURRENT RACIAL IDENTIFIABILITY OF THE SYSTEM'S SCHOOLS

Since 1954, the schools in DeKalb County have retained their racial identity. Notwithstanding the adoption by the DCSS of certain purportedly non-discriminatory practices in the area of student assignment for some period beginning in 1969, it is not disputed that the DCSS never desegregated fac-

ulty and staff and always assigned black students disproportionately to those schools in which black faculty and staff could be found. Moreover, since 1969, the DCSS's school construction and abandonment policies have served primarily to exacerbate the racial identifiability of the schools.

Notwithstanding the continuous racial identifiability of the schools, the DCSS now claims it should be released from further court supervision in the area of student assignments—not because it has satisfied its affirmative duty to complete the transition to a school system in which the vestiges of *de jure* segregation have been eliminated, but because demographic changes during the life of the desegregation decree purportedly contributed to existing segregated student assignments in the district. Given the DCSS's failure ever to take the steps necessary to eliminate the blatant racial identifiability of the county schools, however, there can be little doubt that the DCSS itself influenced relevant demographic patterns and their reinforcement of existing racial identification. This Court has long recognized the causal relationship between the perpetuation of racial identity of schools and demographic patterns that serve to reinforce such racial identity. And, in fact, while the demographic changes occurred, the DeKalb County school board took steps that served to reinforce and even exacerbate segregative effects of these patterns. The DCSS accordingly remains under an affirmative duty to take practicable steps to remedy the existing racial identification that now exists in the district's schools—including in the area of student assignment.

It remains true that the scope of the affirmative duty to effectuate the transition to a "unitary" school system is defined by the scope of the constitutional violation. Even in a case where a school board is no longer obligated to implement affirmative remedial steps, however, the school board, when it does act, remains under a continuing obligation to take no action that would hinder the constitutionally mandated transition to a school system in compliance with the Fourteenth Amendment.

A. The demographic changes that have occurred in DeKalb County cannot shield the school authorities from responsibility for remedying existing racial identity in the school system—including in the area of student assignments.

It is well settled that when a school district has operated a *de jure* segregated system, it bears the burden of demonstrating that the existence of racially identifiable schools is not the result of school board action. *See Dayton II*, 443 U.S. at 537 ("systemwide nature of the violation furnished *prima facie* proof that current segregation . . . was caused at least in part by prior intentionally segregative official acts"); *Columbus*, 443 U.S. at 465 n.13 (burden on the school board was to prove that its conduct was not a "contributing cause" of racial identifiability of schools); *Keyes*, 413 U.S. at 211 & n.17 (burden is on the school board to prove that its conduct did not "create or contribute to" the racial identifiability of schools, or that racially identifiable schools are "in no way the result of" school board action); *Swann*, 402 U.S. at 26 ("[t]he court should scrutinize [predominantly one-race] schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part").

Thus the Courts of Appeals, including the Court below, have consistently held that a school system that has not removed all vestiges of segregation cannot avoid the constitutional obligation to do so on the basis of claims that ongoing demographic changes have made the process more difficult. *See Vaughns* v. *Board of Educ.*, 758 F.2d 983, 988 (4th Cir. 1985); *Davis* v. *East Baton Rouge Parish School Bd.*, 721 F.2d 1425, 1435 (5th Cir. 1983); *Lee* v. *Macon County Bd. of Educ.*, 616 F.2d 805, 810 (5th Cir. 1980). This doctrine reflects the principle that school authorities cannot avoid the continuing duty to desegregate a school system based on the consequences of their failure, to date, effectively to dismantle all features or vestiges of the dual system. These holdings are supported by the decisions of this Court in *Columbus* and *Swann* and are premised on the clear recognition by this Court that patterns of segregated schooling influence housing choices and cause or contribute to residential segre-

gation—with the result that the patterns of school segregation are compounded and exacerbated.*

In this case, it would be difficult for the DCSS to maintain its burden of demonstrating that existing racial segregation is not the result of school board action, given the district's previously described segregative actions. It is an insuperable burden in light of the responsibility of school authorities for influencing demographic patterns that have reinforced the racial identity of the schools, and the actions of the school authorities that actually magnified the segregative effects of those demographic changes.

