IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

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

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

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Petitioners are the Columbus Board of Education, five of its seven individual members, Paul Langdon, M. Steven Boley, Virginia Prentice, Marilyn Redden and William Moss, and Dr. Joseph L. Davis, Superintendent of the Columbus Public Schools. They pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 14, 1978.

Adverse respondents are individual plaintiffs and a plaintiff class consisting of all children attending Columbus Public Schools, together with their parents and guardians.[1]

OPINIONS BELOW

The July 14, 1978 opinion of the Court of Appeals is not yet reported and is reproduced in the Appendix at pages 140-207. The March 8, 1977 liability opinion and order of the United States District Court for the Southern District of Ohio is reported at 429 F. Supp. 229, and is reproduced in the Appendix at pages 1-86. The July 29, 1977 order of the district court concerning desegregation plan guidelines and rejecting desegregation plans submitted by Petitioners, is not reported and is reproduced in the Appendix at pages 97-124. The district court's October 4, 1977 Memorandum and Order ordering implementation of a systemwide desegragation plan is not reported, and is reproduced in the Appendix at pages 125-137.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 14, 1978, and this petition for a writ of certiorari will be filed within 90 days of the entry of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In a school desegregation case, where mandatory segregation by law has long since ceased, does the imposi-

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[1] Additional respondents are the Ohio State Board of Education and Franklin B. Walter, the Ohio Superintendent of Public Instruction (State Defendants), and Harriet L. Hammersmith, William K. Hammersmith, and Robert E. Hammersmith (Intervening Defendants).

tion of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceed the equitable jurisdiction of a federal court where the court has failed to determine how much incremental segregative effect discrete and isolated segregative acts had on the racial composition of the individual schools within the system at the time of trial as compared to what the racial composition would have been in the absence of such acts?

2. May a federal court employ legal presumptions, in combination with evidence of discrete and isolated constitutional violations, to justify a systemwide statistical racial balance remedy where (i) there is no evidence of a causal connection between those unconstitutional actions and the existence of other racially imbalanced schools, (ii) there is a high degree of residential segregation, and (iii) the systemwide remedy would not be warranted by the incremental segregative effect of the identified violations?

3. May a federal court infer segregative intent from the mere assignment of students to schools nearest their homes pursuant to a longstanding, statutorily required and educationally sound neighborhood school policy where the foreseeable effect of such assignment, because of segregated housing patterns in the urban school district, is to cause some schools to be racially imbalanced?

4. Where there was no direct proof that segregation of students was a factor which motivated the decision of school officials, may a federal court infer segregative intent solely from evidence that a collateral foreseeable effect of the decision made would be to continue or increase statistical racial imbalance within schools when the same decision would have been made for educational and administrative reasons?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Fourteenth Amendment to the United States Constitution, Section 1.

> " . . . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the laws."

B. Ohio Revised Code, Chapter 33:

§ 3313.48 Free Education to be Provided; Minimum School Year

> "The board of education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof."

STATEMENT OF THE CASE

A. Introduction

The decisions of the courts below cannot be properly understood without an appreciation of some basic characteristics of the Columbus public school system at the time this case was tried.

For the 1975-76 school year, the Columbus City School District had a total enrollment of 95,998 students, making it the second largest school district in Ohio. The student enrollment in that year was 67.5% white and 32.5% non-white.

The boundaries of the school district are generally coterminous with the boundaries of the City of Columbus. The City and the school system experienced a unique and tremendous growth from 1950 to the time of trial. The

population of Columbus increased by 22.8% in the 1950's and by an additional 25.4% in the 1960's, while the geographic area increased from 40 square miles in 1950 to over 173 square miles in 1975 as a result of its aggressive annexation policy. School enrollment more than doubled during this period, and 103 new schools were built.

There was also a dramatic increase in the number and percentage of black residents in Columbus during this period. The number of black residents almost tripled from 1940 to 1970, and the percentage of black residents increased from 11.7% to 18.5% in that period. At the same time, the black student population of the Columbus schools increased at an even faster rate, and by 1970 over 29% of the student enrollment was black.

As in many large cities in the United States, the black residential population in Columbus is concentrated in a geographically contiguous area. In 1970, 71% of all blacks resided within just 23 contiguous census tracts located in the east central area of Columbus. This concentration is reflected in the racial composition of enrollments in the neighborhood schools serving that area.

In Ohio, statutory segregation of school children ceased long ago. In 1887, the Ohio General Assembly repealed a law which had permitted separate schools for black children. Prior to that time, in 1881, the Columbus Board had abolished separate schools for black children, and assigned all students to attend schools in districts where they resided. Thus, the Columbus Board of Education's neighborhood school policy has been in continuous force since before 1900 and before any meaningful residential racial segregation in Columbus.

Adherence to a neighborhood school policy in a city which exhibits patterns of residential segregation necessarily results in some schools which are not racially balanced, and Columbus is no different in this respect.

However, despite the concentration of blacks and general residential segregation, the Columbus schools are substantially more integrated than the residential population of Columbus. This is due in large part to the Columbus Board's promotion of integration in a manner consistent with the neighborhood school policy.

B. Procedural History

This action commenced on June 21, 1973, upon the filing of a complaint seeking declaratory and injunctive relief concerning an $89.5 million school construction and improvement program. The plaintiffs, 14 black and white students and their parents, alleged that the Columbus Board of Education, its individual members, and its Superintendent (hereinafter collectively referred to as the "Columbus Board") had, by virtue of the United States Constitution and certain Board resolutions, a legal obligation of affirmative integrative action in the expenditure of the construction funds. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331(a) and 1343(3) and (4). After the plaintiffs had withdrawn their motion for a preliminary injunction and filed one amended complaint, a second amended complaint was filed on October 22, 1974. The second amended complaint was styled a class action, and it alleged that the Columbus Board had intentionally segregated the public schools by creating and maintaining a neighborhood school policy notwithstanding a segregated housing pattern in the city, by using optional attendance areas, by segregating teachers and principals, and by failing to desegregate. The second amended complaint also named the Ohio State Board of Education and its Superintendent of Public Instruction, and it alleged that they were liable for failing to bring about the desegregation of the Columbus public schools. The plaintiffs sought an order requiring desegregation of the schools.

