IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

GARY L. PENICK, et al., *Respondents.*

BRIEF OF RESPONDENTS, THE OHIO STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION, ON PETITION FOR WRIT OF CERTIORARI

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These respondents support the petition and respectfully pray that a writ of certiorari be issued to the Court of Appeals for the Sixth Circuit.

INTRODUCTORY STATEMENT

These respondents, the Ohio State Board of Education and Franklin B. Walter, Superintendent of Public Instruction, support the petition of the Columbus School Board and its superintendent, and urge the issuance of a writ of certiorari to the Court of Appeals for the Sixth Circuit.

We adopt the petitioners' statements concerning the opinions below, jurisdiction, the questions presented, and the applicable constitutional and statutory provisions.

STATEMENT OF THE CASE

These respondents adopt the petitioners' statement of the case. We add this supplementary note concerning the Court of Appeals' treatment of the liability of the State Board of Education and Superintendent of Public Instruction. The District Court made no finding of independent segregative intent on the part of the state defendants. It found them guilty of a Fourteenth Amendment violation on the basis of its conclusion that they should have done more to end the racial imbalances which existed in the Columbus City School District. It held that the State Board's failure to take "firm action" against the local district provided a basis for an inference "that they intended to accept the Columbus defendants' acts, and thus shared in their intent to segregate in violation of a constitutional duty to do otherwise." [A. 67.]

The Court of Appeals appeared to regard this as sufficient support for a violation finding against the state defendants, but it still entertained enough doubt about the legal sufficiency of the District Court's conclusion to warrant the remand of the case to the District Court for further consideration of the State Board's liability. [A. 204-207.]

REASONS FOR GRANTING THE WRIT

There are four reasons why the petition for certiorari should be granted: (1) to correct the Sixth Circuit's misconstruction of *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); (2) to require the District Court to make the findings of fact concerning incremental segregative effect which *Dayton* has mandated; (3) to clarify the liability presumptions described in *Keyes*[1] in relation to the remedial fact finding required by *Dayton;* and (4) to insure that the inference of segregative intent which might be drawn from a school board's failure to take all possible integrative action does not become a springboard by which courts vault into administrative control of school districts.

The District Court firmly declined to make the findings of fact concerning incremental segregative effect which *Dayton* absolutely requires. The Court of Appeals not only failed to correct this error. It compounded it by misconstruing *Dayton.*

Both lower courts also made improper use of inferences and presumptions to justify their racial balance remedy. Both courts held that a school board intends to perpetuate racially disproportionate school populations if it fails to pursue racially integrative options. Both courts considered that Columbus' failure to correct its racial imbalances was unconstitutional. [A. 50-51, 58-61, 165.] By equating a toleration of racial imbalances with unconstitutional segregation, both courts laid the foundation for their employment of the *Keyes* inference of duality. *Keyes*, 413 U.S. 189, 201-202, 203 (1973). Presuming thereby that a "dual" school system existed in 1954, the Court of

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

Appeals held that Columbus was thereafter under a continuing constitutional duty to desegregate. [A. 165.] Columbus' subsequent construction of new school facilities in neighborhoods where the children were, with the knowledge that they would be racially imbalanced, was regarded by both lower courts as unconstitutional. [A. 48-49, 50-51, 58, 173, 198.] The District Court found eight incidents of discrete segregation subsequent to 1954. [A. 21-24, 26-42.] The Court of Appeals acknowledged that "these instances can properly be classified as isolated in the sense that they do not form any systemwide pattern." [A. 175.] However, it found that the policies of the Columbus Board as to neighborhood school siting and pupil assignment did have systemwide impact [A. 198] and that these warranted a systemwide remedy calling for racially balanced student populations in all schools of the district.

If this use of inferences and presumptions may be indulged in school desegregation cases, racial imbalances will be tantamount to constitutional violations, and judicial reconstruction of school districts can be expected as a matter of course. Neither that result nor the process by which it was reached below is authorized by this Court's decisions in *Swann, Dayton, Austin, Pasadena, Arlington Heights,* or *Washington v. Davis.*[2]

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[2] *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Village of Arlington Heights v. Metropolitan Housing* Development Corp., 429 U.S. 252 (1977); *Washington v. Davis,* 426 U.S. 229 (1976); *Austin Independent School District v. United States,* 429 U.S. 990 (1976); *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977); *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976).

