IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Nos. 78-610, 78-627

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

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

DAYTON BOARD OF EDUCATION, et al., *Petitioners*

v.

MARK BRINKMAN, et al. *Respondents.*

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the evidence supports the lower courts' findings that the Columbus Board of Education and

the Dayton Board of Education adopted and maintained segregative policies with a systemwide impact.

2. Whether the systemwide impact of the violations warranted a systemwide remedy in each case.

INTEREST OF THE UNITED STATES

The United States has substantial enforcement responsibility with respect to school desegregation under Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d and 2000h-2, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* The Court's resolution of the issues presented in this case would affect that enforcement responsibility. The United States has participated either as a party or as amicus curiae in most of this Court's school desegregation cases, including *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955); *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *School Board of City of Richmond* v. *State Board of Education*, 412 U.S. 92 (1973); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976); *Milliken* v. *Bradley*, 433 U.S. 267 (1977); and *Day-*

ton Board of Education v. *Brinkman*, 433 U.S. 406 (1977).

STATEMENT

These school desegregation cases involve the cities of Columbus and Dayton, Ohio. The city of Columbus has an area of 173 square miles and a population of more than 500,000 (Columbus Pet. App. 12). The boundaries of the school district are generally coterminous with the boundaries of the city. In 1976, the year the Columbus case was tried, approximately 96,000 students attended the Columbus public schools (*ibid.*). More than 32% of these students were black (Columbus Pet. App. 19).

The city of Dayton has a population of 245,000 (Dayton A. 34). The Dayton school district is not coterminous with the city (*ibid.*). Some parts of the city are included within other school districts, while the school district includes some parts of other townships. The population within the Dayton school district boundaries is 268,000 (*ibid.*). In 1976, approximately 45,000 students were enrolled in the Dayton public schools, slightly less than 50% of whom were black (Dayton A. 34-35).

At the times of trial, both Columbus and Dayton had a high degree of racial separation in their schools. In Columbus, about 70% of all students attended schools that were more than 80% white or 80% black (Columbus Pet. App. 18). Half of the 172 schools operated by the Columbus Board of Education were more than 90% black or 90% white

(Columbus Pet. App. 163). In Dayton 51 of the 69 public schools were virtually all-white or all-black (Dayton Pet. App. 149a-150a). In each case, plaintiffs sought to prove that these conditions of racial separation were brought about by deliberate school board actions. In each case the court of appeals concluded that plaintiffs had proved systemwide constitutional violations warranting systemwide remedies. The Columbus and Dayton school boards now challenge these conclusions. Because we believe that their petitions raise basically the same legal issues, we address both cases in a single brief.

I. COLUMBUS

A. The district court's findings of fact

This suit was filed on June 21, 1973, by a group of students attending the Columbus Public Schools, and their parents, against the Columbus Board of Education ("the Columbus Board"), its elected members, and the State Board of Education (Columbus Pet. App. 4-5).[1] The second amended complaint, styled a class action, was filed on October 22, 1974; it alleged that the Board had engaged in a systemwide policy of segregation warranting a systemwide remedy (Columbus Pet. App. 5-6). A group of inter-

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[1] The Superintendent of the Columbus Public Schools, the State Superintendent of Public Instruction, the Governor, and the Attorney General were also named as defendants (Columbus Pet. App. 4). The district court found no evidence of any segregative conduct by the Governor or the Attorney General (Columbus Pet. App. 63).

vening plaintiffs made essentially the same allegations and also sought a " 'system-wide' plan of desegregation" (Columbus Pet. App. 6).

After a trial lasting 36 days, the district court entered detailed findings of fact, concluding that the Columbus Board had a long-standing systemwide policy of segregating its students on the basis of race.[2]

The court focused first on the period before 1954 "to discover whether past acts or omissions are in any degree responsible for the admitted current racial imbalance in the Columbus schools" (Columbus Pet. App. 7). It found that the Columbus Board had formally abolished separate schools for blacks in 1881, and for a number of years assigned children to schools on the basis of geographic proximity (Columbus Pet. App. 8). In 1909, however, the Board built Champion school in a predominantly black residential district and staffed it with all black teachers (Columbus Pet. App. 8). During the 1920's and 1930's, all black teachers employed by the Board were assigned to Champion (Columbus Pet. App. 8-9). In succeeding years, the Columbus Board established several other black schools to accommodate the growing black population. For example, in 1938 the Board converted Pilgrim School, which was then a racially mixed junior high school, into an elementary school for black children (Columbus Pet. App. 9). This

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[2] The district court also found the State Board of Education jointly liable (Columbus Pet. App. 64-67). The court of appeals remanded the case for more detailed findings by the district court on this point (Columbus Pet. App. 200-207).

change was accomplished by gerrymandering Pilgrim's attendance zones along racial lines and by replacing the school's all-white faculty with an all-black faculty (Columbus Pet. App. 9). Similarly, the teaching staffs at Felton, Garfield, and Mount Vernon, which became predominantly black schools, were converted from 100% white to 100% black (Columbus Pet. App. 9-10). The court found that by 1954 the Board had deliberately isolated most of its black students in five black schools on the near-east side of Columbus (Columbus Pet. App. 10-11). In conjunction with overt discrimination in student assignment, the Board assigned black teachers and administrators to its black schools (Columbus Pet. App. 9-10). Accordingly, the district court found that at the time of this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Columbus Board of Education was operating a dual system (Columbus Pet. App. 11).

Turning to the period after 1954, the court found that the Board never attempted to dismantle this dual system of education (Columbus Pet. App. 61). To the contrary, the Columbus Board instead perpetuated and intensified racial separation by the following practices.

1. *Faculty segregation*

The court found that until 1974 the Board "generally maintained" its policy of assigning black teachers to those schools with substantial black student populations (Columbus Pet. App. 15). As the court

noted, this practice was discontinued only after a complaint was filed by the Ohio State Civil Rights Commission, and a conciliation agreement was entered in July 1974 (Columbus Pet. App. 15, 59).

2. *School construction*

The court found (Columbus Pet. App. 21) that of the 103 schools constructed by the Board between 1950 and 1975, 87 opened with racially identifiable student bodies, and 71 remained racially identifiable at the time of trial.[3] Recognizing the Board's contention that it had followed a neutral neighborhood school policy, the court noted (Columbus Pet. App. 21) that the Board could have foreseen the probable racial composition of the new schools, and that in some instances the Board was warned that a school constructed on a proposed site would be racially identifiable. For example, before the Board constructed Gladstone in 1965, it was warned that the school

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[3] The court adopted the criteria of plaintiffs' expert, Dr. Gordon Foster, to determine whether a school was "racially identifiable" (Columbus Pet. App. 78-79). Racial identifiability describes the relationship between the racial composition of a particular school and the racial composition of the system as a whole. A measure of statistical variance is applied to the systemwide percentage of black pupils. Schools that have a percentage of black pupils outside this range are racially identifiable. For example, if the percentage of black pupils in the school system is 32%, and the statistical variance is + or − 15%, schools outside the range of 17% to 47% black would be racially identifiable. Dr. Foster's computations for the years 1950-1957, 1964, and 1975 appear in the appendix to the district court's opinion (Columbus Pet. App. 78-79).

would open and remain black if built on its proposed site (Columbus Pet. App. 21). The court found that the Board had ignored this warning and built Gladstone on a site that served to contain the black student population in the area south of Hudson Street; in contrast, if the Board had built Gladstone further north and readjusted its zone lines as some suggested, it would have promoted integration at three schools (Columbus Pet. App. 22).

The court did not infer segregative intent simply from the fact that the Board constructed new schools in residentially segregated areas, and it noted that in residentially segregated areas, the neighborhood school policy limits site selection (Columbus Pet. App. 25). The court found, however, that in those areas of the city with substantial black and white populations, there had been opportunities, not taken by the Board, to select sites for new schools that would have had an integrative effect (Columbus Pet. App. 25).

3. *Optional attendance zones*

The court found (Columbus Pet. App. 26-33) that the Board had established a number of optional zones to allow white students to avoid attending their predominantly black neighborhood schools. For example, for sixteen years the Board maintained the "Near-Bexley Option," which permitted students in a small white enclave on Columbus' predominantly black near-east side to attend predominantly white schools, despite the fact that they had to "traverse the City of Bexley to arrive at the option schools" (Columbus

Pet. App. 26-28). The court found that the Near-Bexley Option was a "classic example of a segregative device * * *" (Columbus Pet. App. 29). Other optional zones with obvious racial consequences and without apparent administrative justification were established between (or among) Highland and West Broad (Columbus Pet. App. 30), Highland and West Mound (Columbus Pet. App. 31-32), Franklin and Roosevelt (Columbus A. 458-464), Central and North (Columbus A. 464-466), East and Linden-McKinley (Columbus A. 466-469), the "downtown" schools (Columbus A. 478-485), Main and Livingston (Columbus A. 485-489), Linmoor and Everett (Columbus A. 492-494), Fair and Pilgrim, and Pilgrim, Eastwood and Eastgate (Columbus A. 500-503).

4. *Boundary lines*

The court found that the Board also drew boundary lines along racial lines. For example, in the Hilltop area on the west side of Columbus, there are three predominantly white schools (Burroughs, West Broad, and West Mound) and one predominantly black school (Highland) (Columbus Pet. App. 29, 32). The Board not only removed white residential areas from the predominantly black Highland zone (Columbus Pet. App. 29-32) but also maintained boundaries that served to contain the black student population in Highland when alternative boundary determinations would have fostered integration at all four schools (Columbus Pet. App. 32-33).

Even after the Board formally announced that improved racial balance was a relevant factor in its site selection and boundary determinations, this pattern continued. For instance, the Superintendent designed two alternative plans to relieve overcrowding in the integrated Mifflin School District, one of which would have maintained the original attendance area by building one new school and pairing it with the existing school. The Board rejected this integrative alternative, and instead chose to divide the area into two attendance zones, one serving the predominantly black, the other the predominantly white part of the district (Columbus Pet. App. 37). The court found the Board's attempts to show a nondiscriminatory reason for rejecting the integrative option unconvincing. It found there was no evidence supporting the Board's claim that the first plan would have required substantial transportation of students, and concluded that the Board had approved the use (which it rejected here) of primary and intermediate schools when it served other interests (Columbus Pet. App. 38).[4]

5. *Noncontiguous attendance zones*

The court also found that the Board sometimes adopted noncontiguous attendance zones when application of neutral neighborhood school principles would have resulted in greater integration. For instance,

[4] Much of the evidence concerning boundary adjustments relates to the opening of new schools (see Columbus A. 488-527).

from 1966 to 1968 the Board bused white students from a white residential area past predominantly black Alum Crest Elementary School to predominantly white Moler Elementary (Columbus Pet. App. 34). Although the principal of Alum Crest asked a Columbus School administrator for an explanation, he never received one (Columbus Pet. App. 34). The court could "discern no other explanation than a racial one" for this situation (Columbus Pet. App. 34). The Board also assigned pupils on a noncontiguous basis to Fornof School (Columbus Pet. App. 34-35) with similar segregative effects.

6. *Failure to act*

The court found that the Board was at all times aware of the segregative consequences of its actions and fully apprised of alternatives. The court pointed out that "[v]arious segments of the community, notably black parents and civic organizations, have repeatedly and articulately vocalized concern, anger or dismay concerning both overtly segregative actions and lost integrative opportunities" (Columbus Pet. App. 50). Local civil rights organizations, a Board-sponsored advisory committee and the State Board of Education, among others, all "called attention to the problem and made certain curative recommendations" (Columbus Pet. App. 51). Yet the Board consistently failed to act on these recommendations (Columbus Pet. App. 53).