It should come as no surprise that the demographic changes in DeKalb County occurred in racially identifiable patterns reinforcing the racial identifiability of the DCSS schools. This Court has long recognized that "people gravitate toward school facilities," *Swann*, 402 U.S. at 20, and that racially identifiable schools influence the gravitational pull. Indeed, the DCSS's claim that it should be released from its affirmative duty to dismantle the dual system because of demographic changes is certainly not novel, and similar claims have already been rejected by this and lower courts. In *Columbus*, for example, school authorities contended that "because many of the involved schools were in areas that had become predominately black residential areas by the time of trial, the racial separation in the schools would have occurred even without the unlawful conduct of [the school board]." *Columbus*, 443 U.S. at 465 n.13. That

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* This rule is not one of absolute liability without regard to the facts and circumstances of a particular case, however, as the opinion of the Court below might be read. This Court's school desegregation precedent establishes a framework according to which a previously *de jure* school district may seek to demonstrate that segregation in its schools or programs is not the result of the dual system, its failure to eradicate that system and its effects, or any actions it has taken that have impeded that process. A school board that has effectively implemented remedies to desegregate all aspects of a school system and, therefore, has removed the racial identifiability and stigma that influence housing choice and residential segregation, may be in a position to demonstrate that subsequently occurring racial imbalance is not the product of any failure to dismantle *de jure* schooling. Whatever the circumstances in which a district could carry this burden, they are not presented by the DCSS in this case.

argument—then as it should be now—was easily dispatched by this Court: "the phenomena described by [the school board] *seems only to confirm, not disprove* . . . that school segregation is a contributing cause of housing segregation." *Id.* (emphasis added). This Court found persuasive the district court's findings that notwithstanding adoption of an ostensibly racially neutral attendance policy, the school board's failure to dismantle the dual school system perpetuated racially identifiable residential patterns. *See Penick* v. *Columbus Bd. of Educ.*, 429 F. Supp. 229, 259 (S.D. Ohio 1977).

The DCSS obviously did not cause people to move into DeKalb County. But as explained in *Keyes*, the perpetuation of identifiably black or white faculty in schools

> [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 residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.
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> —*Keyes*, 413 U.S. at 202.

By failing to eliminate the racial identifiability of its schools, the DCSS cast the die for the occurrence of demographic changes that would reinforce the racial identifiability of the schools.

Moreover, once those demographic changes began and the need arose for increased school capacity to accommodate the increased student population, the DCSS affirmatively exacerbated the effects of the demographic changes on the school system through its policy of expansion. Rather than build schools or expand existing schools in areas that promised a racially diverse student body, the DCSS instead built and expanded schools in the peripheral parts of DeKalb County that guaranteed racial homogeneity. Together with the neighborhood student attendance plan and restricted minority transfer programs, the new and expanded schools locked the system into a separation of the races. Black schools were

located in areas within DeKalb County that assured their racial identifiability would remain intact.

In *Swann*, this Court recognized that within a school system that had yet to achieve unitary status, the location of schools can have a powerful effect on residential patterns, particularly when the students are assigned to schools on a neighborhood zoning basis:

> The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by 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 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 of a new school. *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.*
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> —*Swann*, 402 U.S. at 20-21 (emphasis added).

Studies by social scientists have confirmed that racially identifiable schools influence demographic patterns so as to reinforce the schools' racial identifiability. *See, e.g.*, Billingsley, *et al.*, "School Segregation and Residential Segregation: A Social Science Statement," in *School Desegregation: Past, Present, and Future* 240 (W.G. Stephan & J.R. Feagin, eds.) (1980). Indeed, as thirty-eight social scientists agreed in

a collective statement, "[a]ll discriminatory acts by school authorities that contribute to the racial identifiability of schools promote racially identifiable neighborhoods." *Id.* at 236.