A motion to intervene was filed by NAACP lawyers on February 5, 1975, on behalf of 11 other black and white students and their parents. The complaint in intervention contained essentially the same allegations as the second amended complaint and sought the systemwide desegregation of the Columbus public schools. The district court granted the motion to intervene, certified the case as a class action, and designated one of the NAACP lawyers as lead counsel for the entire plaintiff class.

The case was tried in 36 trial days from April 19 to June 17, 1976. On March 8, 1977, the district court issued its Opinion and Order, including findings of fact and conclusions of law, which found that the Columbus public schools were unconstitutionally segregated "as a whole." The court enjoined the Columbus Board and the State Board from discriminating on the basis of race in the operation of the Columbus system, and ordered both defendants to formulate and submit desegregation plans.

In accordance with the district court's order, the Columbus Board of Education formulated and submitted a desegregation plan on June 10, 1977, reserving all rights to appeal. The State Board filed its plan on June 14, 1977. Shortly thereafter, this Court announced its decisions in three major urban school desegregation cases: *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (June 27, 1977); *Brennan v. Armstrong,* 433 U.S. 672 (June 29, 1977); and *School District of Omaha v. United States,* 433 U.S. 667 (June 29, 1977). In all three cases, lower court decisions finding systemwide violations and ordering systemwide remedies were vacated and remanded with the direction to determine the incremental segregative effect of any unconstitutional school board actions and to formulate remedies limited to the correction of that effect. Prompted by these decisions, the Columbus Board, on July 8, 1977, filed an amended desegregation plan designed to racially balance the specific schools identified

in the Court's liability decision as being involved in the constitutional violations found.[2] Hearings on all of the plans submitted by the defendants began on July 11, 1977. At the start of the remedy hearings, both the Columbus and State Boards moved the district court to make the determination of incremental segregative effect required by this Court's decisions in *Dayton, Brennan* and *Omaha,* before it proceeded to fashion a remedy. The court denied these motions.

On July 29, 1977, the district court issued its order rejecting the desegregation plans formulated by the Columbus Board and the State Board and ordered development of a new systemwide racial balance remedy plan. [A. 97.] On August 31, 1977, the Columbus Board filed a desegregation plan which conformed to the requirements of the district court's July 29 Order that every school in the Columbus system be racially balanced.[3] On October 4, 1977, the district court entered a Memorandum and Order approving the August 31 Plan and ordering that it be implemented in September, 1978. [A. 125.]

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[2] The district court entered a Memorandum and Order July 7, 1977, granting leave to file the amended plan. [A. 90.] Although it permitted the plan to be filed, the district court stated its opinion that this Court's decisions in *Dayton, Brennan* and *Omaha* had no effect on this litigation, and that "systemwide liability is the law of this case pending review by the appellate courts." [A. 95.]

[3] Although the Board developed and submitted the plan in accordance with the court's remedy directives, the Board in no way approved of the racial-balancing provisions of the plan and reserved its right to appeal all orders requiring implementation of the plan or any part of it. The Board has persistently contended that a systemwide racial balance remedy is not constitutionally required in this case. The Columbus Board believed, however, that if any such plan was to be ordered, its staff had the ability and expertise to design the most reasonable plan for the Columbus school system.

The Columbus Board of Education took interlocutory appeals under 28 U.S.C. §1292(b) from the March 8, 1977 liability order and from the July 29, 1977 interim remedy order. Both orders were certified for interlocutory appeal by the district court on its own motion, and the Sixth Circuit granted the Board's petitions for permission to appeal. The Board also appealed the October 4 remedy order. The appeals were consolidated in the Court of Appeals and argued on February 15, 1978.

On July 14, 1978, the court of appeals affirmed the district court's orders and judgments with respect to the Columbus Board, but remanded the case for additional findings concerning the liability of the State Board. [A. 140.] A Judgment to that effect was entered on July 14, 1978. [A. 208.] On July 31, 1978, the Court of Appeals denied the Columbus Board's application for a stay of its mandate and judgment pending the filing of a petition for a writ of certiorari.

On August 11, 1978, Mr. Justice Rehnquist stayed the mandate and execution and enforcement of the judgment of the Court of Appeals pending the timely filing of a petition for a writ of certiorari. [A. 217.] The stay of the lower court's judgment remains in effect pending disposition of this petition.

C. The District Court's Decisions

The district court's liability findings, issued March 8, 1977, were predicated upon a finding that the Columbus Board was responsible for the creation of five predominantly black schools in the east area of the school district prior to 1943. Although the court conceded that there was "substantial racial mixing of both students and faculty in some schools," it found that as a result of the existence of the five schools there was not a "unitary school system" when this Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). [A. 10-11.] The court then reviewed

the actions of the Columbus Board in the 20 years intervening between *Brown* and the filing of the second amended complaint.

The district court first found that enrollments in the Columbus system had increased rapidly since 1950. Enrollment grew from 46,352 in 1950-51 to 110,725 in 1971, then declined to 95,998 in 1975-76.[4] This "rapid growth demanded new school facilities and placed pressures upon the school officials seeking to provide quality school facilities for the expanding enrollments in a continually enlarging geographical area." [A. 12.] The Columbus Board responded by building 103 new schools between 1950 and 1975. These schools were built in "substantial conformity" with the specific recommendations contained in the "comprehensive, scientific and objective" analyses of the Columbus school plant needs performed by the Bureau of Educational Research of The Ohio State University. [A. 13-14.] The six research reports prepared by the Bureau were based upon the neighborhood school concept and made specific recommendations for the "size and location of new school sites as well as additions to existing sites." [A. 14.] Although the court found that the Columbus Board had substantially followed these objective recommendations and had considered all of the many relevant school siting factors, it nevertheless found it necessary "to consider those foreseeable effects of the construction practice which promote or preserve a segregated school system." [A. 21.]