Having found widespread racial separation in the Columbus school system, the court held (Columbus

Pet. App. 60-61) that under *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), the burden of proof shifted to the defendants to show that "the racial character of the school system is the result of racially neutral social dynamics or the result of acts of others for which defendants owe no responsibility." The court found (Columbus Pet. App. 60) that the result of the Board's actions segregating black students in schools on the near-east side of the city had "survived unattenuated by any acts of defendants," and that recent nondiscriminatory efforts by the Board in the areas of faculty assignments "have lessened the sting" of the Board's longstanding discriminatory policy, "but have not served to substantially remove the evil it helped create." The court found (Columbus Pet. App. 61) that the defendants had failed to show "that the present admitted racial imbalance in the Columbus Public Schools would have occurred even in the absence of their segregative acts and omissions * * *."

Although the Board had argued that because of demographic trends some portion of the current segregation would have existed even in the absence of discrimination, the court found that the Board's actions had had a significant impact on housing patterns, and that "[t]he interaction of housing and the schools operate[d] to promote segregation in each" (Columbus Pet. App. 58). The court noted school authorities had no duty to "cure[ ] the evils of residential segregation," but it stated that they should have recognized the interaction between housing and

schools, and "certainly should not have aggravated racial imbalance in the schools by their official actions" (*ibid.*).

Based on the totality of this evidence the court concluded that the Board had not maintained a racially neutral neighborhood school policy. Instead, the court found (Columbus Pet. App. 61) that the Board had been operating a dual system at the time of the *Brown* decision in 1954, and that it "never actively set out to dismantle this dual system." "Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, and the other such actions and decisions of the Columbus Board of Education in recent and remote history," the court found it "fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion" (*ibid.*).

The effects of the Board's actions were dramatic. The court found that "those elementary, junior, and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions" of the school board (Columbus Pet. App. 73). And it emphasized (*ibid.*) that its findings concerned "the Columbus school district as a whole" since the Board's actions tending to make "black schools blacker necessarily have the reciprocal effect of making white schools whiter."

Based upon these findings, the court directed the Board to provide each black child in Columbus with an opportunity for an integrated education (Columbus Pet. App. 75). The court noted that such a plan could maintain predominantly white schools if the Board could show that the racial imbalance in those schools was not the result of its segregative policies (Columbus Pet. App. 75).

B. The district court's adoption of a remedial order

The Board first submitted a plan that desegregated all formerly black schools and continued 22 predominantly white schools (Columbus Pet. App. 102). Following this Court's decision in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (*Dayton I*), the Board submitted an amended plan which had as its purpose the desegregation of the 11 identifiably black schools that had been referred to in the district court's opinion (Columbus Pet. App. 99-102).

The district court rejected the Board's proposed desegregation plans after reexamining its findings in light of *Dayton I*. The court concluded that "[t]he Dayton decision stands for the proposition that an equitable remedy should not go beyond the scope of the wrong which it purports to redress," with the remedy in school desegregation cases designed to redress the " 'incremental segregative effect' " of the actions of school officials (Columbus Pet. App. 92-93, quoting *Dayton I*, *supra*, 433 U.S. at 420). Here, the district court found (Columbus Pet. App. 94), "there should be no confusion concerning the

scope of defendants' liability" because the court had previously found that " 'liability in this case concerns the Columbus school district as a whole.' " In contrast to the *Dayton* case, the court pointed out that its determination of liability did not rest on any specific number of violations, but rather on the Board's actions since 1954 that "intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers" (Columbus Pet. App. 94). The court found that although school officials had ample opportunity to show that the admitted racial imbalance in the schools was caused by factors unrelated to the Board's actions, "[t]his they did not do" (Columbus Pet. App. 95).

The court found the Board's original plan inadequate (Columbus Pet. App. 97-107). The Board had adduced no evidence that desegregation of the 22 white schools would require transportation detrimental to health or to the educational process, and the Board made no effort to meet its burden under *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971), to show that the racial composition of these schools was not the result of past or present discriminatory action on its part (Columbus Pet. App. 105). Moreover, an alternate staff plan that required only a marginal increase in transportation distances promised more extensive desegregation without leaving large areas for white flight (Columbus Pet. App. 105). The court stated that the Board could use either the latter plan, which would bring each school within 15% of the district-

wide norm of 32% black students, or a plan submitted by the State Board of Education, as a starting point in drafting an acceptable plan (Columbus Pet. App. 107, 111).

The court also rejected the Board's amended plan, which would have desegregated only the schools specifically referred to in the court's opinion on liability, leaving 41 identifiably black schools and 73 identifiably white schools unaffected (Columbus Pet. App. 99-102). The court found (Columbus Pet. App. 102) that the Board had made no effort to show that the imbalance in these schools was not the result of its past and present discriminatory actions.

The Board subsequently submitted a plan for student reassignment that the court found constitutionally acceptable (Columbus Pet. App. 126-127).

C. The court of appeals' decision

The court of appeals affirmed (Columbus Pet. App. 140-207). The appellate court held the record "fully supports" the district court's findings that "[a]s of 1954 the Columbus School Board had 'carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system' " (Columbus Pet. App. 159-160, quoting *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 201-202). Under *Keyes* the court of appeals held (Columbus Pet. App. 165-166) that the burden then shifted to the Board to show that the high degree of racial separation present in the schools at the time of trial was not the result of the Board's segregative actions.

After noting "the substantial evidence of segregation in pupil, teacher and administrator assign-

ments," the court of appeals considered the evidence pertaining to the Board's selection of school sites and its construction program (Columbus Pet. App. 166). It found (Columbus Pet. App. 172) that the record amply supports the trial court's findings. The appellate court added (Columbus Pet. App. 173) that the racially identifiable character of the vast majority of new schools created "a very strong inference of intentional segregation," but that "the record actually requires no reliance upon inference" because there was evidence that the Board repeatedly chose sites that it knew would have a segregative effect even when there were alternative sites that would have had an integrative effect. Finally, the appellate court held that the record supported the district court's findings that the Board had intentionally employed gerrymandering, optional attendance zones, and discontinuous attendance areas as "devices which allowed white students to avoid attendance at a primarily black school, or which required black students to attend a primarily black school in place of a closer white school" (Columbus Pet. App. 174-175). The court stated (Columbus Pet. App. 175) that although the specific instances of gerrymandering of attendance boundaries and use of optional attendance zones cited by the trial court were "isolated in the sense that they do not form any systemwide pattern," they were significant because they demonstrated that the Board's " 'neighborhood school concept' was not applied when application of the neighborhood concept would tend to promote integration rather than segregation."

Turning to the question of "the incremental segregative effect" of the Board's actions, the court of appeals affirmed the district court's finding that the Board's discriminatory actions had "systemwide application and impact" that justified the district court's order of a systemwide remedy (Columbus Pet. App. 198-199).

D. The stay applications to this Court

The Board then applied to this Court for a stay of the district court's order. Mr. Justice Stewart denied the stay, but on further application, on August 11, 1978, Mr. Justice Rehnquist granted a stay of the district court's order pending disposition of the Board's petition for certiorari, and, if the petition were granted, until further order of the Court (Columbus Pet. App. 217). In a brief opinion accompanying the order, Mr. Justice Rehnquist stated (Columbus Pet. App. 213) that in this case and the Dayton case the court of appeals appeared to have given this Court's opinion in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), "an unduly grudging application." He concluded (Columbus Pet. App. 213-214) that the court of appeals "is apparently of the opinion that presumptions, in combination with such isolated violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations."

A motion to vacate the stay was then presented to Mr. Justice Stewart and denied by him. A motion to convene the Court for a special term to vacate the

stay was denied on August 25, 1978 (Columbus Pet. App. 218).

II. DAYTON

A. The proceedings to and including this Court's decision in *Dayton I*

Much of the procedural history of this case is recounted in this Court's decision in *Dayton I, supra.* At the initial hearing, the district court found a three-part cumulative violation consisting of (1) substantial racial imbalance in the schools, (2) the use of optional attendance zones and (3) the Board's rescission of a resolution admitting past discrimination and calling for various remedial measures (Dayton Pet. App. 12a). Based on these findings, the court ordered limited relief (Dayton Pet. App. 26a-31a).

Cross-appeals were taken. Plaintiffs contended that the Board's discrimination went well beyond the three-part violation found by the district court and warranted systemwide relief. Although the court of appeals questioned many of the district court's findings, it found it unnecessary to rule on the question whether the court had erred in failing to find additional discrimination (Dayton Pet. App. 56a-67a). Instead, it held that the desegregation plan ordered by the district court was inadequate to remedy the cumulative violation it had identified (Dayton Pet. App. 48a).

On remand the district court subsequently adopted a systemwide desegregation plan (Dayton Pet. App.

99a-117a), and the court of appeals affirmed (Dayton Pet. App. 118a-123a).

This Court reversed. Viewing the district court's findings in the light most favorable to plaintiffs, this Court concluded that the court of appeals "had no warrant in our cases for imposing the systemwide remedy which it apparently did." 433 U.S. at 417. "[I]nstead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope." *Ibid.* The Court remanded the case to the district court to make more specific findings, and, if necessary, to take additional evidence. 433 U.S. at 419. The Court concluded (433 U.S. at 420):

> 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. *Washington* v. *Davis, supra.* All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. 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.

B. The district court's decision on remand

On remand, following a supplemental hearing, the district court issued an opinion denying all relief and dismissing the complaint (Dayton Pet. App. 142a-188a). The court found that there was little dispute concerning the historical discrimination against black students until the early 1950's in Dayton (Dayton Pet. App. 148a). Although it found that the evidence demonstrated "an inexcusable history of mistreatment" of black children from the early 1900's through approximately 1950, the court concluded that plaintiffs had failed to meet their burden of proof because they had not demonstrated the incremental segregative effect of these practices on the racial distribution of the current school population (Dayton Pet. App. 149a).

1. *Faculty segregation*

The court found that until approximately 1950 the Dayton Board of Education followed a policy of racially discriminatory faculty assignment under which black teachers were permitted to teach black students only (Dayton Pet. App. 151a). The Board replaced this policy in 1951 with a policy of "dynamic gradualism" that permitted the introduction of black teachers into schools having a mixed or white population when there was evidence that such communities were ready to accept black teachers (Dayton Pet.

App. 151a-152a, 195a n.11). As a result of this policy, each school in the system had at least one black teacher by 1969 (Dayton Pet. App. 152a). In 1971 the Board reached an agreement with the Department of Health, Education, and Welfare that provided for faculty desegregation similar to the plan approved in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). Despite this long history of faculty segregation, the court found no current segregative effects, concluding that if the schools to which black faculty members had been assigned were racially identifiable, it was because of the composition of their student bodies, not the composition of the faculty (Dayton Pet. App. 153a-154a).[5]

2. *Attendance zones and boundary changes*

Although it had previously found the use of certain optional attendance zones "embraced desires motivated by racial considerations" and had "significant potential effects in terms of increased racial separation" (Dayton Pet. App. 8a), the district court now found no segregative intent or effect in connection with the option zones affecting neighborhood schools (Dayton Pet. App. 162a-169a). With regard to one of the two city-wide high schools, Dunbar, which opened in 1933 with an all-black staff, a black principal, and an all-black student body, and was maintained as an all-black school until it closed in

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[5] Indeed, the district court apparently did not consider the policy of dynamic gradualism to be racially discriminatory (Dayton Pet. App. 152a-153a).

1962, the court held that "the relationship between the Board's past segregative acts and the all-black status of Dunbar High School in 1962 has 'become so attenuated' as to be incapable of supporting a finding of de jure segregation warranting judicial intervention" (Dayton Pet. App. 171a, quoting *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 211). The court also found (Dayton Pet. App. 159a, 171a) the subsequent conversion of Dunbar into all-black McFarlane Elementary and the opening of the new Dunbar High as an all-black school were non-discriminatory because they were consistent with the Board's policy of assigning children to the nearest school.

3. *Site selection*

Between 1950 and 1972 the Board opened 24 new schools, 22 of which opened with more than 90% enrollment of students of one race (Dayton Pet. App. 173a). The court described the Board's process of site selection as "a most imprecise science" that "approached the level of haphazard in some instances" (Dayton Pet. App. 173a). It concluded (Dayton Pet. App. 174a-176a) that the defendants' evidence that racial considerations played no part in site selections was virtually undisputed for most schools, and that in the case of Roth, Gardendale, Highview, and Miami Schools, that the preponderance of evidence showed no segregative intent.[6]

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[6] In 1971 the Board reorganized its school structure and created five middle schools (Dayton Pet. App. 157a). The court found that the reorganization had both an integrative and a segregative effect and that there was no evidence of a segregative purpose (Dayton Pet. App. 158a).