I. THE DECISIONS BELOW ARE IN CONFLICT WITH AND MISAPPLY DECISIONS OF THIS COURT, IN THAT THEY IMPOSE A SYSTEM-WIDE RACIAL BALANCE REMEDY WITHOUT FIRST DETERMINING THE INCREMENTAL SEGREGATIVE EFFECT OF THE CONSTITUTIONAL VIOLATIONS.

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977), established something new in the law of school desegregation: a precise definition of the area over which remedial control may be exercised by the courts. It holds:

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the School Board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. * * * If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton School population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy.
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> 433 U.S. at 420.

Demonstrating that the *Dayton* rule was not peculiar to the Dayton factual context, this Court remanded both the Omaha and Milwaukee cases for the same findings mandated in *Dayton.*[3] The requirement of a specific finding

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[3] *Brennan v. Armstrong,* 433 U.S. 672 (1977); *School District of Omaha v. U.S.,* 433 U.S. 667 (1977).

on incremental segregative effect cannot be attributed to *Dayton's* particular facts. *Dayton* lays down a rule which is applicable to all school desegregation cases.

Dayton orders district courts to establish the difference between two patterns of population distribution. It requires a comparison of the racial dispersal of pupils in school at the present time with the dispersal which probably would have existed if no constitutional violations by school officials had distorted the probable distribution. No other conclusion can be drawn from this Court's language:

> . . . the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.
> *Ibid.*

The District Court in the present case failed to make that determination. Its reason seems to be that *Keyes*[4] authorizes a finding of system-wide violation once plaintiffs show that pupil segregation in a meaningful portion of the system is attributable to segregative intent by school officials. Under *Keyes,* such a showing creates a rebuttable presumption that other segregated schools in the system are also the products of discriminatory intent. Whatever may be the inferences which *Keyes* allows to make a prima facie case of *violation, Dayton* requires district courts to carry the factual inquiry further before issuing *remedial orders* concerning pupil reassignment and transportation. It requires district courts to determine the extent to which the present distribution of pupils differs from the one which would have existed if the constitutional violations of school officials had not occurred.

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[4] *Keyes v. School District No. 1, Denver Colorado,* 414 U.S. 189 (1973).

Subsequent to *Dayton*, it is not enough for a district court to say that there have been some violations, therefore by presumption all racial imbalances are due to segregative intent, therefore there must be a system-wide redistribution of all the pupils in the school district. Since the District Court failed to make *any* determination of incremental segregative effect, its remedial order is not in compliance with *Dayton*, and the Court of Appeals' affirmance was clearly erroneous.

Since *Swann* was decided in 1971 there has been a gradual refinement of this Court's definition of the remedial action which lower courts might take in desegregation cases. *Dayton* provides new requirements which regulate lower court actions both as to fact finding and remedial decrees. It caps a period of several years of increasingly refined thinking about the functions which the district courts are to play in school desegregation cases and lays down important limits of their discretionary power.

Brown I established that state laws which compelled children to attend different schools solely because of their race were in violation of the Equal Protection Clause of the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954). *Brown II*, 349 U.S. 294 (1955), held that in those states school officials carried the burden of devising plans for desegregation under the guidance of federal district courts.

For at least a decade after 1955 federal courts held that *Brown I* and *II* did not require affirmative action to undo racial imbalance.[5] During these years many "freedom of choice" plans were proposed by southern school administrators which permitted children to attend the schools of their choice. The practical effect of the freedom of choice plans was to maintain the segregated conditions which had been required or permitted by state law prior

[5] See for example *Bell v. School City of Gary, Indiana*, 324 F. 2d 209 (7th Cir. 1963); *Downs v. Board of Education*, 336 F.2d 988 (10th Cir. 1964); *Deal v. Board of Education*, 369 F. 2d 55 (6th Cir. 1966).

to 1954. Little practical integration occurred in southern systems.