The court found that the Columbus Board had, in accordance with its neighborhood school policy, built schools "in locations where the expanding and growing population demanded additional facilities." [A. 21.] Of the 103 new schools opened between 1950 and 1975, however, 87 opened with a "racially identifiable student

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[4] During the 1950's, enrollment increased at a rate of 3,700 each year. In the 1960's, the rate of increase was 2,700 each year. Thus, about 100 new classrooms were needed each year.

body," that is, a student racial composition greater than a certain statistical range from the systemwide mean. [A. 21, 78.] Although it purported to recognize that "given segregated residential patterns, not all schools can be built in an integrated setting," the court nevertheless made a generalized finding that "in some instances the need for school facilities could have been met in a manner having an integrative effect rather than a segregative effect." [A. 24-25.] Only two instances of new school siting, however, were condemned by the court. [A. 21-24.] Nevertheless, the district court inferred segregative intent from the mere continuance of the neighborhood school construction policy with knowledge of segregated housing patterns and the foreseeable racial effects of such actions. [A. 48-49.]

The district court found some other isolated, discrete actions after 1954 from which it also inferred segregative intent. These included the use of three optional zones, three boundary changes, and the use of two discontiguous attendance areas. [A. 26-42.] These discrete actions were among the hundreds of post-1954 actions challenged by the plaintiffs as intentionally segregative. Finally, although teacher assignments had been racially imbalanced in the past, the Board's implementation of a state civil rights consent agreement had racially balanced all teaching faculties by the time the second amended complaint was filed. [A. 15-16.]

The district court also inferred segregative intent from the failure to take action "to correct and to prevent the increase in racial imbalance." [A. 50-51.] Although the Columbus Board's recent efforts to promote integration through voluntary methods were "highly commendable," they fell short of providing the degree of racial balance the lower court found to be constitutionally required. [A. 59-60.]

The district court determined there was systemwide liability, stating that the "finding of liability in this case

concerns the Columbus school district as a whole." [A. 73.] In so finding, however, the court did not attempt to compare the present racial composition of the schools with what it would have been in the absence of the specific constitutional violations found in its opinion. In fact, that comparison was found to be unnecessary and impossible by the trial judge. [A. 58.] The Columbus and State Boards were ordered to formulate and submit systemwide desegregation plans. The court directed the defendants to prepare plans which would give each black child "an opportunity for integrated education" and cautioned the defendants about leaving any "racially imbalanced, predominantly white schools" under the plans. [A. 75.]

Three plans were formulated and submitted to the district court pursuant to its March 8 order. On July 29, 1977, the district court rejected all three plans and ordered development of a new plan to comply with five specific "principles" for pupil reassignment. [A. 97.] The district court found the July 8 amended plan constitutionally unacceptable, stating that it "falls far short of providing a reasonable means of remedying the systemwide ills." [A. 100.] The June 10 plan was also found to be constitutionally unacceptable. The State Board's plan was found to be constitutionally acceptable, but was rejected for its educational and logistical shortcomings. [A. 106.] Finally, the Court specifically approved the "numerical face" of the results of an early planning exercise by the Columbus Board's staff which developed school pairings which would result in a racial balance within ± 15% of the 32.5% mean black student population in each of the system's school buildings. [A. 107.]

The July 29 decision concluded by ordering that a new plan be developed which would desegregate "the entire Columbus school system." [A. 111.] A new plan was formulated in accordance with the court guidelines and was filed on August 31, 1977. On October 4 the district court

ordered the plan's implementation in September 1978. [A. 125.] The desegregation remedy ordered by the court requires that every school in the system be racially balanced to within ± 15% of the system's overall racial composition. Implementation of the remedy will involve the reassignment of over 42,000 children from the neighborhood schools which they currently attend to schools in different geographic areas of the city. These reassignments will involve extensive cross-town transportation of over 37,000 students on 213 buses. In order to accomplish this transportation with available equipment, six different school starting times must be scheduled so that each bus can make an average of three trips each morning and afternoon. The pairing and clustering of elementary schools under the plan requires the alteration of grade structures in nearly every elementary school.

D. The Court of Appeals' Decision

The Court of Appeals affirmed the liability and remedy judgments against the Columbus Board. [A.140.] Referring to the trial court's discussion of the Columbus schools prior to 1954, the court of appeals concluded that a "dual school system" existed as of 1954, and that "under these circumstances, the Columbus Board of Education has been under a constitutional duty to desegregate its schools for 24 years." [A. 160.] With that finding as its predicate, the court of appeals took the view that any action taken by the Board after 1954 which did not eradicate all racial imbalance was unconstitutional. The appellate court held:

> "[T]he District Judge on review of pre-1954 history found that the Columbus schools were de jure segregated in 1954 and, hence, the Board had a continuing constitutional duty to desegregate the Columbus schools. The pupil reassignment figures for 1975-76 demonstrate the District Judge's conclusion that this burden has not been carried. On this basis alone (if

there were no other proofs), we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation." [A. 165.]

With respect to the post-1954 actions, the Sixth Circuit, quoting extensively from the lower court's findings on liability, agreed with the analysis and conclusions of the district court. The appellate decision added that the gross data alone, showing that 87 of the 103 new schools opened as "racially identifiable" schools and that 71 of the 87 were still racially identifiable at the time of trial, "requires a very strong inference of intentional segregation." [A. 173.] The court of appeals stated that these "repeated instances" of constructing neighborhood schools which were "racially identifiable" was the equivalent of choosing segregative sites and justified a finding of "unconstitutional systemwide segregation." [A. 173.] The other acts indentified in the trial court's decision as unconstitutional (boundary changes, optional areas, discontiguous areas) were characterized as "isolated in the sense that they do not form any systemwide pattern" of segregation. [A. 175.]

The court of appeals found that the district court had correctly imposed a systemwide remedy even in the absence of any attempt to determine incremental segregative effect in the manner directed in *Dayton*. [A. 197.] Instead, the court of appeals was of the opinion that legal presumptions could be used to justify a systemwide statistical racial balance remedy even though the specific constitutional violations cited by the district court were isolated in nature.