C. The court of appeals' second decision

The court of appeals reversed, holding many of the district court's findings clearly erroneous (Dayton Pet. App. 189a-217a).

1. *The creation of a dual system prior to* Brown I

The court of appeals first held that the district court had erred in concluding (Dayton Pet. App. 75a) that the Dayton Board of Education was not operating a dual school system at the time of the decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (Dayton Pet. App. 194a-205a). The court of appeals found that in the 1951-1952 school year "the Dayton school board pursued an overt policy of faculty segregation and, through a variety of measures, endeavored to segregate pupils on a racial basis" (Dayton Pet. App. 195a).

The court noted that the underlying facts were essentially undisputed (Dayton Pet. App. 196a). In the 1951-1952 school year, 77.6% of all the students in the Dayton system attended schools in which one race accounted for 90% or more of the students, and 54.3% of the black students attended four schools that were 100% black (Dayton Pet. App. 197a). The faculty at each of the four 100% black schools was 100% black (Dayton Pet. App. 196a). With only one exception, the faculty at all other schools in the system was 100% white (*ibid.*). Until 1951, the Board's explicit policy was to assign no black teacher to a white or mixed classroom (Dayton Pet. App. 195a). In 1951 the policy was changed to an

equally unacceptable one of "introduc[ing] negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers" (Dayton Pet. App. 195a n.11).

The court found that the four all-black schools, which in 1952 served more than half of the black students in the Dayton system, had been earmarked as black schools by official purposeful discriminatory action.

Garfield was the site of intra-school racial segregation that began in 1912 (Dayton Pet. App. 198a). Even after the Dayton Board's practice was specifically held to be unlawful in a decision by the Ohio Supreme Court in 1926, racial segregation at Garfield persisted (*ibid.*). During the 1930's, the Board permitted white students assigned to Garfield to transfer to predominantly white schools, so that by 1936 Garfield had become all black (Dayton Pet. App. 198a-199a). The Board then assigned an all-black faculty to the school, and thereafter Garfield was maintained as an all-black school (Dayton Pet. App. 199a).

Dunbar was intentionally established as a school for blacks only, and blacks from throughout the district were automatically assigned or induced to attend Dunbar, although in many cases they had to cross attendance boundaries to do so (Dayton Pet. App. 199a). The Board's intentional operation of Dunbar as an all-black school until it closed in 1962 had the effect of keeping other high schools throughout the district predominantliy white during those years (Dayton Pet. App. 200a).

During the 1940's, the Board permitted white students to transfer to predominantly white schools (Dayton Pet. App. 201a). In 1945 Wogamon closed with an all-white staff and reopened the following school year with an all-black faculty and black principal (*ibid.*). Wogamon subsequently became and remained all black (*ibid.*).

Similarly, the Board permitted whites to transfer out of Willard so that by 1935 it was overwhelmingly black (*ibid.*). The Board then assigned an all-black faculty and the remaining whites left (*ibid.*).

There was also evidence of other officially sanctioned racial separation. Separate swimming pools and locker rooms were maintained for black and white students at Roosevelt High School until approximately 1950 (Dayton Pet. App. 201a). Moreover, in the late 1940's and early 1950's, the Board operated one-race classrooms in housing projects that were strictly segregated according to race (*ibid.*).

In light of these fundamentally undisputed facts, the court of appeals found that at least from the early 1900's to the early 1950's Dayton operated two school systems, one primarily for white students, and the other primarily for blacks (Dayton Pet. App. 204a-205a). It held that there was "ample evidence to support the finding that at the time of *Brown I* defendants were carrying out 'a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities' " (Dayton Pet. App. 202a (footnote omitted), quoting *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 201). It

held (Dayton Pet. App. 202a-203a; footnote omitted) that "[t]he district court failed to attribute the proper legal significance to the deliberate policy of faculty segregation which, at the time of *Brown I*, made it possible to identify a 'black school' in the Dayton system without reference to the racial composition of pupils," and to the fact that Garfield, Willard, Wogamon and Dunbar were segregated due to defendants' actions. These facts, the court found, "were sufficient to constitute a prima facie violation of the fourteenth amendment under the rule of *Swann* [v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971),] and to shift the burden of proof to defendants."

The court concluded that the district court also erred in failing to recognize that discriminatory purpose and intent may be inferred from circumstantial evidence and may be established by the use of reasonable presumptions (Dayton Pet. App. 203a). Quoting *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975), the court observed (Dayton Pet. App. 203a) that " '[a] presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation.' " The court found (Dayton Pet. App. 204a) that the evidence in the instant case "clearly establishes that the natural, probable and foreseeable result of defendants' actions was the creation and perpetuation of a dual school

system." The court also held that the district court had ignored the teaching of *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 208, that once there is "a finding of intentionally segregative school board actions in a meaningful portion of a school system" the burden shifts to the defendants to show that other racially imbalanced schools are not the result of intentional segregation.

Employing these standards, the court of appeals held (Dayton Pet. App. 204a-205a) that the defendants had not shown that the character of the 1954 school district was not the result of their racially segregative actions. It also held (*id.* at 205a) that the effect of "defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system."

2. ***The Board's conduct subsequent to* Brown I**

The court of appeals concluded (Dayton Pet. App. 205a) that the district court's failure to recognize that the defendants were operating a dual system at the time of the *Brown* decision had resulted in that court's "failure to evaluate properly the Board's post-*Brown I* actions, which must be judged by their efficacy in eliminating the continuing effects of past discrimination." Despite the fact that the defendants had been under a duty to dismantle this dual system since 1954, the district court had specifically found (Dayton Pet. App. 150a, 206a) that "with one exception * * * no attempt was made to alter the racial characteristics of any of the schools"; moreover, the only attempt that was made was a failure. The dis-

trict court, however, "neither charged defendants with the affirmative duty to eliminate the effects of their discrimination nor did it place upon the Board the burden of proving that it had done so" (Dayton Pet. App. 206a). The court found (*ibid.*) that the record not only "demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination," but also that the defendants "have intentionally maintained a segregated school system down to the time the complaint was filed in the present case." The court also found (*ibid.*) that there was also evidence of actions by the Board subsequent to 1954 that "actually have exacerbated the racial separation existing at the time of *Brown I*."

a. *Faculty assignments*

The court of appeals found that the Board continued to assign faculty on the basis of race until at least the 1970-1971 school year, and held that the district court's finding to the contrary was clearly erroneous (Dayton Pet. App. 206a). Moreover, the Board's systematic discrimination in faculty assignments made it reasonable to presume that other practices of the Board were likewise undertaken with segregative intent (Dayton Pet. App. 207a). For example, when old all-black Dunbar was closed in 1962, it reopened that fall as the all-black McFarlane Elementary School, and a new (and overwhelmingly black) Dunbar High School was opened at the same time (*ibid.*). The all-black Garfield and Willard schools were also closed at this time and most of

their students were assigned to McFarlane or to other identifiably black schools (Dayton Pet. App. 207a). Both McFarlane and the new Dunbar were assigned virtually all-black faculties (*ibid.*).

The court held (*ibid.*) that the Board had failed to rebut "the reasonable presumption that the simultaneous assignment of both a predominantly black faculty and student body at these schools was the product of segregative intent and an effort to perpetuate the dual school system extant at the time of *Brown I.*"

The court also found (Dayton Pet. App. 209a) that "[n]owhere in the record have defendants demonstrated that the present systemwide racial imbalance would have occurred even in the absence of their segregative acts."

3. *Optional attendance zones*

The court found (Dayton Pet. App. 209a) that the Board's use of optional zones for racially discriminatory purposes bolstered the conclusion that racial imbalance within the Dayton school system was "not merely adventitious." The appellate court found that the district court's repudiation of its earlier findings of segregative intent and effect were clearly erroneous, and was the result of its failure to apply the proper standards for determining segregative intent and to shift the burden of proof to defendants once plaintiffs made a prima facie case (Dayton Pet. App. 210a).

4. *School construction*

The court of appeals held the district court's finding that the Board's site selections were not segregative in purpose and effect to be clearly erroneous, concluding that the Board's pattern of school construction "unmistakably increased or maintained racial isolation" (Dayton Pet. App. 211a). The coordinate assignment of faculty on a racial basis reinforced the natural inference that these decisions were racially motivated (*ibid.*). The court found no evidence that the Board's construction practices were motivated by racially neutral policies (*ibid.*).

5. *Reorganization of grade structure*

The court of appeals held (Dayton Pet. App. 213a) that the district court had erred in failing to recognize the Board's conversion in 1971 to a system of middle schools as a component of the Board's dual system. That conversion was characterized by the Ohio Department of Education in a 1971 report as offensive to the Constitution and degrading to school children (Dayton Pet. App. 212a). And unrebutted expert testimony concluded that its effect was to maintain or increase segregation (Dayton Pet. App. 213a).

Upon consideration of the entire record the court concluded that (*ibid.*):

> rather than eradicate the systemwide effects of [their] dual system extant at the time of *Brown I* defendants' racially motivated policies with re-

spect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization perpetuated or increased public school segregation in Dayton.

Focusing on the effects of these violations, the court held that the district court had erred in examining each alleged constitutional violation as if it were an isolated occurrence and in placing the burden on the plaintiff to show the precise incremental segregative effect of each such occurrence (Dayton Pet. App. 215a). Because plaintiffs had shown "a systemwide pattern of intentionally segregative actions" it was reasonable to presume that these discriminatory practices had contributed to segregation throughout the school system (Dayton Pet. App. 216a). The Board had not rebutted the presumption that the current racial composition of the schools had been affected by the systemwide impact of its segregative acts, and accordingly the court reinstated the systemwide remedy it had approved on the prior appeal (Dayton Pet. App. 216a-217a).[7]

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[7] This plan was drafted in accordance with an earlier order of the district court. The remedial order permitted the Board to choose among various plans and techniques, subject only to the requirement that each school in the system have no less than 33% nor more than 63% black students (Dayton Pet. App. 102a-103a). The court provided that "where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis" (Dayton Pet. App. 104a), and it further provided that "[v]ariations from the [percentage range] may be permitted in exceptional

D. The Board's stay applications

The court of appeals denied the Board's application for a stay of its order on August 21, 1978 (Dayton A. VIII). On August 28, 1978, Mr. Justice Stewart also denied a stay, and on further application Mr. Justice Rehnquist denied a stay on August 30, 1978 (*ibid.*). The plan has therefore remained in effect.

SUMMARY OF ARGUMENT

I

Both the Dayton and Columbus school systems exhibit extreme conditions of racial separation. The plaintiffs had the burden of showing that these conditions resulted from the Boards' intentional policy of segregation. In both cases the record fully supports the court of appeals' conclusion that plaintiffs proved the existence of systemwide policies of intentional racial segregation.

A. The court of appeals properly began its analysis of the causes of the current conditions in the Dayton and Columbus schools with a review of the virtually undisputed evidence that in the early 1900's the Boards created separate school systems for white and black students, which they maintained and oper-

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circumstances without destroying the desegregation * * *" (Dayton Pet. App. 106a). The court granted an exception for high school juniors and seniors (Dayton Pet. App. 103a). The Dayton school system is sufficiently compact that excessive travel times are not involved. The court-appointed Master concluded that the longest travel time should not much exceed twenty minutes (Dayton A. 39).

ated until at least the 1950's. In both cases, the Board isolated most black students in a small enclave of schools, thereby ensuring that the remainder of the schools would be exclusively, or predominantly, white. Moreover, black teachers were assigned only to schools with black students. Since this evidence established a systematic program of state-enforced segregation affecting a substantial portion of the Dayton and Columbus school districts, the court of appeals correctly concluded that petitioners were operating dual systems for white and black students at the time of the decision in *Brown* v. *Board of Education*, 349 U.S. 294 (1955).