In 1968 *Green v. County School Board,* 391 U.S. 430, held that the freedom of choice response to *Brown* was constitutionally insufficient. *Green* involved a rural school district in Virginia in which there were only two schools. Prior to 1954 one had been for black children and the other had been for whites. The freedom of choice plan ostensibly gave black children the right to attend the white school, but as a practical matter none did. The Supreme Court held that school officials in districts which had statutory dual systems prior to 1954 were henceforth obligated to devise programs for integration which would be practical, which would work now, and which would eliminate all remnants of segregation "root and branch."

Under the *Green* doctrine of affirmative action, state neutrality with respect to segregated schools was no longer permissible in those states which permitted or required dual school systems in 1954, and southern school districts were required to take effective desegregative measures. Many of these districts were rural and had always relied upon school buses to transport children to school.

The question of whether the *Green* mandate applied to metropolitan systems arose in *Swann,* which involved the schools of Charlotte and Mecklenburg in North Carolina. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). The Chief Justice observed that the problems encountered by lower federal courts in the years since *Brown I* suggested that the Court should now provide some guidelines for the assistance of all concerned. The Court observed that the "central issue in this case is that of student assignment."

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of

> the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. * * *
>
> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.
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> 402 U.S. at 22-23.

The Court approved the district court's use of modified attendance zones, pairing and clustering, noncontiguous pairing, and the transportation of students under a plan in which they would be picked up at schools nearest their homes and transported to the schools to which they were assigned.

The Court noted that there were limits, however hard to define, on the remedial powers of federal courts. A remedial plan should be workable, effective and realistic. It concluded:

> However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.
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> *Id.*, 31.

Broad authority, unfettered by specific limitations, was thus conferred on lower costs. The Supreme Court was content in 1971 to invoke the spirit of equity and trust to

the wisdom of lower courts as they addressed the problems of formulating equitable desegregation decrees.

Two years later, in 1973, *Keyes* reached the Supreme Court. *Keyes v. School District No. 1,* 413 U.S. 189. It is not a remedy case. It deals instead with the inference of segregative intent which may be drawn from certain evidence. It held that where school officials are shown to have followed a policy of segregating black and white children in a meaningful portion of the school system, a rebuttable presumption arises that other segregated schools in the system were also the result of their segregative intent.

The plaintiffs had proven intentional segregation of the schools in the Park Hill area of Denver. The district court had ordered those schools desegregated. The plaintiffs also pointed to segregated schools in the core of the city and asked that they too be desegregated. The Supreme Court held that the showing of segregative intent with respect to Park Hill also raised a presumption of segregative intent with respect to the schools in the core. It affirmed the district court's order desegregating the Park Hill area and remanded for further proceedings with respect to the core schools:

> If respondent board fails to rebut petitioners' prima facie case, the district court must, as in the case of Park Hill, decree all-out desegregation of the core city schools.
>
> *Id.*, 214.

Keyes is principally significant for its treatment of the presumption issue and its differentiation between *de facto* and *de jure* segregation. However, the Supreme Court's remand order, ending on the note that "all-out desegregation of the core city schools" must be decreed if the school officials could not rebut the presumption of their segregative intent with respect to such schools, suggested that system-wide desegregation of big city schools could be ordered if the plaintiffs could show that school officials

played some role in the maintenance of segregated schools in a meaningful portion of the city.

Mr. Justice Powell, concurring in the judgment, observed that lower courts might henceforth be in some doubt as to the scope of their authority to issue remedial orders in such situations. His separate opinion in *Keyes* outlines problems which he then discerned on the horizon —problems which would not be squarely addressed and decided until *Dayton*. Commenting on *Swann*, which had been decided only two years before, he observed:

> In imposing on metropolitan southern school districts an affirmative duty, entailing large scale transportation of pupils, to eliminate segregation in the schools, the Court required these districts to alleviate conditions which in large part did *not* result from historic, state-imposed *de jure* segregation. Rather, the familiar root cause of segregated schools in *all* the biracial metopolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities. This is a national, not a southern, phenomenon. And it is largely unrelated to whether a particular state had or did not have segregatory school laws.
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> 413 U.S. at 222-223.
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> * * * In decreeing remedial requirements for the Charlotte-Mecklenburg school district, *Swann* dealt with a metropolitan, urbanized area in which the basic causes for segregation were generally similar to those in all sections of the country, and also largely irrelevant to the existence of historic, state-imposed segregation at the time of the *Brown* decision. Further, the extension of the affirmative duty concept to include compulsory student transportation went well beyond the mere remedy of that portion of school segregation for which former state segregation laws were ever responsible.
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> *Id.*, 224-225.