REASONS FOR GRANTING THE WRIT

This school desegregation case presents important questions pertaining to the proper legal standards which must be adhered to by federal courts in the determination of constitutional violations and in the fashioning of equit-

able remedial decrees. If the lower courts' interpretation of these legal principles is permitted to stand, any large urban school district in a city with segregated housing patterns may be presumed to be in violation of the equal protection clause and under a constitutional duty to achieve racial balance in each school in the system. The uncontrolled use of legal presumptions in these cases leads inevitably to the imposition of systemwide racial balance remedies because the use of such presumptions has the effect of turning the constitutional prohibition against racially discriminatory action into an affirmative duty to racially balance all schools.

The opinions of the courts below illustrate the need for explicit guidelines from this Court to limit school desegregation remedial orders to the correction of segregation caused by school officials and not that caused by others. The lower federal courts must be instructed that in making the transition from the liability stage to the remedy stage of school desegregation cases, they are not to forsake fact-finding, supported by a reasoned statement of legal principles, in favor of what they may find more fair or socially desirable. However well-intentioned, federal courts have no general jurisdiction in these cases to restructure public education. Under the aegis of constitutional authority and with the improper use of presumptions, the federal courts are doing just that. Large urban school districts are being forced to restructure their entire school systems, to transport students away from their nearby neighborhood schools, and to spend large amounts of scarce resources to implement ambitious racial balance remedies.[5] This is seen as wasteful by taxpayers, undesirable and threaten-

[5] In Ohio, many school districts do not even have sufficient resources to continue operations for the remainder of the current school year. The Columbus system now projects an $8.8 million deficit for 1978, and that it will be forced to close schools by mid-November unless emergency state loans are made available.

ing by parents whose children are forced to participate in these massive relocations, and counterproductive by many educators. This Court should issue a writ of certiorari to correct the substantial legal errors committed by the courts below, and to set forth explicit standards confining the fashioning of equitable remedial decrees to the correction of the demonstrated effects of specific unconstitutional conduct on the part of school officials.

I. THE DECISIONS BELOW ARE IN CONFLICT WITH AND MISAPPLY DECISIONS OF THIS COURT IN FINDING THAT LIABILITY CONCERNS THE SYSTEM AS A WHOLE AND IN IMPOSING A SYSTEMWIDE RACIAL BALANCE REMEDY WITHOUT FIRST DETERMINING INCREMENTAL SEGREGATIVE EFFECT

A. In Failing to Determine Incremental Segregative Effect, the Decisions Below Conflict With the Decisions of this Court in *Dayton, Brennan* and *Omaha*

The courts below violated the dictates of this Court's decisions in *Dayton, Brennan* and *Omaha* by failing to determine the current incremental segregative effect of the remote and isolated constitutional violations found by the district court, and by failing to tailor a remedy confined to the correction of that effect. Both courts approved the imposition of a systemwide statistical racial balance remedy which goes far beyond the correction of any possible current effect of the limited violations which were found.

Neither the district court, nor the court of appeals, conducted the inquiry which this Court mandated in *Dayton*.

> "The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has

> long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, *must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.* The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there by a systemwide remedy."
> *Dayton Board of Education v. Brinkman,* 433 U.S. at 420. (Emphasis added.)

The lower courts refused to make this mandatory comparison of present racial distribution with the racial distribution that would exist but for the constitutional violations.

An examination of the district court's March 8, 1977 opinion discloses that the court absolutely failed to make any factual inquiry into the incremental segregative effect of constitutional violations found, but rather premised its findings of systemwide liability on a *presumption* that the violations would have a systemwide impact. No attempt was made to find that portion of segregation in the schools which was caused by the defendant school officials as opposed to that portion caused by segregated housing patterns attributable to economics, choice, and discrimination by non-parties in the housing market. Indeed, the trial court specifically found that it was *not* required to make such a comparison:

> "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 would have looked like today with-

> out the other's influence. I do not believe such an attempt is required." [A. 58.]

The district court did find, however, that no "reasonable action by the school authorities could have fully cured the evils of residential segregation." [A. 58.] More importantly, it found and concluded that

> "It is plainly the case in Columbus that had school officials never engaged in a single segregative act or omission, the system-wide percentage of black students would nevertheless not be accurately reflected in each and every school in the district." [A. 74.]

Notwithstanding these findings and its refusal to determine incremental segregative effect, the district court, relying on legal presumptions, found that liability "concerns the Columbus district as a whole" and imposed a systemwide remedy. [A. 73.] This generalized approach, devoid of fact-finding on incremental effect, was affirmed by the court of appeals.

The district court was required to make the specific factual inquiry mandated by *Dayton,* and thereby to sort out that portion of any current racial segregation caused by school officials from that caused by others. Although perhaps a "difficult task, . . . nonetheless, that is what the Constitution and our cases call for." *Dayton,* 433 U.S. at 420. The district court's finding that not all schools in Columbus would be racially balanced even in the absence of any segregative actions by school officials is inconsistent with its imposition of a systemwide remedy. Since the plaintiffs failed to prove, and the court was unable to find, any current condition of segregation resulting from such actions, no remedy was constitutionally permissible under *Dayton, Brennan* and *Omaha.*

The conflict between this Court's decisions and those of the lower courts is further illustrated by the district court's comments concerning the application of *Dayton,*

Brennan and *Omaha* to this case. In its July 7, 1977 order permitting the Board to leave to file an amended desegregation plan, the court stated:

> "In my view, the hope that the Dayton case would provide new and clear instructions for trial courts has not been realized. I do not view these principles as any different from those under which the litigants were operating when this case was tried." [A. 93.]