Moreover, a school board can trigger or influence a racially identifiable demographic trend in neighborhoods by "signalling" that the racial identity of an existing school is to change, or, in the case of a new school, what its racial identity will be. This is particularly so in communities undergoing substantial demographic changes, because "the changing racial composition of a school's pupils and staff serves as a signal to the public—realtors, homeseekers, residents, etc.—that school authorities expect the school to become all black." Tauber, *Demographic Perspectives on Housing and School Segregation*, 21 Wayne L. Rev. 833, 843 (1975). *See also* "School Segregation and Residential Segregation: A Social Science Statement," *supra*, at 235 ("[c]hange in the racial identifiability of a school can influence the pace of change in racial composition in a 'changing' residential area").

A significant, and perhaps most obvious, reason for this relationship between racially identifiable schools and demographic patterns is that parents perceive that black schools are generally inferior to white schools. *See, e.g.*, Tauber, *Demographic Perspectives on Housing and School Segregation*, *supra*, 21 Wayne L. Rev. at 843 ("if predominantly black schools were not perceived as inferior schools, then school attendance zones would play only a minor role in residential choices and in the behavior of real estate businesses").

Swann, *Keyes* and *Columbus* teach that when assessing the relationship between racially identifiable demographic trends and school board action, the district court must consider the acts (and omissions) of the school board before and during the time period in which those trends occurred. An analysis which considers only the present overlooks the vital question: whether past actions have contributed to present harm. This "segregative snowball" effect, *Penick* v. *Columbus Bd. of Educ.*, 429 F. Supp. 229, 259 (S.D. Ohio 1977), has been recognized by numerous lower courts and taken into account

when determining the appropriate scope of relief required to effectively desegregate a formerly *de jure* school system.*

Not surprisingly, racially identifiable demographic trends are less likely in communities which have undergone successful school desegregation. "School desegregation, if effectively implemented, removes the racial identifiability of schools, and hence removes one of the restrictions on housing choice by white and black families." Tauber, "School Desegregation and Racial Housing Patterns," in *New Directions for Testing and Measurement: Impact of Desegregation* 63 (D. Monti, ed.) (1982). "[S]chool desegregation has helped ease the traditional patterns of rigid residential segregation. . . . Once the racial character of a neighborhood can no longer easily be stamped by an identification of its schools as black or white, racial barriers in housing begin to lower." Taylor, *Brown, Equal Protection and the Isolation of the Poor*, 95 Yale L.J. 1700, 1711 (1986) (*citing* D. Pearce, *Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns* (1980)).

Here, by contrast, the district court's reliance on demographic changes to relieve the DCSS of its duty to desegregate the schools in DeKalb County simply ignored how demographic changes responded to, and thus reinforced, racially identifiable schools. Had the DCSS effectively acted to remedy the vestiges of *de jure* segregation, the DCSS would not today retain its dual characteristics.

The district court's analysis of the DCSS's responsibility for the current racial identifiability of the schools in DeKalb County overlooked the critical analysis: whether those ves-

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* *See, e.g., United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *United States* v. *Board of School Comm'rs*, 573 F.2d 400, 408-09 n.20 (7th Cir. 1978); *NAACP* v. *Lansing Bd. of Educ.*, 559 F.2d 1042, 1049 n.9 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); *Evans* v. *Buchanan*, 393 F. Supp. 428, 436-37 (D. Del.), *aff'd*, 423 U.S. 963 (1975); *Hart* v. *Community School Bd.*, 383 F. Supp. 699, 706 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975); *Davis* v. *School District*, 309 F. Supp. 734, 742 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). *See also Adams* v. *United States*, 620 F.2d 1277, 1291 (8th Cir.) (public perception of racial identity of a school is a powerful factor in shaping neighborhood residential patterns), *cert. denied*, 449 U.S. 826 (1980).