Mr. Justice Powell thus expressed the recognition that the remedy approved in *Swann*—and the remedy which the district court was impliedly invited to order for Denver's core schools—addressed a quantum of racial concentration in the schools which had not actually been caused by school officials.

> It is true, of course, that segregated schools—wherever located—are not solely the product of the action or inaction of public school authorities. Indeed, as indicated earlier, there can be little doubt that principal causes of the pervasive school segregation found in the major urban areas of this country, whether in the North, West, or South, are the socio-economic influences which have concentrated our minority citizens in the inner cities while the more mobile white majority disperse to the suburbs.
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> *Id.*, 236.

> The controlling case is *Swann, supra,* and the question which will confront and confound the District Court and Denver School Board is what indeed does *Swann* require. *Swann* purported to enunciate no new principles, relying heavily on *Brown I* and *II* and on *Green*. Yet it affirmed a district court order which had relied heavily on 'racial ratios' and sanctioned transportation of elementary as well as secondary pupils. Lower federal courts have often read *Swann* as requiring far-reaching transportation decrees [footnote omitted] 'to achieve the greatest possible degree of actal desegregation.' 402 U.S. at 26. In the context of a large urban area, with heavy residential concentrations of white and black citizens in different—and widely separated—sections of the school district, extensive dispersal and transportation of pupils is inevitable if *Swann* is read as expansively as many courts have been reading it to date.
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> *Id.*, 237-238.

Mr. Justice Powell then cautioned:

> To the extent that *Swann* may be thought to require large scale or long distance transportation of students

> in our metropolitan school districts, I record my profound misgivings. Nothing in our Constitution commands or encourages any such court-compelled disruption of public education. It may be more accurate to view *Swann* as having laid down a broad rule of reason under which desegregation remedies must remain flexible and other values and interests be considered.
>
> *Id.*, 238.

Mr. Justice Powell was the first member of the Supreme Court to record an awareness that remedial orders requiring large-scale pupil transportation in urban centers might be attempting to correct more than just the segregation caused by school officials. As subsequent cases were decided, other members of the Court came to share the same view.

The implications of *Swann* were ultimately re-examined by the full Court, but it was to take several years before its evolving grasp of the problem would lead to *Dayton's* clear rule.

The extent to which lower courts were construing *Swann* as authority for system-wide transportation orders was made plain in the year after *Keyes*, when the Detroit case reached the Supreme Court. *Milliken v. Bradley*, 418 U.S. 717 (1974). In reversing the Sixth Circuit's approval of a multi-county remedial program for the schools of Detroit, *Milliken* marked the first effort by the Supreme Court after *Swann* to define the scope of remedial orders which lower courts might make. *Milliken* emphasized that the remedy may not go further than the constitutional violation—that its office is to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.*, 746. That important theme would recur with increasing emphasis in the decisions to come.

The next case to reach the Court was *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

Pasadena school officials had been found responsible for segregated schools in that city. The district court ordered a remedial plan having attendance patterns which would ensure that no school would be more than 50 percent black. The plan was put into effect, and the remedial order was satisfied in all its terms. Four years later the school board asked the district court to terminate its jurisdiction and dissolve the order. The district court refused on the ground that 5 of the system's 32 schools had developed black pupil concentrations exceeding 50 percent. The Ninth Circuit affirmed, finding no abuse of discretion. The Supreme Court held that both lower courts were wrong. Mr. Justice Rehnquist wrote the opinion for the six-member majority.