The court's attempt in that order to distinguish *Dayton* on the premise that a determination of incremental segregative effect was only required in cases of "isolated" violations, and not where there was a finding of "systemwide liability," was in direct conflict with *Brennan* and *Omaha*. In both of those cases, the lower courts had found systemwide liability and had ordered systemwide remedies. Nevertheless, this Court vacated those decisions and remanded the cases with instructions to make the mandatory inquiry into incremental segregative effect.[6] Thus, the district

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[6] In *Omaha*, the district court had ordered a systemwide desegregation plan in conformity with an earlier decision by the Eighth Circuit, 521 F.2d 530 (8th Cir. 1975), finding extensive constitutional violations which created systemwide liability. 418 F. Supp. 22 (D. Neb. 1976). The plan was affirmed by the court of appeals. 541 F.2d 708 (8th Cir. 1976). Despite the unambiguous finding of the courts below that the violation was "systemwide," this Court vacated the judgments and directed the courts below to conduct the *Dayton* inquiry. 433 U.S. 667.

In *Brennan*, the district court found intentional segregation in the "entire" Milwaukee school system and that Milwaukee officials had operated a "dual" system. *Amos v. Board of Directors*, 408 F. Supp. 765, 821 (E.D. Wis. 1976). The Seventh Circuit affirmed the finding of systemwide liability. *Armstrong v. Brennan*, 539 F. 2d 625 (7th Cir. 1976). Thereafter, the district court ordered implementation of a systemwide desegregation plan. *Armstrong v. O'Connell*, 427 F. Supp. 1377 (E.D. Wis. 1977). Despite the finding of systemwide violations, this Court vacated and remanded the liability judgments with the direction that the mandatory *Dayton* inquiry be made. 433 U.S. 672.

court's attempt to confine the rule of *Dayton* to the facts of that case was clearly improper. Under *Omaha* and *Brennan,* the district court's finding that "systemwide liability is the law of this case" did not excuse it from making the inquiry into incremental segregative effect. Nor does the court of appeals' single cryptic footnote dismissing the applicability of *Omaha* and *Brennan* justify or explain its refusal to require such an inquiry. [A. 200.]

In his August 11, 1978 decision granting the Columbus Board's stay application, Mr. Justice Rehnquist, after reviewing the decisions below and the July 27, 1978 decision of the Sixth Circuit in the Dayton school desegregation case [A. 219.], stated that these decisions "clearly indicate to me that the Sixth Circuit has misinterpreted the mandate of this Court's *Dayton* opinion." [A. 213.][7] The Sixth Circuit's approach in the Columbus case "evinced an unduly grudging application of *Dayton.*" [A. 213.] Mr. Justice Rehnquest further concluded that in these cases the Sixth Circuit Court of Appeals had

> "employed legal presumptions of intent to extrapolate systemwide violations from what was described in the Columbus case as "isolated" instances. *Penick v. Columbus Board of Education, supra,* slip op. at 36 (July 14, 1978). The Sixth Circuit 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. 213-214.]

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[7] In *Dayton,* this Court remanded the case directly to the district court for further proceedings. On remand, the district court conducted evidentiary hearings, and on December 15, 1977 rendered a decision dismissing the plaintiffs' complaint. The Sixth Circuit reversed all the findings of fact made by the District Judge as "clearly erroneous," and held that he "misunderstood" this Court's mandate on remand. The court of appeals reinstituted the systemwide racial balance remedy. *Brinkman v. Gilligan,* Case No. 78-3060 (6th Cir. July 27, 1978). [A. 219.]

Mr. Justice Rehnquist therefore found the Sixth Circuit's view inconsistent with *Dayton* and worthy of review on certiorari:

> "That is certainly not my reading of *Dayton* and appears inconsistent with this Court's decision to vacate and remand the Sixth Circuit's opinion in *Dayton III*. In my opinion, this questionable use of legal presumptions, combined with the fact that the Dayton and Columbus cases involve transportation of over 52,000 school children, would lead four Justices of this Court to vote to grant certiorari in at least one case and hold the other in abeyance until disposition of the first." [A. 214.]

We respectfully submit that Mr. Justice Rehnquist's assessment of the proceedings below is correct, and that the Court should therefore grant certiorari in this case.

B. There Must Be Factual Findings and Conclusions of Law on Incremental Segregative Effect Before a Remedy Can Be Fashioned

Dayton, Brennan and *Omaha* require that findings of incremental segregative effect be entered *before* a remedy is fashioned. In the present case, there was no evidentiary support or findings upon which the court of appeals, in July, 1978, could make a finding of incremental segregative effect. Instead, it resorted to the use of a legal presumption to find that "school board policies of systemwide application necessarily have systemwide impact." [A. 198.] This after-the-fact attempt to supply some "findings" to support the lower court's October 4 systemwide remedy order was improper.

Petitioners respectfully submit that the Sixth Circuit's purported effort at making a determination of incremental segregative effect from the record which was before it was, in fact, a rather transparent attempt to avoid the clear conflict of the trial court's systemwide liability and remedy judgments with the decisions of this Court in *Dayton,*

Brennan and *Omaha*.[8] Although the court of appeals purported to apply *Dayton* to this record, the opinion discloses no attempt to make the required inquiry into "the racial distribution of the [Columbus] school population as presently constituted" as "compared to what it would have been" in the absence of the school board actions which the district court found to be constitutional violations. *Dayton*, 433 U.S. at 420. In fact, it would have been impossible for the court to make that comparison on the basis of the record before it. The trial court's only relevant finding on this issue was that even in the absence of any segregative acts, "the systemwide percentage of black students would nevertheless not be accurately reflected in each and every school in the district." [A. 74.] Yet, such racial balance is precisely what the systemwide remedy approved by the court of appeals requires.

Petitioners do not lightly suggest that the Sixth Circuit is disregarding the recent decisions of this Court. However, its decision in this case, especially when read in conjunction with its July 27, 1978 ruling in the Dayton school desegregation case, demonstrates that the Sixth Circuit has adopted an approach to the adjudication of school desegregation cases which conflicts with *Dayton*, *Brennan* and *Omaha*.