In urging that their conduct at the time of the *Brown* decision has little relevance to current conditions, petitioners ignore the crucial point that even racially neutral policies may effectively maintain and perpetuate an entrenched dual system. In the face of the evident potential for perpetuation of their deliberately established dual systems, petitioners' failure to take meaningful steps to convert these dual systems to unitary systems violated their constitutional duty to eliminate their unlawful dual systems "root and branch." Although the impact of past segregative acts may eventually become too attenuated to warrant remedial action, petitioners did not establish that the current racial separation in the schools was not the result of their past segregative acts.

B. But the court of appeals did not rest its findings of systemwide discrimination solely on proof

of unremedied historical practices of racial discrimination. Respondents offered substantial evidence that the Boards' intentional discrimination continued to the present, and the court of appeals expressly based its findings of systemwide segregation on those recent practices, as well as the past practices just described. In determining whether the Boards intentionally maintained segregative policies, the court of appeals properly evaluated the Boards' contemporary practices in light of its findings regarding the 40-year history of intentional segregation in the design and operation of these school systems, which gave rise to a strong inference that both Boards continued to practice racial discrimination.

1. The court of appeals attributed substantial weight to the evidence that until the early 1970's—when state and federal enforcement agencies intervened—the Columbus and Dayton Boards continued to practice overt systemwide racial discrimination in faculty assignments. The evidence of the Boards' continuing assignment of teachers on the basis of race convincingly rebutted their contention that after the early 1950's they abandoned their segregative policies and adopted a racially neutral neighborhood school policy. As the court of appeals pointed out in the Columbus case (Columbus Pet. App. 174), "[o]bviously it was no 'neutral' neighborhood school concept which occasioned generations of black teachers to be assigned almost exclusively to black schools until the Ohio Civil Rights Commission complaint was settled in July of 1974."

2. The court of appeals concluded that the Boards also continued to manipulate their neighborhood school policies to separate students on the basis of race. The court found that both the Dayton and Columbus Boards deviated from the neighborhood school concept in ways that can rationally be understood only as part of an overall policy to maintain racial segregation. Both Boards employed optional attendance zones—which are not consistent with the neighborhood school concept—in neighborhoods undergoing racial transition, without an adequate educational or administrative explanation. In Dayton, the Board operated a district-wide all-black high school until 1962, when it closed this school and opened a new school with a virtually all-black student body and facility. In Columbus, the Board made boundary changes that removed white residential areas from predominantly black areas, and operated noncontiguous attendance zones where white students were bused past black schools. The court found no satisfactory nonracial explanation for these actions. The Boards' construction programs were clearly segregative in effect. In Dayton, 22 of the 24 schools constructed since 1950 opened with a student body that was 90% or more black or white (Dayton Pet. App. 210a). Particularly in light of their history of deliberate segregation, the pattern of the Boards' rejection of sites that were compatible with a neighborhood school policy and that would have had an integrative effect gave rise to an inference that the Boards' decisions were intended to encourage racial

separation. Again, neither Board rebutted this inference.

The court of appeals properly treated the Boards' choice of policies that had the natural and foreseeable consequence of creating and maintaining racial separation as evidence that the Boards had segregative intent. The court correctly recognized that disparate effect is not the equivalent of purposeful discrimination. But evidence of disparate effect may provide an important starting point in establishing the presence of discriminatory purpose.

The segregative effect of the Boards' policies was simply one of many factors tending to show the Boards' intent. The court of appeals' findings of segregative intent rested on the patterns that emerged from both direct and circumstantial evidence establishing that the Boards' actions in both cases were motivated by racial considerations. In characterizing their acts of discrimination as isolated rather than systemwide, the Boards apparently assume that a systemwide policy or practice cannot be shown without noncircumstantial proof, on a school-by-school basis, of racially motivated Board actions. That is not, and never had been, the plaintiffs' burden of proof in a desegregation case. Normal evidentiary principles apply to the determination whether the plaintiffs have proved that school officials followed a general policy of racial discrimination. The court of appeals correctly concluded that the evidence in these cases demonstrates systemwide segregation.

II

Dayton I emphasizes that in formulating a remedial decree in a school desegregation case, the court must tailor the remedy to fit the nature and extent of the violation. Since the purpose of the remedy is to correct the condition that offends the Constitution, a systemwide remedy may be ordered only where school officials' segregative policies have had a systemwide impact. Applying these principles, the court of appeals correctly concluded that because of the systemwide impact of the Boards' policies, systemwide relief was warranted. The remedies here were designed to convert the dual systems to unitary systems, eliminating all vestiges of prior segregation in Dayton and Columbus "root and branch."

Petitioners argue that despite the findings that they maintained systemwide segregative policies, under *Dayton I* respondents had the further burden of proving the precise degree to which petitioners' segregative policies caused the current conditions of racial separation, wholly apart from other factors such as residential patterns. In petitioners' view, respondents failed to carry this burden.

Dayton I does not support petitioners' claim. Although the opinion in *Dayton I* did not directly address the central issue here—the proper allocation of the burden of proof at the remedial stage when a court is formulating a decree to eliminate all vestiges of systemwide discrimination "root and branch"—it does cite and follow *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), and *Swann* v.

Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), which establish the governing principles here.

1. *Keyes* and *Swann* establish that once a systemwide violation has been shown, a systemwide remedy will be imposed unless school officials show that some portion of the racial separation is not attributable to their discriminatory conduct. Once systemwide discriminatory practices have been proved, the court should rebuttably presume that those practices achieved their full potential in contributing to the current racial separation in the schools. The burden then shifts to school officials to show the extent to which racial separation would have existed in the absence of such discrimination. This is consistent with the established principle that the perpetrator of a constitutional wrong has the burden of showing that his violation was without, or was of only limited, effect. School officials are in the best position to produce evidence on this question.

As a practical matter, if plaintiffs were required to show the precise effects of official discrimination while school officials who had engaged in systematic discrimination stood silent, the plaintiffs in school desegregation cases would often face an insuperable burden. It is extremely difficult to calculate the precise effects of a pervasive pattern of discrimination by school officials. Certainly the effects are not limited to the immediately perceptible changes in the racial composition of the student body. The identification of schools by race may have a profound recip-

rocal effect on the racial makeup of the surrounding neighborhood. Under general remedial principles the task of proving what would have happened in the absence of the constitutional violation should be placed on the wrongdoers, not their victims.

Where it is not possible to separate the effects of official segregation from other factors that may have encouraged racial separation, this uncertainty should not preclude an effective remedy. The victims of purposeful school discrimination are entitled to a remedy that eliminates all vestiges of prior discrimination "root and branch." A systemwide remedy will accomplish this end, and school officials who believe a more limited decree will remedy the violations have the burden of proving that such a decree will effectively do so.

2. The court of appeals correctly approved systemwide remedies in these cases, because the Boards did not establish that less extensive remedies would cure the "incremental segregative effects" of the systemwide policies of discrimination on the basis of race. In each case the court shifted the burden to the Board to show that the racial composition of the student bodies was not caused by the Board's systemwide segregative policies. The Boards adopted an all or nothing approach on the issue of remedy. Neither demonstrated that any portion of the racial separation in its district would have occurred in the absence of its segregative conduct. Although both Boards contend that the racial composition of the schools merely reflects the residential patterns in

each city, they offered no proof that the residential patterns developed independently of the prescribed racial character of the schools. Respondents—although it was not their burden to do so—presented undisputed expert testimony that a pattern of systematic school discrimination does affect residential decision-making.

3. The remedial principles of *Keyes* and *Swann*—which are grounded on considerations of " 'fairness' and 'policy' "—are not inconsistent with *Dayton I*, and there is no justification for petitioners' contention that *Keyes* and *Swann* should be overruled. The principles announced in those cases have proved a practical and effective means of eliminating the effects of longstanding pervasive discrimination in violation of the Fourteenth Amendment. Those decisions have provided the basis for desegregation plans now in operation in hundreds of school districts throughout the United States.

ARGUMENT

I

THE COLUMBUS AND DAYTON SCHOOL BOARDS ENGAGED IN SYSTEMWIDE POLICIES OF INTENTIONAL RACIAL SEGREGATION

The Columbus and Dayton school systems exhibit conditions of extreme racial separation. In Columbus, 32% of all public school children are black (Columbus Pet. App. 19). Yet about 70% of all students attend schools that are more than 80% white or 80% black (Columbus Pet. App. 18). Of the Columbus

system's 172 schools, 137 are "racially identifiable"—that is, their racial compositions are substantially different from the district-wide percentage. One half of the Columbus schools are more than 90% black or 90% white (Columbus Pet. App. 163). In Dayton, slightly less than 50% of all public school children are black (Dayton A. 34-35). Racial separation is even more pronounced in Dayton than in Columbus. Of the 69 public schools in Dayton, 51 are virtually all-white or all-black (Dayton Pet. App. 149a-150a).

The court of appeals correctly recognized (Columbus Pet. App. 150; Dayton Pet. App. 202a) that these conditions of racial separation, standing alone, do not violate the Constitution. See, *e.g.*, *Dayton I*, *supra*, 433 U.S. at 417; *Washington* v. *Davis*, 426 U.S. 229, 240 (1976). The plaintiffs in each of these cases had the burden of proving "not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 198.

In these two cases the court of appeals' findings of systemwide intentional segregation were premised on similar subsidiary factual findings. First examining historical practices, the court of appeals found that continuously until the early 1950's both the Dayton and Columbus school boards had deliberately isolated most black students into small enclaves of all-black schools (Dayton Pet. App. 202a-203a; Columbus Pet. App. 155-160). During the same period, the Boards did not permit black teachers to teach in white schools (Dayton Pet. App. 202a-203a; Colum-

bus Pet. App. 157-159). Turning to more contemporary practices, the court of appeals found that the Dayton Board and the Columbus Board both continued to assign faculty by race until the early 1970's, and that this discrimination in faculty assignments ended only upon the intervention of governmental agencies (Dayton Pet. App. 206a; Columbus Pet. App. 173-174). As for student assignments since the 1950's, the court of appeals found that neither the Dayton nor the Columbus Board had followed a consistent neighborhood school policy. Rather, both engaged in a number of manipulative practices which were designed to separate the races. Those practices included, in both cases, discriminatory site selections for new schools and the use of optional attendance zones to avoid integration (Dayton Pet. App. 210a-212a; Columbus Pet. App. 168-173). In addition, the court concluded that the Dayton Board had reorganized the system's grade structure so as to create middle schools that would increase or maintain segregation (Dayton Pet. App. 212a-213a). The Columbus Board, in turn, used a number of classically segregative devices, including redrawing school boundary lines, adopting noncontiguous attendance zones, and busing white students past black schools (Columbus Pet. App. 194-195). Finally, the court of appeals found that neither school board took any meaningful steps to dismantle the dual school systems they had created (Dayton Pet. App. 213a; Columbus Pet. App. 198).

Both petitions raise the question whether these findings constitute a sufficient predicate for the conclusion that the Boards had engaged in systemwide policies of segregation warranting remedial judicial action. They argue that in finding there was systemwide segregation the court of appeals erroneously gave controlling significance to the Boards' past segregative practices, and improperly required petitioners to shoulder the burden of proving that the current racial imbalance is not the result of their past segregative practices. Finally, petitioners urge that the court of appeals improperly held conduct designed to serve legitimate educational objectives to be purposefully discriminatory merely because racial separation was a foreseeable consequence.

The Dayton Board of Education also challenges (Br. 26-39) the subsidiary findings of the court of appeals, arguing that the appellate court erred in setting aside the district court's findings on the segregative purpose and effect of the Board's post-*Brown I* conduct. Since our primary concern is the common legal issues raised by these two petitions, we will not here undertake a review of the evidence supporting the court of appeals' subsidiary factual findings. We note, however, that after a thorough review of the record the United States filed an amicus brief in the court of appeals urging that the district court's findings in the Dayton case were clearly erroneous, and we generally concur in respondents' detailed analysis (Br. 9-67) of the evidence supporting the court of appeals' findings.