The majority found the District Court's order to be inconsistent with *Swann*. Its order that no school be more than 50 percent black was apparently considered by it "as an inflexible requirement . . . to be applied anew each year. . . ." 427 U.S. at 434. It apparently believed "it had authority to impose this requirement even though subsequent changes to racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible." *Ibid.*

> There was also no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools . . . were in any manner caused by segregative actions chargeable to the defendants. * * * The fact that black student enrollment at five out of 32 of the regular Pasadena schools came to exceed 50 percent during the four-year period from 1970 to 1974 apparently resulted from people randomly moving into, out of, and around the [school district] area. This quite normal pattern of human migation resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools. But as these shifts were not attrib-

> uted to any segregative actions on the part of the defendants, we think this case comes squarely within the sort of situation foreseen in *Swann*: 'It does not follow that communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year by year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.'
>
> 427 U.S. at 435-436.

In conclusion, the Court held that the district court was not empowered to require the school board to rearrange attendance zones each year to ensure that a racial mix desired by the court was maintained in perpetuity.

The teaching of *Pasadena* is that racial concentrations in the schools which do not result from discriminatory action by school officials are not matters which are subject to judicial control. Remedial orders may reach segregation caused by the unlawful action of school officials. But racial concentrations caused by the random movement of people into and out of a school district are something else, and courts do not have authority to order school officials to readjust pupil assignments to correct such developments.

During the next seven months the Court rendered two decisions which left no doubt about its view on a related subject – the indispensability of discriminatory intent in any equal protection claim under the Fourteenth Amendment. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 50 L. Ed. 2d 450 (1977). The relevance for "remedy" cases which arises out of *Washington* and *Arlington Heights* is that racial imbalances in schools are Fourteenth Amendment violations only if they have been caused by school officials

who have acted with discriminatory intent. Racial imbalances due to other causes are not remediable.

Consistent with this reasoning, and reinforcing it, was the Supreme Court's handling of the *Austin* case.[6] The Fifth Circuit had nullified a plan for the desegregation of the schools in Austin, Texas. The school board had proposed what was essentially a neighborhood school system for a city that was racially and ethnically segregated. The Fifth Circuit held broadly that the maintenance of a neighborhood school system in any city which had racial and ethnic concentrations like Austin's was sufficient evidence of segregative intent to support a finding of Fourteenth Amendment liability. The Supreme Court vacated the judgment and remanded for reconsideration in light of *Washington v. Davis*. Three of the justices then took the unusual step of expressing sharp reservations about the Fifth Circuit's view on remedy, a matter which was not before the Court for decision. Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist joined, stated that the Fifth Circuit's order involved such "a misapplication of a core principle of desegregation cases" that discussion of the remedy issue ought to be made in the remand order. His opinion foreshadowed the rationale of *Dayton*, which was to be decided in a few months. He wrote:

> . . . the task is to correct by a balancing of the individual and collective interests 'the condition that offends the Constitution.'
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> A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, 'as with any equity case, the nature of the violation determines the scope of the remedy.'
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> 50 L. Ed. 2d 603.

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[6] *Austin Independent School District v. United States*, 420 U.S. 990, 50 L. Ed. 2d 603 (1976).

He stated that the Fifth Circuit "seems to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights." *Id.*, 604.

> As is true in most of our larger cities with substantial minority populations, Austin has residential areas in which certain racial and ethnic groups predominate in the population. Residential segregation creates significant problems for school officials who seek to achieve a nonsegregated school district. In Austin those problems are perhaps accentuated by the geography of the city.
>
> * * *
>
> The Court of Appeals . . . concluded that nothing short of extensive crosstown transportation would suffice.
>
> Designed to achieve a degree of racial balance in every school in Austin, the desegregation plan endorsed by the Court of Appeals is remarkably sweeping.
>
> *Ibid.*

The remedial plan was described as involving the transportation of 32 percent to 42 percent of the entire school population, some 18,000 to 25,000 pupils.

> Whether the Austin school authorities intentionally discriminated against minorities or simply failed to fulfill affirmative obligations to eliminate segregation . . . the remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. The Court of Appeals did not find . . . that absent those constitutional violations the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was coextensive with the constitutional violations, it adopted a view of the constitutional obligations of a school board far exceeding anything required by this Court.
>
> The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control

> of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns.
>
> I do not suggest that transportation of pupils is never a permissible means of implementing desegregation. I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation. Thus, *large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past.* Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary age children. A remedy simply is not equitable if it is disproportionate to the wrong.
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> 50 L. Ed. 2d at 605 (Underscoring supplied).