tiges of the *de jure* system, such as segregated faculty and staff, which have perpetuated the racial identities of the schools, contributed to the racially segregated character of demographic changes. The burden properly belonged on the DCSS to demonstrate that such segregative demographic changes were not influenced by racial identity of the schools that school authorities had themselves caused or perpetuated. Moreover, the district court was clearly erroneous in concluding that the DCSS's actions in response to the demographic changes had achieved maximum practical desegregation in light of the DCSS's record with regard to the location of new schools, the neighborhood student attendance plan, and the restricted minority transfer programs—steps that exacerbated the segregative effects of the demographic changes.

Because the current segregation of student assignments can only properly be considered a vestige of *de jure* segregation in DeKalb County, the DCSS continues to bear the duty to implement affirmative steps to remedy, to the extent practicable, this racial identifiability. Consideration of remedies, of course, must be based upon the current circumstances in the school system rather than those existing at an earlier point in the desegregation process. This case should be remanded to the district court so that the school board itself can implement necessary remedies. In the event of default by the school board in that duty, the district court will be in the best position to fashion an appropriate remedy.

B. Where a school board that has not completed the transition to a unitary system is not obligated to implement further affirmative remedial steps, school authorities, when they do act, remain obligated to take no action that would impede completion of the transition.

The continuing obligation of the DCSS to achieve the transition to a unitary system is fully consistent with the Fourteenth Amendment principle that a school board's affirmative duty in a given district is defined by the scope of the constitutional violation. *See, e.g., Swann*, 402 U.S. at 16; *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977). This Court has, of course, long recognized that the vestiges

of *de jure* segregation can be manifest or perpetuated through various means that are thus embodied within the violation of the Fourteenth Amendment. *See* Point I, *supra.*

Moreover, as this Court reiterated in *Dayton II*, the obligation to effectuate the transition to a unitary system includes "the obligation not to take any action that would impede the process of disestablishing the dual system and its effects." *Dayton*, 443 U.S. at 538. *See also Wright* v. *Council of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972). This duty to "do no harm" applies without regard to the purported motivation for particular school board actions. During the transition to a school system in compliance with the Constitution, "[t]he existence of a permissible purpose cannot sustain [school board] action that has an impermissible effect" of impeding "the effectiveness of the remedy ordered to dismantle the dual system." *Wright*, 407 U.S. at 462, 470. Thus, in both *Wright* and *Scotland Neck*, school authorities could not erect new student assignment boundary lines where the effect of such new boundaries would have been to undermine progress towards school desegregation in the districts. *See Wright*, 407 U.S. at 460 (proposed action could be judged only according to whether "it hinders or furthers the process of school desegregation"); *Scotland Neck*, 407 U.S. at 489.

This duty not to impede the transition to a unitary system remains until the transition is complete. For example, even if a school district has been implementing effective steps toward the transition to a unitary system, and therefore may be under no obligation to initiate further restructuring of the school system in response to racial imbalances resulting from demographic change, it nevertheless is obligated to take no action that will impede or frustrate the transition. *See also* p. 23n., *supra.* Accordingly, when such a district does act—to adjust attendance zones, to construct or abandon schools, to assign faculty, to implement pupil transfer programs—it is obligated to act in a manner that does not exacerbate segregation within the district or "serve to perpetuate or reestablish the dual system." *Swann*, 402 U.S. at 21.

A school board that is not obligated to take further affirmative remedial steps thus cannot permissibly take the type of

action proposed by the DCSS in this case—expansion of a high school in a section of the county with a predominantly white population, where the result will be to draw students to the school from currently less segregated schools and thereby increase the separation of the races in the district.

The affirmative duty to bring a school district into compliance with the Constitution would be rendered meaningless if school authorities were free to take action during the period of transition that would hinder the process of school desegregation or even promote separation of the races in the system.

CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals should be affirmed.

June 21, 1991

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