A. The Causes of Current Racial Separation In The Columbus And Dayton Schools Must Be Evaluated In Light Of The Historical Creation And Maintenance Of Dual Systems

The court of appeals concluded that from the early 1900's through the 1950's, the Columbus and Dayton Boards of Education unquestionably created and operated dual systems of education. To be sure, Ohio law prohibited compulsory segregation, and the school boards therefore could not overtly segregate every student within the system. But the record shows that petitioners nonetheless sought to segregate the races to the greatest possible degree. By a variety of manipulative devices, each Board established a small enclave of schools for blacks and was able to isolate most black students in these schools. The isolation of black students had the obvious reciprocal effect of earmarking other schools in both systems as identifiably for whites. See *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 201 & n.12. The Boards' discriminatory intent was also manifested in their strict policy of assigning black teachers only to schools with black students. And in Dayton, the intensity of that Board's discrimination led the district court to characterize the mistreatment of black students as "inhumane," "reprehensible" and "inexcusable" (Dayton Pet. App. 149a). Not only did the Dayton Board of Education intentionally confine black children to a segregated education, it even overtly segregated swimming pools, locked rooms and athletic competitions (Dayton Pet. App. 201a).

Petitioners scarcely dispute the fact that they practiced far-reaching and systematic racial discrimination in student and faculty assignments for many years, at least until the early 1950's. They urge, however, that the court of appeals erred in finding that they were operating dual systems, and further erred in finding that these historical practices had current significance.

1. Petitioners erroneously contend (Columbus Br. 69-70; Dayton Br. 16) that the segregated conditions they created and maintained could not—even in the early 1950's—properly be characterized as "dual systems." Petitioners emphasize that Ohio law did not mandate racial separation, and that many black students attended schools with whites. A similar argument was squarely rejected in *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 198-205, where there was no statutory dual system, and this Court held that evidence of the school board's deliberate, segregation in Park Hill city schools—affecting 37.69% of the total black student population, as well as teachers and staff—sufficiently supported a finding of a dual system. Where "school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." 413 U.S. at 201. Unless there is a showing that the geographic structure of a district or natural boundaries divide it into "separate, identifiable and un-

related units,"[8] *Keyes* holds that "proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system." 413 U.S. at 203.

The records establish that such a systematic program of state-imposed segregation in a substantial portion of the Dayton and Columbus districts existed at the time of *Brown I*, and accordingly the court of appeals correctly concluded that petitioners had operated dual school systems for whites and blacks.

2. Petitioners argue that even if they were operating dual systems at the time of the *Brown I* decision, in view of the "evidence of a myriad of intervening events and forces" their conduct more than 20 years ago is of little value in determining whether the Columbus or Dayton schools "were unconstitutionally segregated at the time this case was tried" (Columbus Br. 70; see Dayton Br. 16-18).

a. Petitioners ignore the fact that even if it is assumed that their segregative intent ended in the early 1950's, "neutral" practices thereafter could simply perpetuate and maintain the dual system. "Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation." *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 211. When a school board has through pervasive techniques isolated most black students and faculty in an enclave of schools, the

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[8] There is no contention that Dayton or Columbus is divided into separate unrelated units. See Dayton Pet. App. 205a n.43.

unmistakable message that these schools are earmarked for blacks while many others are reserved for whites "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." 413 U.S. at 202. Subsequent neighborhood zoning practices, no matter how scrupulously "neutral," may have the direct effect of "further lock[ing] the school system into the mold of separation of the races." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 21 (1971). See also *id.* at 28. Thus, the effect of building upon a dual system already in place may be only to preserve its existence.

b. Moreover, in the face of the clear potential for perpetuating their dual systems, petitioners took no meaningful affirmative steps to convert their dual systems into unitary ones without " 'white' school[s] and * * * 'Negro' school[s], but just schools." *Green* v. *County School Board*, 391 U.S. 430, 442 (1968). Petitioners therefore violated their constitutional duty to eliminate promptly their entrenched dual systems "root and branch." *Id.* at 438. Nevertheless, they now argue that their long-standing practices of racial discrimination and their persistent refusals to eliminate the effects of those practices must be discounted solely because of the passage of time, and that respondents bear the burden of proving the extent to which the current conditions of segregation in each system are causally related to the historical creation and maintenance of the dual systems.

Keyes provides the full response to these contentions. In *Keyes* the Court acknowledged that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention." 413 U.S. at 211. But it concluded that "certainly plaintiffs in a school desegregation case are not required to prove 'cause' in the sense of 'non-attenuation.' That is a factor which becomes relevant only after past intentional actions resulting in segregation have been established. At that stage, the burden becomes the school authorities' to show that the current segregation is in no way the result of those past segregative actions." 413 U.S. at 211 n.17. Finally, *Keyes* holds that unless the school board can prove it had no segregative intent,[9] "it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition." 413 U.S. at 211.

The court of appeals' decisions reflect careful adherence to the principles expressed in *Keyes*. Petitioners contend (Columbus Br. 70-73 & n.38) that in applying the *Keyes* presumption, the court of appeals failed to follow *Dayton I*, which, they argue,

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[9] The Court expressly "reject[ed] any suggestion that remoteness in time has any relevance to the issue of intent," holding that "[i]f the actions of school board authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.' " 413 U.S. at 210-211.

overrules or limits *Keyes*. To the contrary, however, although *Dayton I* does not specifically address the procedure the lower courts should follow in making liability findings, it cites *Keyes* (433 U.S. at 410, 420; *id.* at 421, 423 (Brennan, J., concurring)), and nowhere suggests that in making the "complex factual determinations" required on remand the district court should not apply the principles established in *Keyes*.

Accordingly, the court of appeals correctly concluded that neither the Columbus Board nor the Dayton Board had shown that its past segregative acts did not create or contribute to the current segregated condition of the schools (Columbus Pet. App. 165-166; Dayton Pet. App. 208a-209a). Thus, even if the Columbus and Dayton Boards had shown that they ceased practicing intentional discrimination in the 1950's, judicial remedial action would have been warranted.

B. The Boards' More Contemporary Practices Deliberately Perpetuated And Increased Racial Separation In Their School Systems

But the court of appeals' findings of systemwide discrimination in the present cases do not rest solely on proof of historical practices. Respondents offered substantial evidence that the Boards' intentional discrimination continued to the present, and the court of appeals expressly based its findings of systemwide segregation on those recent practices taken against the background of the past practices just described. In making these findings of current segregative policies and practices, the court of appeals correctly concluded

that the evidence did not support the Boards' claims that they were operating a neutral neighborhood school system, but rather showed an overall policy of promoting racial separation. The court correctly considered the fact that racial separation was a foreseeable effect of a neighborhood school policy as a factor in determining the Boards' intent. It did not, as petitioners charge (Columbus Br. 81-95; Dayton Br. 20-26), simply equate intent to discriminate with the fact of disproportionate impact.

1. ***The Boards' current practices were evaluated in light of their history of discrimination***

In determining whether the Boards had maintained and continued their policies of segregation, the court of appeals correctly evaluated the Boards' contemporary practices in light of their past discriminatory practices. As this Court explained in *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 267 (1977), in determining whether invidious discriminatory purpose is a motivating factor, the "historical background" of official action is an important evidentiary source—"particularly if it reveals a series of official actions taken for invidious purposes." Absent some cogent explanation, it should not be lightly assumed that a school board that practiced intentional racial discrimination over a forty-year period suddenly began to act in a totally neutral fashion. See *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 209-210.

The court of appeals applied this principle. In the *Dayton* case, the court stated (Dayton Pet. App. 197a):

> We recognize that racial imbalance in student attendance is not in itself a constitutional violation. See *Dayton Board of Education* v. *Brinkman, supra*, 433 U.S. at 413, 417 (1977); *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *Keyes* v. *School District No. 1*, 413 U.S. 189, 198 (1973). However, such racial imbalance does assume increased significance in the historical context of repeated intentional segregative acts by the school board directed at the four schools which were 100 percent black in 1954. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).

See also *id.* at 207a, 209a. The court likewise made it clear in the Columbus case that it was undertaking its review of the school board's current practices in the context of their " 'historical background' " (Columbus Pet. App. 166, quoting *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, *supra*, 429 U.S. at 267).

This emphasis on the longstanding history of segregation was entirely proper. Although the membership of school boards changes periodically, and isolated or sporadic acts of discrimination may be caused by the predilections of individual members, in the face of long-standing, continuous, and pervasive acts of racial discrimination, courts should carefully scrutinize claims that a school board suddenly experienced a complete change of heart.

Neither the Columbus nor Dayton Board points to any event in the early 1950's indicating that they had a dramatic change of purposes.[10] The Boards' actions and motivations cannot be neatly compartmentalized into discrete time frames. Given the largely undisputed findings that the Boards had a forty-year history of pervasive intentional segregation in the design and operation of their "neighborhood school" systems through at least the early 1950's, a strong inference arose that they continued to practice racial discrimination in the subsequent operations of those same systems. See *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 209-212. Cf. *Hazelwood School District* v. *United States*, 433 U.S. 299, 309 n.15 (1977), citing, *inter alia*, 1 J. Wigmore, *Evidence* § 92 (3d ed. 1940); 2 J. Wigmore, *Evidence* §§ 302-305, 371, 375 (3d ed. 1940).[11]

[10] For example, neither Board contends that new members were then elected who proposed to alter significantly the previous policies. Nor did either Board then openly renounce its past practices or adopt a formal resolution to achieve substantial desegregation. Such a renunciation and resolution were adopted in Dayton in late 1971, but, following the election of a new board, these actions were rescinded (see Dayton Pet. App. 180a-185a).

[11] In some circumstances, this Court's 1954 decision in *Brown* v. *Board of Education*, 347 U.S. 483 (*Brown I*), might have introduced new legal obligations and acted as the catalyst for a fundamental change in school board policy. Unfortunately, even in those areas of the country where *Brown I* made compulsory segregation illegal, many school boards acted in open definance of the decision for more than a decade. See, *e.g.*, *Swann* v. *Charlotte-Meckleburg Board of Education*, *supra*, 402 U.S. at 13-14. In any event, *Brown I* was con-

2. The Boards continued to assign faculty by race

As we have shown (*supra*, pages 6-7, 29-30), for two decades following the early 1950's, the Columbus and Dayton Boards continued to practice overt and systemwide racial discrimination in faculty assignments. These practices ended in the early 1970's because of intervention by federal and state enforcement agencies. In evaluating the Boards' contentions that the continuing racial imbalance in both systems was the result of a neutral neighborhood school policy, the court of appeals correctly attributed great weight to this long history of deliberate racial discrimination (Columbus Pet. App. 173-174; Dayton Pet. App. 206a-207a). As the court of appeals pointed out in the Columbus case (Columbus Pet. App. 174), "[o]bviously it was no 'neutral' neighborhood school concept which occasioned generations of black teachers to be assigned almost exclusively to black schools until the Ohio Civil Rights Commission complaint was settled in July of 1974."

The court of appeals' emphasis on the Boards' overt racial discrimination in faculty assignments is consistent with this Court's recognition that faculty discrimination is "among the most important indicia of a segregated system. * * * Independent of student

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sistent with prior Ohio law, which since 1887 had prohibited intentional school segregation. The Columbus and Dayton Boards had violated the unambiguous state prohibition against segregation since the early 1900's. There is no basis for assuming that the Columbus and Dayton Boards ended practices that they already knew to be illegal because *Brown I* held school segregation also violated federal law.

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." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 18. As the Ninth Circuit has succinctly explained (*Kelly* v. *Guinn*, 456 F.2d 100, 107 (1972), cert. denied, 413 U.S. 919 (1973) (footnote omitted):

> [T]eacher assignment is so clearly subject to the complete control of school authorities, unfettered by such extrinsic factors as neighborhood residential composition or transportation problems, that the assignment of an overwhelmingly black faculty to black schools is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices. "[T]he school district's obvious regard for race in assigning faculty members and administrators is a factor which may be considered in assessing motives underlying past decisions which resulted in segregation." *Davis* v. *School District of Pontiac, Inc.*, 443 F.2d 573, 576 (6th Cir. 1971).