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[8] The appellate court's attempt to make the necessary "complex factual determination" (*Dayton* at 420) was clearly outside the proper scope of appellate review. If it felt that the trial court failed to make adequate findings under Rule 52, Fed. R. Civ. P., it should not have attempted to make these findings itself, but should have reversed, or vacated the judgment and remanded the case for additional findings by the trial court. *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940); 5A Moore, *Federal Practice*, ¶¶ 52.06[2], 52.11[4]; 9 Wright & Miller, *Federal Practice and Procedure: Civil*, § 2577 (1971). Civil rights cases do not present an exception to this general rule. *See, e.g., Echols v. Sullivan*, 521 F.2d 206 (5th Cir. 1975); *Davis v. Board of School Commissioners*, 422 F.2d 1139 (5th Cir. 1970).

C. The Lower Courts Presumed a Causal Connection Between Remote and Isolated Acts and the Current Racial Imbalance in the School System

Where there is no history of statutorily mandated segregation, it is incumbent upon the plaintiffs to adduce proof of causal connection between racially imbalanced schools and intentionally discriminatory actions by school officials:

> "[I]n the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action."
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> *Keyes v. School District No. 1,* 413 U.S. 189, 198 (1973).

This requirement was reaffirmed and elaborated upon in *Dayton,* which defined the causation standard in terms of the demonstrated current incremental segregative effect of intentionally discriminatory action. Lower federal courts are required to make findings, supported by factual proof, of a causal relationship between alleged discriminatory acts and the racial composition of schools, and to specifically quantify that effect. Despite this, the courts below substituted legal presumptions for a detailed factual inquiry into cause and effect, thus permitting the imposition of a systemwide remedy in the absence of factual proof of a systemwide effect.

The lower courts' abandonment of the causation requirement is most apparent from the trial court's liability opinion. First, the district court based its liability findings to a great extent upon actions by predecessor boards of education dating back to 1871, which the court found to have created, by 1943, an "enclave" of five predominantly black schools on the near east side of the city. Even if it is assumed that these acts were intentionally discriminatory, however, there was no attempt by the plaintiffs to prove,

or the district court to find, a causal connection between these acts and the current existence of racially imbalanced schools. Instead, relying on a "fruit of the poisonous tree" theory, the court concluded that these acts were responsible for or tainted the contemporary school system. It was just such a theory which this Court rejected in *Dayton.* 433 U.S. at 417. Second, while the court identified the immediate impact on the racial composition of schools involved in the isolated post-1954 violations, it again made no effort to determine whether these effects continued to the date of trial. Finally, although the trial court acknowledged that a "myriad" of other factors were responsible for residential racial imbalance, it found it was not required to attempt to separate their effects from those attributable to actions by school officials. [A. 58.][9]

Consequently, it is apparent that the courts below abandoned the requirement set forth in *Keyes* and *Dayton,* that plaintiffs must prove a cause and effect relationship between acts found to be intentionally discriminatory and a current condition of racially imbalanced schools. In substitution therefor, the lower courts employed legal pre-

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[9] In fact, the record contained ample evidence of intervening events and circumstances which were acknowledged as the cause of the residential racial imbalance in Columbus, the principal cause of racially imbalanced schools. These factors included demographic trends, economics, personal choice, and discrimination by non-parties. Within the category of discrimination by non-parties were: (1) racially motivated site selection and assignment policies of public housing authorities; (2) racially motivated site selection, financing, sale and rental policies of FHA and VA; (3) racially motivated site selection, relocation and redevelopment policies of urban renewal programs; (4) zoning and annexation policies; (5) restrictive covenants; (6) policies of financial institutions that discourage prospective developers of racially integrated private housing; (7) policies of financial institutions that allocate mortgage funds and rehabilitation loans to blacks only if they live in black areas; (8) practices of the real estate industry such as limiting the access of black brokers to realty

sumptions to arrive at a judgment of systemwide liability and systemwide remedy. This Court should grant certiorari to review this departure from its decisions.

D. The Statistical Racial Balance Remedy is in Conflict with *Swann*

This Court has consistently disapproved of any desegregation plan which requires statistical racial balance in every school. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-24 (1971); *Milliken v. Bradley*, 418 U.S. 717, 740-741 (1974); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976). In *Dayton*, the Court reaffirmed its consistent position that the Constitution does not command that schools be racially balanced. 433 U.S. at 417.

Although careful not to say so explicitly, the district court's July 29 order required development of a systemwide desegregation plan which would racially balance the enrollment of all schools in the system to within ± 15% of the systemwide black student enrollment, thus eliminating all "racially identifiable" schools in the system

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associations and multiple-listing services, refusal by white realtors to co-broker on transactions that would foster racial integration, block-busting and panic selling, racially identifying vacancies overtly or by nominal codes, steering, and penalizing brokers who attempt to facilitate racial integration; and (9) racially discriminatory practices by individual homeowners and landlords.

In view of the district court's findings concerning the impact of residential racial imbalance on the racial composition of schools, it is apparent that the courts below sought to use the vehicle of this litigation to correct the effects of residential segregation, discrimination by non-parties, and socio-economic stratification. While such an objective may be laudable as a matter of social policy, it is clearly beyond the scope of a federal court's remedial jurisdiction in this type of case. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-23 (1971).

under the court's definition.[10] [A. 97.] The plan ultimately ordered by the court accomplishes that objective. [A. 125.] Although the Columbus Board strenously objected to the requirement that each school be racially balanced within a ± 15% range or target, these objections were not addressed by the court of appeals. The Court should review this case to make it clear that such use of statistical racial ratios is not constitutionally permissible under *Swann*.

II. THE DECISIONS BELOW CONFLICT WITH AND MISAPPLY DECISIONS OF THIS COURT AND HIGHLIGHT A CONFLICT AMONG THE CIRCUITS CONCERNING THE MANNER IN WHICH DISCRIMINATORY INTENT OR PURPOSE MAY BE PROVEN

The lower courts adopted a legal rule which effectively dilutes the requirement of proof of invidious discrimination as an element of a violation of the equal protection clause. By drawing an inference of segregative

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[10] The district court adopted the following definition of racially identifiable schools:

> "The concept of racial identifiability or unidentifiability is used to describe 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 actual (or estimated) system-wide percentage of black pupils. Schools which have a percentage of black pupils within this range are racially unidentifiable, or balanced. Schools which have a black population in excess of this range are racially identifiable, or imbalanced, black schools. Schools having a black population less than the range are racially identifiable, or imbalanced, white schools."
> [A. 78.]