To what extent the views of Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist joined, were shared by other members of the Court was then unclear. Only Justices Brennan and Marshall voted to affirm the Fifth Circuit's decision. Seven members of the Court clearly disapproved of it for various reasons.

By the time of the *Austin* decision, the Court was clearly emphasizing, at least through three of its members, that not all of the racial concentrations in the schools were due to the segregative intent of school officials, and that remedial orders had to be confined to the conditions which their violations caused.

Dayton was decided six months later. *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977). It represents the culmination of six years of experience in the Supreme Court's shaping of remedial guidelines since *Swann.* That experience might be summarized as a period of

expansionist involvement by lower federal courts in the reorganization of local public school systems, coupled with increasing concern by the Supreme Court about the scope and wisdom of their remedial efforts. The Supreme Court became explicit.

Dayton defines the specific condition which a remedy order may address: racial segregation caused by the discriminatory intent of school officials. Racial concentrations which are caused by factors *other* than such misconduct are not remediable in a school desegregation case. Like *Swann,* which said that "one vehicle can carry only a limited amount of baggage,"[7] *Dayton* recognizes that school officials are not responsible for all the concentrations of racial groups in metropolitan schools. It reiterates that the victims of segregative policies are to be restored to the positions they would have occupied if unlawful action by school officials had not occurred. Remedial orders are not to carry any farther.

Writing for a unanimous court (Mr. Justice Marshall having taken no part in the consideration of the case), Mr. Justice Rehnquist stated:

* * *

> We realize, of course, that the task of fact-finding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multi-membered public bodies are of necessity difficult, of. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 45 USLW 4073 (January 11, 1973), and the question of whether demographic changes resulting in racial concentrations occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.
>
> 433 U.S. at 414.

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[7] 402 U.S. at 22.

* * *

Viewing the findings of the District Court as to the three-part 'cumulative violation' in the strongest light for the respondents, the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy which it apparently did. * * * It is clear from the findings of the district court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact, without more, of course, does not offend the Constitution. *Spencer v. Kugler*, 404 U.S. 1027 (1972); *Swann, supra*, at 24. The Court of Appeals seemed to have viewed the present structure of the Dayton school system as a sort of 'fruit of the poisonous tree,' since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.

Id., 417-418.

* * *

In effect, the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the district court taking those findings of violations in the light most favorable to respondents.

Id., 418.

* * *

The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary.' It 'may be exercised only on the basis of a constitutional violation.' [Citations omitted]. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.' [Citations omitted].

Id., 419-420.

* * *

> The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington v. Davis, supra.*
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> * * *
>
> If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes, supra,* at 213.
>
> We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as 'cumulative violation' than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.
>
> *Id.*, 420.

If there was any question in anyone's mind as to whether the *Dayton* rule would apply to other factual situations, all doubt should have been extinguished two days later when the Supreme Court remanded the Omaha case to the Eighth Circuit for reconsideration in light of *Village of Arlington Heights* and *Dayton. School District of Omaha v. United States,* 433 U.S. 667 (1977). And on

the same day the Court made it plain that *Dayton* applies to liability findings as well as to remedial orders. After the Seventh Circuit had affirmed liability findings in Milwaukee on an interlocutory appeal, the Supreme Court vacated the judgment of the Court of Appeals and remanded for reconsideration so that the inquiry required by *Dayton* could be undertaken. *Brennan v. Armstrong*, 433 U.S. 672 (1977).

It has now been established as firm constitutional doctrine that no remedy may be ordered concerning pupil reassignments without prior findings by the district court comparing the present racial distribution of pupils with what it would have been had school officials not been guilty of unlawful discrimination. There is no constitutional warrant for ordering a quantum of desegregation which would exceed that probable norm.

The District Court failed to make the findings which *Dayton* required. Its remedial order does not rest on a constitutional foundation. The Court of Appeals' judgment of affirmance is equally contrary to law.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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