We have argued above that courts should closely scrutinize the claim of a school board with a history of pervasive discrimination that its policies suddenly changed to complete neutrality at a particular time. Here, the suggestion of the Columbus and Dayton Boards that an abrupt shift in purpose occurred in the early 1950's is refuted by the Boards' continuing

assignments of teachers on an overtly racial basis. Petitioners' behavior was not suddenly transmuted into racial neutrality, and no plausible reason has been offered to explain why they would have continued invidiously motivated practices as to teachers but not as to students (to whom a pattern and practice of discriminatory teacher assignments is inevitably a lesson in itself). Indeed, the Dayton Board publicly articulated its systemwide discriminatory policy of not allowing blacks to teach white students until the community was " 'ready to accept negro teachers' " (Dayton Pet. App. 195a-196a n.11).[12] A strong inference arises that a school board that so readily yielded to actual or assumed community opposition to integration in faculty assignments continued to allow similar impermissible considerations to influence its student assignment policies.

3. *The Boards continued to manipulate their "neighborhood school" policies to separate students by race*

The Columbus and Dayton Boards have attempted to explain their student assignment policies since the early 1950's as based entirely on the "neighborhood school" concept. In our view, even scrupulous adherence to neighborhood attendance zone assignments would not necessarily have absolved petitioners from responsibility for the creation and maintenance of a

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[12] The Board's policy also provided that it would " 'not attempt to force white teachers, against their will' " to teach " 'in schools now in negro areas that are now staffed by negroes' " (Dayton Pet. App. 195a-196a n.11).

dual system. Of course, the disparate impact of a policy of operating neighborhood schools does not by itself deprive minority students of the equal protection of the laws. See *Washington* v. *Davis*, *supra*. As the Court observed in *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 28, "[a]ll things being equal, with no history of discrimination, it [may] well be desirable to assign pupils to schools nearest their homes." [13] But *Swann* also recognized that in school systems that have been "deliberately constructed and maintained to enforce racial segregation," such as Columbus and Dayton, "all things are not equal" and neighborhood school assignments may operate to maintain an artificially created racial separation. *Ibid.* The use of a neighborhood school policy by a school board that created a dual system may be a further constitutional violation if the board intentionally uses the policy to reinforce segregation.[14] And, for the reasons stated

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[13] Congress has likewise stated in Sections 202 and 206 the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701, 1705, that "the neighborhood is the appropriate basis for determining public school assignments," though it has also provided that the assignment of students to neighborhood schools "for the purpose of segregating students on the basis of race, color, sex, or national origin" constitutes a violation of "equal protection of the laws."

[14] The Equal Educational Opportunities Act expressly declares that no state shall deny equal education opportunities to any individual by either (1) "the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools," or (2) "the

above, segregative intent is manifested when the school board maintains a purposefully discriminatory pattern of faculty assignments in such schools.

But the present cases do not raise the question whether scrupulous adherence to an otherwise neutral neighborhood school policy, standing alone, may constitute the deliberate maintenance of a dual system. For here, as in *Keyes*, the record demonstrates that "the 'neighborhood school' concept has not been maintained free of manipulation." *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 212.

a. The court of appeals correctly concluded that the Columbus and Dayton Boards readily departed from strict neighborhood school assignments when increased racial separation would result. For example, both Boards made extensive use of optional attendance zones in neighborhoods undergoing racial transition (see pages 8-9, 30, *supra*). As the district court recognized in the Dayton case, optional zones are inconsistent with the concept of neighborhood school assignments (Dayton Pet. App. 12a-13a). In cases where school boards, particularly those with a history of discrimination, have offered students the choice of attending schools of substantially differing racial compositions, the lower courts have properly inferred segregative intent absent some persuasive non-racial explanation. See, *e.g.*, *United States* v. *School Dis-*

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failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system." Section 204(a) and (b), 20 U.S.C. 1703(a) and (b).

trict of Omaha, 521 F.2d 530, 540-543 (8th Cir.), cert. denied, 423 U.S. 946 (1975), and cases cited therein. As this Court pointed out in *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, *supra*, 429 U.S. at 267 (footnote omitted), "[s]ubstantive departures" from usual policies may be relevant in determining intent, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." Neither the Columbus nor Dayton Boards came forward with adequate educational or administrative explanations for the continued use of optional zones in areas undergoing racial transition. Accordingly, the court of appeals correctly concluded that the use of such zones was motivated by segregative intent (Dayton Pet. App. 209a-210a; Columbus Pet. App. 175, 179, 182-183).

The Columbus and Dayton Boards also deviated from neighborhood school assignments in other ways that can rationally be understood only as part of an overall policy to maintain racial segregation. In Dayton, the Board maintained Dunbar High School as a district-wide school for black students until 1962 (Dayton Pet. App. 199a-200a). When this school was closed, a new Dunbar High School was opened with a virtually all-black student body and faculty (Dayton Pet. App. 207a). In Columbus, the Board made boundary changes that removed white residential areas from predominantly black zones and operated noncontiguous zones in which white students were bused past black schools (Columbus Pet. App.

179-183, 184-186). The court of appeals found that no adequate non-racial explanation was offered for any of these practices.

Thus, the records show that neither the Columbus nor the Dayton Boards pursued a bona fide neighborhood school policy. As the court of appeals succinctly put it (Columbus Pet. App. 175), "the Columbus Board's 'neighborhood school concept' was not applied when application of the neighborhood concept would tend to promote integration rather than segregation." This observation applies equally to the Dayton Board (see Dayton Pet. App. 209a-210a).

b. As the Columbus and Dayton school systems expanded in the 1950's and 1960's, both boards undertook ambitious school construction programs. These programs resulted in extreme patterns of racial separation in both systems. In Columbus, 87 of the 103 schools built since 1950 opened as racially identifiable (Columbus Pet. App. 173). In Dayton, 22 of the 24 schools constructed since 1950 opened 90% or more black or white (Dayton Pet. App. 210a).

The court of appeals correctly recognized that a close examination of this pattern of school construction was " 'a factor of great weight' " in determining whether the school systems were deliberately segregated (Columbus Pet. App. 168, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 21; see Dayton Pet. App. 210a-211a). School construction programs of this magnitude ordinarily will have a profound effect on segregation or integration within the system as a whole. As this

Court explained in *Swann*, the consequences of school construction programs are far-reaching (402 U.S. at 20-21):

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. * * * The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
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> 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 a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segre-

> gated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.
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> In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight.

As we have shown, the post-1950 pattern of school construction in Columbus and Dayton was undisputably segregative in effect. Both Boards were, of course, fully knowledgeable of the racial residential and school attendance patterns within their systems, and were thus aware of the potential impact that their construction decisions would have on integration or segregation. They had the option of making these construction decisions with the goal of achieving meaningful integration, or for the purpose of perpetuating or aggravating existing racial separation.

Particularly in light of the Boards' practices of deliberate segregation, the pattern of rejection of alternate sites that were compatible with a neighborhood school policy and that would have had an integrative, rather than a segregative effect, raised an inference that racial separation was a factor motivating the Boards' construction decisions. Neither Board rebutted this inference. In Columbus, the district court identified several instances where the Board had rejected integrative sites without offering any explanation for their choice (Columbus Pet. App.

21-24). The court of appeals held that the district court had properly relied in part on these instances in finding deliberate systemwide segregation (Columbus Pet. App. 173). In the Dayton case, although the district court did not credit it, respondents also offered evidence that the Board had rejected sites that would have had an integrative effect (see Dayton Pet. App. 174a-176a). The inference that these sites were rejected because of segregative intent was strengthened by evidence of the "coordinate racial assignment of professional staffs to [newly constructed] schools and additions on the basis of the racial composition of the pupils served by the schools" (Dayton Pet. App. 210a). No racially neutral plan for school construction in Dayton was proved. To the contrary, the district court described the process of site selection in Dayton as "a most imprecise science" that "approached the level of haphazard in some instances" (Dayton Pet. App. 173a). In view of the strong history of segregation in the Dayton schools, the use of such a subjective decision-making process reinforced the inference that racial considerations played a role in the Board's construction decisions. See *Castaneda* v. *Partida*, 430 U.S. 482, 497 (1977).

c. The Boards do not seriously contend they pursued policies intended to promote integration, but they deny that they had any intent to discriminate. They argue that racial considerations were irrelevant to their decisions and were subordinated to the achievement of valid educational objectives, and that the court of appeals erroneously equated their decision

to pursue a neutral neighborhood school policy—where the foreseeable effect was racial separation—with intentional segregation.

In both the Dayton and Columbus cases the court of appeals treated the Boards' adoption of policies that had the natural and foreseeable consequences of creating and maintaining racial separation as probative of the Boards' segregative intent (see Dayton Pet. App. 203a-204a; Columbus Pet. App. 173). And in Dayton, the court stated, quoting *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975), that (Dayton Pet. App. 203a):

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

We agree with petitioners that awareness of disparate effect is not the same as purposeful discrimination. But proof that a challenged official act has a disparate effect on a particular group may be important in ascertaining the intent of the decisionmaker.[15] As the Court stated in *Village of Arlington*

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[15] In his concurring opinion in *Washington* v. *Davis, supra*, 426 U.S. at 253, Mr. Justice Stevens explained the importance of disparate effect in proving intent as follows:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather

Heights v. *Metropolitan Housing Corp.*, *supra*, 429 U.S. at 266:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington* v. *Davis*, *supra*, at 242—may provide an important starting point.

Where disparate effect is very difficult to explain except as the product of purposeful discrimination, the evidence of effect may for all practical purposes establish the violation. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Guinn* v. *United States*, 238 U.S. 347 (1915).[16] And in some circumstances, evidence of a grossly disproportionate effect on a protected class justifies shifting the burden to the state to produce evidence that this effect was not the product of purposeful discrimination. See *Castaneda* v. *Partida*, 430 U.S. 482, 494 & n.13 (1977); *Washington*

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than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particiularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation.

[16] Nothing shows intent as well as a demonstration that a series of decisions *all* have a similar disparate effect. See *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Such a demonstration shows a cumulation of disadvantage inexplicable on grounds other than the forbidden but unstated characteristic.

v. *Davis*, *supra*, 426 U.S. at 241; *Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972).

Accordingly, several courts of appeals have held that, once plaintiffs demonstrate that particular official action naturally and foreseeably resulted in segregation in the schools, that evidence creates a rebuttable presumption that the action was taken with a discriminatory purpose, shifting the burden to the school officials of coming forward with evidence proving that they had no segregative intent. See, *e.g.*, *United States* v. *Texas Education Agency*, 579 F.2d 910, 912-914 (5th Cir. 1978), petition for cert. pending, No. 78-897; *United States* v. *School District of Omaha*, 521 F.2d 530, 535-536 (8th Cir.), cert. denied, 423 U.S. 946 (1975). See generally Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317 (1976).