The "range" adopted by the court was ± 15% from the 32.5% black student enrollment in the system. Thus, under the court's approach, a school is racially balanced only if it has a black enrollment of between 17.5% and 47.5%.

intent from the mere continuance of a neighborhood school system and the construction of new schools in racially imbalanced neighborhoods, the lower courts misapplied decisions of this Court. Under the lower courts' opinions, any school system which employs a neighborhood assignment policy in an urban area with residential racial imbalance will be presumed to be in violation of the Constitution.

A. The Courts Below Inferred Segregative Intent From the Mere Continuance of the Neighborhood School System

Although the district court explicitly recognized the worth of the neighborhood school policy and the benefits derived from such a policy [A. 55], the Columbus Board's continuance of a neighborhood school policy since before 1900 was inexplicably found to be evidence of segregative intent.[11] The district court's inference of segregative intent from adherence to the neighborhood school policy is apparent from a question posed and answered in its opinion:

> "If a board of education assigns students to schools near their homes pursuant to a neighborhood school policy, and does so with full knowledge of segregated housing patterns and with full understanding of the foreseeable racial effects of its actions, is such an assignment policy a factor which may be considered by a court in determining whether segregative intent exists?" [A. 48.]

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[11] The neighborhood school policy has a statutory foundation in Ohio. The Sixth Circuit has interpreted Ohio Revised Code § 3313.48 to compel Ohio boards of education to follow a neighborhood school policy. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

The United States Congress has enacted a statute declaring the neighborhood to be the "appropriate basis for determining public school assignments." 20 U.S.C. § 1701(a)(2).

After stating that "a *majority* of the United States Supreme Court has not directly answered this question regarding non-racially motivated inaction," the district court answered the posed question in the affirmative. [A. 48-49.] The court of appeals approved, adding that mere proof of construction of 103 neighborhood schools between 1950 and 1975, 87 of which opened "racially identifiable," required "a very strong inference of intentional segregation." [A. 173.]

This Court has not yet directly confronted the question of whether segregative intent can be inferred from adherence to a neighborhood school policy in a school system which is residentially imbalanced. In *Keyes*, the Court specifically reserved the question

> "whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation."
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> *Keyes*, 413 U.S. at 212.

Subsequent decisions, however, require that this question be answered in the negative. In *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *Austin Independent School District v. United States*, 429 U.S. 990 (1976), and *Dayton*, the Court explicitly required proof of discriminatory motive, and not merely proof of a racially disproportionate impact.

Particularly in *Austin* and *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the Court has indicated its negative answer to the question reserved in *Keyes*. In *Austin*, the Court vacated and remanded, in light of *Washington v. Davis*, a judgment of the Fifth Circuit which had relied on the foreseeable effect concept in drawing an inference of segregative intent from mere

adherence to a neighborhood school policy.[12] In the *Pasadena* case, the Court held that school systems were not constitutionally required to reassign students to overcome racial imbalance attributable to demographic patterns. 427 U.S. at 436.

In this case the courts below have answered the question reserved in *Keyes* in a manner which is inconsistent with this Court's subsequent decisions. Since it is an acknowledged fact that residential racial imbalance is a characteristic of nearly all urban areas of this country, if the standards announced below are allowed to stand, no urban school system in this country can adopt a neighborhood school policy without being presumed to be in violation of the equal protection clause. This Court should therefore grant certiorari to answer the question whether neighborhood school systems are *per se* unconstitutional.

B. The Lower Courts' Adoption of a Foreseeable Effects Standard of Liability is in Conflict with *Washington v. Davis.*

As early as its decision in *Keyes,* this Court made it clear that proof of intent or purpose to segregate was an essential element of a violation of the equal protection clause. The Court's subsequent decisions in *Washington v. Davis, Arlington Heights* and *Dayton* reaffirmed and

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[12] The Fifth Circuit had held:

> "[S]chool authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent."
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> *United States v. Texas Education Agency,* 532 F.2d 380, 392 (5th Cir. 1976).

Mr. Justice Powell's concurring opinion in *Austin* cited this holding as contrary to *Washington v. Davis.*

elaborated upon that rule. Nonetheless, ever since *Keyes* was decided, the lower federal courts have adopted conflicting interpretations of the intent requirement. The interpretations adopted in this case are in conflict with this Court's decisions and serve to highlight a conflict among the circuits.

Although acknowledging the requirement of proof of segregative intent, the lower courts adopted a foreseeable effects standard of proof which excused the plaintiffs of any burden of proof on intent. This was done in two basic ways. First, if the school board took a specific action with knowledge or reason to know that a collateral effect of the action (whether desired or not) was to maintain or increase racial imbalance, the court drew an inference of segregative intent.[13] Under this approach, the Columbus Board's neighborhood school policy was *per se* unconstitutional.

Second, whenever the Board was presented with two alternative courses of action, one with an integrative effect and one with the effect of maintaining or increasing racial imbalance, the failure to choose the integrative alternative, regardless of the preponderance of other factors weighing in favor of the less integrative alternative, was taken as evidence of segregative intent. Thus, a decision not to alter the grade structures and to pair two elementary schools, regardless of non-racial justifications, was condemned as segregative because it did not improve racial balance. [A. 35-42.] The court felt "constrained" to draw an inference

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[13] This formulation is similar to the tort concept of intent, and was expressed by the district court in the following terms:

> "The intent contemplated as necessary proof can best be described as it is usually described – intent embodies the expectations that are the natural and probable consequences of one's act or failure to act. That is, the law presumes that one intends the natural and probable consequences of one's actions or inactions." [A. 44-45.]

of segregative intent from the failure "after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance." [A. 19-20.]