But ultimately the court of appeals' decisions in these cases did not rest on a presumption that the Boards intended to bring about the racial separation that was the natural and foreseeable consequence of its actions.[17] Although the segregative impact of their policies "provide[d] an important starting

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[17] As the court commented in the Columbus case (Columbus Pet. App. 173), although an inference of segregative intent could be drawn from the evidence that the vast majority of the new schools opened and remained racially identifiable, "the record actually requires no reliance upon inference" because of the evidence that the Board deliberately selected segregative sites and refused to consider alternatives that would have had an integrative effect.

point" in determining the Boards' intent, ultimately "a clear pattern, unexplainable on grounds other than race," emerged from the court's examination of all the "circumstantial and direct evidence of intent." See *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, *supra*, 429 U.S. at 266. The court's findings of intent to segregate rested not on a presumption, but on a pattern of both direct and indirect evidence of overt racial intent illuminated by the historical context of the Boards' actions.[18]

d. In sum, the court of appeals applied proper legal standards and correctly concluded that the

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[18] In granting a stay in the Columbus case, Mr. Justice Rehnquist stated his concern that the court of appeals had "employed legal presumptions of intent to extrapolate systemwide violations from what was described * * * as 'isolated' instances." *Columbus Board of Education* v. *Penick*, No. A-134 (Aug. 11, 1978) (Rehnquist, J., in chambers), slip op. 3. In the portion of the Columbus opinion to which Mr. Justice Rehnquist referred, the court of appeals commented (Columbus Pet. App. 175) that the post-*Brown I* instances of Board gerrymandering of attendance boundaries and establishing optional attendance areas "can properly be classified as isolated in the sense that they do not form any systemwide pattern." The court found, however, that these instances "are significant in indicating that the Columbus Board's 'neighborhood school concept' was not applied when application of the neighborhood concept would tend to promote integration rather than segregation." This comment in no way undermines the court's finding of systemwide intentional segregation. These particular instances of segregative conduct—which were in one sense "isolated"—were not the primary source of its finding of a violation. Instead they supplemented and gave color to the more systematic and far-reaching effects of the Board's pre-1954 segregation, and the post-1954 practices of discriminatory school site selections and faculty assignments.

Columbus and Dayton Boards continued to pursue a systemwide policy of deliberate racial discrimination from the early 1900's through the dates of trial. The Boards attempt now to characterize their acts of discrimination as discrete or isolated. The thrust of petitioners' argument is that a finding of systemwide segregation cannot be made unless there is non-circumstantial proof, on a school-by-school basis, of invidiously motivated Board action. No such insurmountable burden of proof has ever been placed on plaintiffs in a school desegregation lawsuit. Disputed questions of intent in cases such as these are not easy to resolve, see *Dayton I*, *supra*, 433 U.S. at 414; and a "sensitive inquiry" must be made "into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, *supra*, 429 U.S. at 266. But when this inquiry is made, the plaintiffs' burden of proof is no different than in any other civil case; and the courts should apply normal evidentiary principles in answering the question whether it is more probable than not that the school boards followed a general policy of racial discrimination in assigning students and faculty. Given the strength of the proof adduced in these cases, the court of appeals correctly found that petitioners followed a general policy of racial discrimination.

II

SYSTEMWIDE REMEDIES ARE APPROPRIATE IN THESE CASES BECAUSE THEY ARE TAILORED TO CURING THE CONDITION THAT OFFENDS THE CONSTITUTION

Courts are not at liberty in school desegregation cases to command results merely to achieve socially desirable ends. As this Court explained in *Dayton I*, *supra*, 433 U.S. at 419-420:

> 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 and extent of the constitutional violation.' " [Citations omitted.]
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> * * * If [constitutional] 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*, 413 U.S., at 213.

The task of a remedial decree "is to correct, by a balancing of the individual and collective interests,

the condition that offends the Constitution." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 16. See also, *e.g., Milliken* v. *Bradley,* 433 U.S. 267 (1977); *Hills* v. *Gautreaux,* 425 U.S. 284 (1976).[19]

Applying these principles, the court of appeals correctly concluded that because of the systemwide impact of the Boards' discriminatory policies, systemwide relief was warranted.

A. The Columbus And Dayton Boards Are Under An Affirmative Constitutional Duty To Convert The Dual Systems They Created And Maintained Into Unitary Systems Without "White" Schools And "Black" Schools

Dayton I reaffirms the holding in *Keyes* that where school officials' segregative policies have a "systemwide impact" the court should order "systemwide relief." 433 U.S. at 420. In these cases, the condition found to offend the Constitution is the creation and maintenance of a dual system of education, with each Board operating one set of schools primarily for white students and another set of schools primarily for black students. Under this Court's repeated holdings, the only remedy that will cure this condition is prompt conversion to a unitary system in which there are no longer white schools or black

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[19] Congress has expressed a similar judgment. Section 213 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1712, provides that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court * * * shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."

schools but "just schools." *Green* v. *County School Board, supra,* 391 U.S. at 442. See also, *e.g., Keyes* v. *School District No. 1, supra,* 413 U.S. at 200 & n.11; *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 15. In order to eliminate all vestiges of the dual system " 'root and branch,' " "all-out desegregation" must be undertaken. *Keyes* v. *School District No. 1, supra,* 413 U.S. at 213-214. The remedial decree must therefore seek "to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners,* 402 U.S. 33, 37 (1971).

The remedies challenged in these cases are faithful to these principles. They effect conversions to unitary systems by removing the racial identifiability of schools which have heretofore been identified and operated as schools intended for whites or blacks. They do not require fixed mathematical norms,[20] but instead allow reasonable ranges for flexibility. There is no claim that either decree is impractical. Finally,

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[20] The Columbus Board argues (Br. 79-81) that the district court ordered strict mathematical ratios. However, the district court's remedial order did nothing more than suggest that a staff plan that brought every school within 15% of the district-wide norm could be used as a starting point (Columbus Pet. App. 11). This range is reasonably broad. It permitted ample flexibility and thus was an appropriate "starting point in the process of shaping a remedy, rather than an inflexible requirement." *Swann, supra,* 402 U.S. at 25. The court made clear that exceptions to this already flexible range would be allowed on grounds of practicality (Columbus Pet. App. 105-106).

it is undisputed that neither decree will require excessive travel times for students.[21]

B. The Boards Did Not Meet Their Burden Of Proving That Less Extensive Relief Would Fully Eradicate The Effects Of Their Systemwide Discrimination

Petitioners contend that despite the findings that they had systemwide segregative policies, and that extreme conditions of racial separation are now found in both school systems, no relief should have been ordered. They urge that the racial separation in the schools simply corresponds to the racial patterns in the residential areas served by the schools. Under *Dayton I*, they urge, respondents had the burden of proving not only the systemwide nature of petitioners' intentionally discriminatory policies, but also the precise degree to which these segregative policies caused the current conditions of racial separation, wholly apart from other factors such as residential patterns. In petitioners' view, respondents failed to carry this burden.

1. *When systemwide discrimination has been shown, the burden shifts to the defendants to establish that the remedy need not be systemwide*

In holding that judicial remedies must be addressed to the incremental segregative effects of a school board's discriminatory policies, *Dayton I* did not

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[21] Petitioners do not contend that the remedies ordered here are inconsistent with the remedial priorities stated in Section 214 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1713.

establish new principles. Rather, it reiterated the settled precept that a remedy must be tailored to cure the condition that offends the Constitution by eradicating the effects of the violation. When there have been only isolated and sporadic acts of school board discrimination affecting a limited number of schools or students, a similarly limited remedy is appropriate. On the other hand, when there has been a general policy of discrimination in the operation of the school system as a whole, pervasively eliminating whatever opportunities existed for substantial racial integration (see *Keyes*, *supra*, 413 U.S. at 201-203), a systemwide remedy will generally be required. As *Dayton I* reaffirms "[t]here is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional violations on the part of school officials are proved," 433 U.S. at 410, but "only if there has been a systemwide impact may there be a systemwide remedy." *Id.* at 420. The Court therefore reversed the systemwide remedy ordered in *Dayton I* because it plainly went far beyond the scope of the isolated violations relied on by the court of appeals. 433 U.S. at 417; see also *id.* at 422 (Brennan, J., concurring).

Dayton I does not directly address the central issue here, which is the proper allocation of the burden of proof at the remedial stage when a court must enter a decree which eliminates all vestiges of systemwide violations "root and branch." But *Dayton I* does cite and follow *Swann* and *Keyes*, which

establish the governing principles. 433 U.S. at 410, 420.[22]

Keyes and *Swann* establish that once a systemwide violation has been shown, a systemwide remedy will be imposed unless school officials can establish that some portion of the racial separation in the system is not attributable to their discriminatory conduct. The Court addressed precisely this point in *Swann*, stating (402 U.S. at 26):

> Where the school authority's proposed plan for conversion from a dual to a unitary system con-

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[22] Petitioners rely (Columbus Br. 58-59) heavily on the per curiam decisions in *School District of Omaha* v. *United States*, 433 U.S. 667 (1977), and *Brennan* v. *Armstrong*, 433 U.S. 672 (1977). Despite petitioners' arguments to the contrary, neither case is inconsistent with our reading of *Dayton I*. In both cases, uncertainty as to the scope of the constitutional violations precluded affirmance of findings that there had been systemwide discrimination. In *Omaha*, the court of appeals was directed to reconsider the evidentiary presumptions that it had employed to determine intent in light of the intervening decision in *Arlington Heights*. Upon reexamination of the violations, the court of appeals was also directed to reconsider whether a systemwide remedy was warranted. 433 U.S. at 668-669. In *Brennan*, no remedy had yet been ordered. But the district court's finding of a systemwide violation appeared inconsistent with a specific finding that the Milwaukee Board's boundary and construction decisions (a key element in the alleged violations) were entirely racially neutral. See *Armstrong* v. *Brennan*, 539 F.2d 625, 635-636 (7th Cir. 1976). Notwithstanding this patent inconsistency, the court of appeals upheld the conclusory finding of segregative intent by affording the district court a "presumption of consistency." 539 F.2d at 635-636; see 433 U.S. at 672. The case was therefore remanded to redetermine the scope of the actual violations so that a proper remedy could be developed commensurate with those violations. 433 U.S. at 672-673.

> templates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such 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.

See *Keyes* v. *School District No. 1, supra,* 413 U.S. at 211 n.17.

Once systemwide racially discriminatory practices have been proved, it is proper for the court rebuttably to presume that those practices achieved their full potential as a contributing factor to the current racial imbalance in student attendance patterns. The burden should then shift to the school officials to show the extent to which racial separation would have existed in the absence of the discrimination. For it is ordinarily the school board that is most likely to have access to the information necessary to demonstrate the effects of its racial discrimination, and to be in the best position to establish what conditions would have been but for official discrimination on the basis of race. And it is, after all, the very illegality of the school officials' behavior and their refusal to discharge their constitutional duty promptly to eradicate the effects of their violations that created the uncertainty in measuring the damage caused by those violations. As a practical matter, if plaintiffs are required to demonstrate not only the existence of a

general policy of discrimination but also the specific current effects of that policy, in many cases they will face an insuperable burden since the defendants will often be able to suggest other factors that might have encouraged racial separation in the schools. The perpetrators of racial discrimination should not be permitted to stand silent while their victims are required to shoulder so heavy a burden.

Indeed, it is the established rule that the perpetrator of a constitutional wrong must bear the burden of proving that his violation was without, or was of only limited, effect. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, *supra*, 429 U.S. at 270-271 n.21 (proof of racially discriminatory purpose would "have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered"); *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977). The same rule is applied where the cause of action is statutory. See, *e.g.*, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771-773 (1976); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-125 (1969); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). And see generally W. Prosser, *Law of Torts* § 52 (4th ed. 1971).

For example, when a broad-based pattern of racial discrimination in employment is shown, all minority class applicants are presumptively entitled to awards of full retroactive seniority. *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 772-773;

Teamsters v. *United States*, 431 U.S. 324, 358-362 (1977). Proving whether each applicant would have qualified under neutral and valid standards, whether there were other more qualified applicants, and what the applicant's performance on the job would have been if he were hired is necessarily a difficult and uncertain task. This Court has held that the burden of proof on such matters is properly placed on the wrongdoer, not the victims, even though the remedy sought will directly affect the interests and expectations of incumbent employees. *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 772-773 & n.32, 777-778.[23]

Similarly, it will often be impossible to calculate the precise effects of a pervasive pattern of discrimination by school officials. Certainly those effects are not limited to immediately perceptible changes in the racial composition of the specific schools that were the subject of the plaintiffs' proofs. Once a pattern and practice of discrimination by the school board

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[23] The district court in *Dayton* therefore erred in concluding that the plaintiffs in a school desegregation case must carry the burden of proving the effects of official discrimination because the interests of "innocent" children and parents would be affected (see Dayton Pet. App. 146a-147a). Indeed, the interests of the parents and children in these cases are affected far less dramatically than the interests of the incumbent employees in *Franks*, since the relief respondents seek will not deprive any child of an opportunity to attend school, although many children may not attend the school in their own neighborhoods. Moreover, while the expectations of the employees in *Franks* were contractually secured, a school board has no obligation to continue a neighborhood school policy.

has been established, the inference arises that other acts may have been motivated by racial considerations. Cf. *Teamsters* v. *United States*, *supra*, 431 U.S. at 359 & n.45, 362. School officials might have adopted different operating policies—perhaps not even favoring the neighborhood school concept—but for their consideration of the factor of race. And although petitioners contend that the racial separation in the Dayton and Columbus schools is the result of residential patterns, not school segregation, racial residential patterns do not develop wholly independently of the operation of a dual school system. The earmarking of schools by race "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." *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 202. Where it is not possible to separate the effects of the operation of a segregated school system from the other factors that may also have increased racial separation in the schools, "[c]onsiderations of 'fairness' and 'policy' " dictate that this uncertainty should not preclude an effective remedy. See *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 214.[24]

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[24] The Third Circuit recently reached precisely this conclusion in a unanimous en banc decision. In *Evans* v. *Buchanan*, 582 F.2d 750, 765 (3d Cir. 1978), petitions for cert. pending, Nos. 78-671, 78-672, the court upheld an order remedying pervasive inter-district violations, despite the defendants'

The principle that the risk of uncertainty should not be borne by the victims of illegal action is particularly applicable in cases, such as these, where the plaintiffs seek to vindicate rights that are at the core of the Fourteenth Amendment. The victims of purposeful school segregation are entitled to a remedy that eliminates the effects of discrimination "root and branch." A decree acting upon the school system as a whole will plainly achieve that end. A systemwide remedy will not only remove the racial identifiability of the dual system but it will also visibly rectify the stigma of inferiority which is a product of the pervasive violations. If a school board wishes

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contention that it was not possible to identify the precise incremental effects of their segregative conduct:

> We hold that, in a case such as this, where there is an historical pattern of signficant *de jure* segregation with pervasive inter-district effects, where a facially reasonable plan is proposed to remedy those effects, where the defendant itself admits that it is not feasible to separate out the incremental segregative effects of the constitutional violations from the segregative effects of demographic changes, where the defendant itself is in the best position to ascertain what the pattern of segregation would have been "but for" the constitutional violations, and where the defendant has dragged its heels and obstructed progress toward desegregation for twenty-six years, then the burden of proof shifts to the defendant. Thus the *defendant,* if it opposes the remedy put forward by the plaintiff or the district court, must show the incremental segregative effects of the constitutional vioations, and must show how the proposed remedy goes beyond that incremental impact. To hold otherwise would be tantamount to holding that the plaintiffs are without remedy.

to contend that a less inclusive decree would purge all taints of its proven systemwide racial discrimination, it has the burden to propose and justify such a decree.

2. Since the Dayton and Columbus Boards did not establish that a less extensive remedy would cure the effects of their segregative policies, systemwide remedies were appropriate

The court of appeals, following the principles announced in *Keyes* and *Swann*, properly placed the burden on petitioners to show that despite the systemwide nature of their segregative conduct, a systemwide remedy was not required. The appellate court also recognized that the remedy should be designed to cure what this Court in *Dayton I* called the "incremental segregative effect" of discrimination in the schools. As the court of appeals explained (Dayton Pet. App. 214a), "[t]he purpose of the remedy is to eliminate the lingering effects of intentional constitutional violations and to restore plaintiffs to substantially the position they would have occupied in the absence of these violations." [25] The record in each

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[25] Petitioners seize on other portions of the court's discussion that, they urge, misconstrue the phrase "incremental segregative effect" (Dayton Br. 40-41; Columbus Br. 59-60). In the Dayton case, the court stated (Dayton Pet. App. 214a-215a):

> The word "incremental" merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is "incremental" in that it occurs gradually

case supports the court of appeals' conclusion that petitioners failed to show that a remedy that was not systemwide would be effective to eliminate the incremental effects of their segregative policies.

In the Dayton case, the court of appeals, citing *Keyes*, held (Dayton Pet. App. 216a) that "[w]here plaintiffs prove, as here, a systemwide pattern of intentionally segregative actions by the defendants, it is the defendants' burden to overcome the presumption that the current racial composition of the school population reflects the systemwide impact of those violations." "Nowhere in the record," the court found (*ibid.*), had defendants "rebutted this presumption." The court found (Dayton Pet. App. 216a-217a) that "[t]he impact of defendants' practices

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> over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution.

Similarly, in the Columbus case the court stated (Columbus Pet. App. 197):

> It is clear to us that the phrases "incremental segregative effect" and "systemwide impact" employed in the *Dayton* case require that the question of systemwide impact be determined by judging segregative intent and impact as to each isolated practice, or episode. Each such practice or episode inevitably adds its own "increment" to the totality of the impact of segregation.

Although these statements, standing alone, do not clearly define the concept of "incremental segregative effect," the court of appeals evinced a clear understanding that a remedial order should cure only the "incremental segregative effects," that is, it should (Dayton Pet. App. 214a) "restore plaintiffs to substantially the position they would have occupied in the absence of these violations."

with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization clearly was systemwide in that the actions perpetuated and increased public school segregation in Dayton."

In the Columbus case the court of appeals affirmed the district court's findings and its remedial order. The district court found (Columbus Pet. App. 61) that "[d]efendants have not proved that the present admitted racial imbalance in the Columbus Public Schools would have occurred even in the absence of their segregative acts and omissions * * *." [26] After this Court's decision in *Dayton I*, the district court reviewed and reaffirmed this finding, concluding (Columbus Pet. App. 95; citation omitted):

> Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which defendants owe no responsibility. This they did not do.

Accordingly, the district court held (Columbus Pet. App. 75) that if the Columbus Board proposed a plan

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[26] The court rejected petitioners' claim that segregation in housing alone accounted for the segregated condition of the schools. It found (Columbus Pet. App. 58) that "the actions of the school authorities have had a significant impact upon the housing patterns. The interaction of housing and the schools operates to promote segregation in each. It is not now possible to isolate these factors and draw a picture of what Columbus schools or housing would have looked like today without the other's influence."

that would not affect some of the predominantly or exclusively white schools in the district, the Board would have to establish that the racial composition of those schools "is not the result of present or past discriminatory actions or omissions of defendant public officials or their predecessors in office." The court recognized (*ibid.*) the difficulty of the Board's task of "attempt[ing] to roll back the clock at this point and determine what the school system would look like now had the wrongful acts and omissions discussed earlier in this opinion never occurred." The court subsequently rejected the limited remedial plans proposed by petitioners on the ground that petitioners had failed to carry their burden of proving that the racial imbalance in the schools excluded from those plans was not the result of their discriminatory conduct (Columbus Pet. App. 102-103, 105). The court of appeals upheld the district court's findings and affirmed its systemwide remedial order (Columbus Pet. App. 196-200, 207).

The record in each case supports the lower courts' findings. As the district court observed in the Columbus case (Columbus Pet. App. 102), petitioners, because of their interpretation of *Dayton I*, submitted an amended plan that affected only the schools specifically referred to in the district court's liability opinion, and did not make any attempt to "shoulder the burden of showing that the amended plan's remaining one-race schools are not the result of present

or past discriminatory action on their part * * *." [27] The Dayton Board likewise adopted an all or nothing approach on the question of remedy, premised on its contention that no systemwide violation had been established.[28]

Despite the fact that in both cases petitioners' primary argument is that the racial imbalance in the schools resulted from residential patterns, not the segregative policies of the schools, neither Board presented evidence that its practices of racial discrimination did not affect residential patterns.

In contrast, in both cases plaintiffs—although it was not their burden to do so—presented undisputed expert testimony describing the various ways in which a policy of discrimination in schools affects residential decisionmaking (see Dayton R. I 1425, 1447-1450, 1472-1473, 1599-1601, 1605-1606, 1684-1686; Columbus A. 294-296, 341-343, 353-355). This

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[27] The Columbus Board now relies on a law review article (Columbus Br. 77 n.41) to refute the undisputed expert testimony that schools influence residential decisionmaking. This post-trial effort to show what petitioners failed to prove at the trial level should be rejected. Again relying on secondary sources, the Columbus Board argues that economics accounts for up to 50% of residential segregation. However, the undisputed expert testimony is that economics can account for only a small portion of residential segregation (Columbus A. 293-294). See also Farley, *Residential Segregation And Its Implications For School Integration,* 39 Law & Contemp. Prob. 164, 174-177 (1975); K. Taeuber, *Patterns of Negro-White Residential Segregation* (Rand Corp. Jan. 1970).

[28] Respondents' brief in the Dayton case describes the arguments on this point to the court of appeals (Br. 133-135).

evidence showed, for example, that schools that are operated as disproportionately black in racial composition are commonly perceived as inferior schools. Because the quality of schools is an important factor in home-buying decisions, school board action that causes a school to become identified as a black school may well influence residential movement. Also, the very fact that a school board practices racial discrimination exerts a powerful moral influence on the community, affecting community attitudes and conduct.

In sum, the record supports the court of appeals' conclusion that no showing was made that part or all of the racial separation and imbalance in the Dayton or Columbus systems was not attributable to petitioners' discriminatory policies. Petitioners failed to prove their claim that the racial separation in their districts was caused, in whole or substantial part, by residential patterns existing independent of the segregative policies of school officials. Accordingly, the court properly approved systemwide remedies.

3. *The remedial principles of* Keyes *and* Swann, *upon which these decisions rest, should be reaffirmed*

Petitioners seek to impose on the plaintiffs in school desegregation cases the burden of proving, with mathematical certainty,[29] school by school

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[29] *Dayton I* does not suggest that the effects of a systemwide violation must be determined with mathematical certainty. Indeed, the same day that *Dayton I* was decided, this

throughout a district, the precise degree to which a school board's widespread racially discriminatory conduct affected the racial composition of the student body. A similar approach was rejected in *Keyes*, where this Court explained (413 U.S. at 200, 208-209):

> We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system.
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> * * * * *
>
> [A]t that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only "isolated and individual" unlawfully segregated actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by the segregative intent.

Much of petitioners' argument constitutes an attack on the remedial principles of *Keyes* and *Swann*, which, they contend, are inconsistent with

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Court approved a remedy for systemwide discrimination providing compensatory education for minority students, even though it was impossible to determine the level of educational achievement those students would have attained absent the school board's discrimination. *Milliken* v. *Bradley*, 433 U.S. 267 (1977). See also *Hutto* v. *Finney*, 437 U.S. 678 (1978).

Dayton I. As we have shown, the remedial principles announced in those cases are fully consistent with *Dayton I.* Moreover, those principles are, as this Court stated in *Keyes* (413 U.S. at 209), grounded on considerations of "'fairness' and 'policy,'" and designed to provide a practical and effective means of eliminating longstanding and pervasive segregation of the public schools in violation of the Fourteenth Amendment. Petitioners have suggested no justification for overruling these decisions, which have been "considered maturely and recently" (*Runyon* v. *McCrary*, 427 U.S. 160, 186 (1976) (Powell, J., concurring)), and are both sound and consistent with generally applicable remedial principles.

There is an additional compelling reason for adhering to those principles. Based upon a review of the reported decisions and Department of Justice files, we have determined that approximately 200 school districts with a combined enrollment of more than 5 million students are presently operating under court ordered desegregation plans that are premised in whole or in part on the remedial principles of *Swann* and *Keyes.* In addition, the Department of Health, Education, and Welfare has advised us that it has obtained desegregation plans from more than 200 additional school districts based on the *Swann* and *Keyes* decisions. Overruling or limiting *Swann* and *Keyes* would call into question the validity of every one of these plans. The potential for disrupting settled expectations is enormous.

Since the court of appeals correctly, applied the principles announced in this Court's prior decisions, its judgments should be affirmed.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is disqualified in these cases.