The employment of these inferences by the courts below amounted to the adoption of an "effect" standard — that an act would be presumed to be intentionally discriminatory if it had a racially disproportionate impact. The only apparent qualification to the "effect" test which these courts adopted was to engraft onto it a requirement that the actor must know or have reason to know that the effect might result.

In *Washington v. Davis,* the Court held that official action that has a racially disproportionate impact does not violate the equal protection clause unless it is also discriminatorily motivated. Although the Court did not elaborate upon the manner in which such a motive must be proven, it did reject the practice of inferring such an intent or motive from the impact of governmental action in the absence of other relevant facts from which such an intent or motive could be inferred. 426 U.S. at 242.

The conflict between a "foreseeable effect" standard and this Court's decision in *Washington v. Davis* became apparent almost immediately in *Austin,* where the Court vacated and remanded a lower court decision which had employed a "foreseeable effect" test for reconsideration in light of *Washington v. Davis.* Justice Powell's concurring opinion noted that the Fifth Circuit had erred by imputing segregative intent to school officials by drawing an inference from the foreseeable effect of official action.

In *Village of Arlington Heights,* the Court elaborated on its holding in *Washington v. Davis* and established the manner in which discriminatory intent or purpose must be proven. The Court held that a plaintiff claiming that government action was discriminatory had the burden of proving that discrimination was "a motivating factor." Impact alone is not sufficient to prove this except in the

rare case where it is so stark that the decision would be "unexplainable on grounds other than race."[14] 429 U.S. at 266. Otherwise, as in this school desegregation case, the plaintiff must introduce other evidence which is probative of discriminatory motivation, such as a connection with another invidiously discriminatory decision, a departure from normal procedures in making the decision, a sudden willingness to disregard factors ordinarily considered important, or incriminating statements of decisionmakers. 429 U.S. at 266-268.

In the instant case, the district court did not require the plaintiffs to prove that racial discrimination was "a motivating factor" in decisions of the Columbus Board. In adopting the "foreseeable effect" test, therefore, the district court and court of appeals violated the dictates of *Washington v. Davis, Austin,* and *Village of Arlington Heights.*[15]

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[14] For examples of such cases, *see, e.g., Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). As stated in *Washington v. Davis,* such proof may be appropriate in cases where the selection of jurors is challenged on constitutional grounds. *Washington v. Davis,* 426 U.S. at 242. The Court subsequently applied this relaxed standard of proof in *Castenada v. Partida,* 430 U.S. 482 (1977), where the Court relied almost entirely on disproportionate impact in holding that a Texas county had discriminated in its selection of grand jurors. As *Austin, Dayton, Brennan,* and *Omaha* indicate, this relaxed standard would normally not apply in a school desegregation case.

[15] At least one commentator has recognized that the two intent formulations adopted by the lower courts in this case are improper under *Washington v. Davis* and *Arlington Heights*:

> "Some courts and commentators thought that the tort law intent standard – that an actor, here the decisionmaker, intends the probable, natural, or foreseeable consequences of his decision – applied in the equal protection context. [Citation omitted.] Since the village was probably aware of the consequences of its refusal to rezone, *Arlington Heights* seems to preclude this interpretation. In any event, it would gener-

The error was compounded by treating the foreseeable effects standard as a legal presumption which shifted to the defendants the burden of proving that their acts were not discriminatorily motivated. However, *Washington v. Davis, Arlington Heights* and *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977), indicate that the use of the foreseeability test to shift the burden of proof on this issue is improper and that the district court should have maintained the burden of proof on the plaintiffs until they proved that discrimination was "a motivating factor" in the Columbus Board's decisions.

C. The Decisions Below Highlight a Conflict Among the Circuits as to Whether an Act Can be Presumed to be Motivated by Discriminatory Intent Simply Because its Disproportionate Impact is Foreseeable.

In addition to the Sixth Circuit, the Second, Fifth and Eighth Circuits have held that mere proof of the foreseeable effect of official action, rather than the presence of racial motivation, satisfies the segregative intent requirement of *Keyes* in school desegregation cases. *See Hart v. Community School Board,* 512 F.2d 37 (2d Cir. 1975); *United States v. Texas Education Agency,* 564 F.2d 162 (5th Cir. 1977); and *United States v. School District of Omaha,* 565 F.2d 127 (8th Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978).

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ally amount to the impact test rejected by *Washington v. Davis* . . ."

"Other commentators have suggested that a decisionmaker would violate the intent standard of *Washington v. Davis* if it chose a more segregative measure over an alternative that served its purpose equally well . . . [T]he propriety [of such a standard] is questionable. And *Arlington Heights* seemed to preclude this interpretation of *Washington v. Davis* as well."

The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 166-67 n. 33 (1977).

The Ninth Circuit has rejected the foreseeable effect test. *See, Berkelman v. San Francisco Unified School District,* 501 F.2d 1264 (9th Cir. 1974); *Johnson v. San Francisco Unified School District,* 500 F.2d 349 (9th Cir. 1974); *Soria v. Oxnard School District Board of Trustees,* 488 F.2d 579 (9th Cir. 1973), *cert. denied,* 416 U.S. 951 (1974).

This conflict among the circuits was discussed in the district court's liability opinion and was described as follows:

> "The difference, if any, between the Second Circuit's approach to the standard of liability and that of the Ninth Circuit appears to be that the Second Circuit would affirm a finding of liability based upon proof of affirmative intentional acts and omissions after notice which foreseeably result in segregation even in the absence of a desire to segregate. The Ninth Circuit would appear to require proof of a deliberate policy of segregation, but would permit this requirement to be met by the drawing of reasonable inferences from evidence of defendants intentional acts and omissions." [A. 47-48, n.3.]

Noting, however, that the law of the Sixth Circuit governed this case, the district court adopted the foreseeable effect test set forth in the Sixth Circuit's decision in *Oliver v. Kalamazoo Board of Education,* 508 F.2d 178 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975), which, in turn, had approved the approach of the Second Circuit in *Hart.* Thus, liability was imposed even in the "absence of a desire to segregate." This conflict of decisions should be resolved by this Court.

CONCLUSION

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

Respectfully submitted,

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