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.*

PLAINTIFFS' BRIEF IN OPPOSITION TO CERTIORARI

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INTRODUCTION

The Columbus Board bases its petition for certiorari on assumptions that the trial court, as affirmed by the Court of Appeals, misapprehended the legal standards for segregative intent (Pet. 26-34) and causation (Pet. 16-24) in approving a system-wide remedy to overcome the current system-wide impact of the system-wide violations found. Respondents are in the unusual position, however, of answering such a typical claim of error by a party that has lost in the courts below in the added light of the stay opinion entered by Mr. Justice Rehnquist indicating that at least that Justice believes the issues concerning intent and causation should be reviewed by this Court. 47 U.S.L.W. 3089 (Aug. 11, 1978), Pet. App. 213-214. In this brief, we therefore detail the proceedings and rulings below to demonstrate that there has been *no* error

on this score and that Justice Rehnquist's concern arises from a fundamental misconception of the proceedings and rulings below. As a result, there is no call for this Court to exercise its discretionary review power to supervise the lower courts on the issues in this case (*see* Supreme Court Rule 19(b)); instead, the writ should be denied, and the stay entered by Mr. Justice Rehnquist vacated forthwith so that the vindication of plaintiffs' constitutional rights will be delayed no longer.

In passing, the petitioners also spout the worn rhetoric of "extensive cross-town transportation" (Pet. 13) and "statistical racial balance" (Pet. 25). But busing is not in issue: there has been no claim nor showing that the time or distance of transportation risk the health, safety or education of the children; to the contrary, the transportation is provided to students assigned to schools beyond walking distance so that access to schooling will be convenient for all students. Similarly, the phrase "statistical racial balance" is merely a poorly veiled attempt to substitute semantics for substance; for whatever petitioners intend by use of the term, they apparently concede that if the current "racial imbalance" in Columbus Public Schools is in fact caused by their intentionally segregative conduct, the appropriate remedy would obviously reduce or eliminate that "racial imbalance." Petitioners, nevertheless, then go on to argue that *any* plan to eliminate *de jure*, one-race schools that initially provides for a broad and flexible racial range constitutes a proscribed fixed racial balance. Pet. App. 25-26. Apparently, petitioners would be content only if the range is expanded from 30% to 100%, i.e., to permit complete racial separation between all-black and all-white schools. Such rhetorical broadsides aside, the decision in this case turns on the issues actually decided by the courts below:

QUESTIONS PRESENTED

1. Did the lower courts err in inquiring whether the Columbus school authorities acted with segregative intent and to what extent such intentionally segregative conduct caused the existing segregation of the Columbus Public Schools?

2. Upon finding that the Columbus Board's intentionally segregative policies and practices proximately caused the current segregation throughout the entire school district, did the lower courts err in ordering a system-wide plan to remedy this system-wide violation?

STATEMENT

A. Summary

Unlike the situation in some other school cases (*e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977)), the parties and the district court at the trial on the merits basically agreed on the critical issues to be determined pursuant to this Court's rulings: whether school officials acted with segregative intent and the extent to which such intentional action caused the current segregation of the Columbus Public Schools. *See* Pet. App. 46, 49-50. As a result, the district court conducted the trial on the merits with the understanding that judicial intervention was permitted, and required, only to the extent necessary to overcome the current effects of any intentionally segregative conduct. *E.g.*, Pet. App. 73-75, 95.

The parties, however, disagreed about the *facts* of the case, Pet. App. 46. "Over 70 witnesses . . ., over 600 exhibits . . . [and] a trial transcript . . . in excess of 6,600 pages" (Pet. App. 6) were presented to contest these two critical factual issues of segregative intent and causation. Based on a sensitive inquiry into this extensive and

focused record, the district court reached its judgment approving a system-wide remedy in detailed opinions on the intentional and system-wide nature of the violations and the pervasive extent of their current segregative impact (Pet. App. 1-86), the application of this Court's ruling in *Dayton* to such findings (Pet. App. 90-96), and the adequacy of proposed remedy plans to overcome the continuing system-wide effect of the violations (Pet. App. 97-124, 125-137). The courts below found that the Columbus school district has been and is currently a "northern" dual system, where a variety of intentionally segregative system-wide policies and practices (rather than a single state segregation law) have substantially contributed to and proximately caused the current condition of segregation throughout the district. *E.g.*, Pet. App. 60-61, 73, 94-95, 197-199. The courts below therefore ordered system-wide relief to do no more, and no less, than remedy the violation. *E.g.*, Pet. App. 73-74, 95, 99-107, 127, 207.

B. Liability

Through a carefully, even meticulously reasoned exposition of the evidence and application of the controlling legal standards established by this Court in *Dayton*, *Washington* v. *Davis*, *Arlington Heights*, and *Keyes* to the record, the district court ruled as follows:

1. "From the evidence adduced at trial," District Judge Duncan found that the "Columbus Public Schools were openly and intentionally segregated on the basis of race when *Brown I* was decided in 1954" (Pet. App. 61), with an "enclave of separate, black schools" (Pet. App. 11) intentionally created and maintained to keep most white and black children in racially separate schools. After an early flirtation with nondiscrimination following Ohio's prohibition against racially dual schooling in 1887-1888, the Columbus Board created the all-black Champion elementary school in 1909 and maintained it as such

through 1938. At that time, Champion's all-black faculty were reassigned over the summer to the former Pilgram junior high school; the Board then simultaneously converted Pilgram junior high school into an all-black elementary (by gerrymandering all-white students and assigning all-white staff out to other schools) and Champion into an all-black junior high. Subsequently, the Board made similar overnight and total racial conversions to assign all-black student bodies, administrators and teachers to the Mt. Vernon, Garfield and Felton schools separate from white children and staff in the system. These blatantly segregative actions involved a substantial portion of the black student population, directly affected many white schools on a reciprocal basis and implemented a system-wide policy of racial discrimination in hiring and assigning faculty, administrators, and students. Pet. App. 7-11. Defendants did not even "assert that these results were an accommodation of the neighborhood school concept." Pet. App. 11. In sum, "the Columbus Public Schools were officially segregated by race in 1954 when the Supreme Court decided *Brown.*" Pet. App. 94.

The trial court undertook "this look to the past" not for the "purpose of dragging out skeletons" nor with the sometimes false benefit of "hindsight," but simply in order to "discover" whether the Columbus Board's policy of intentional segregation at the time of *Brown* is "responsible for the admitted current" racial segregation of the Columbus schools (Pet. App. 7).[1] Recognizing the significant growth that characterized the Columbus schools since 1954 and the substantial residential segregation (Pet. App. 11-12, 56-58), the trial court carefully reviewed the entire record evidence (Pet. App. 18-60) and determined that the Columbus Board "never" even tried to (and, not surprisingly, did not) dismantle the "dual

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[1] *See Keyes,* 413 U.S. at 210-211; *cf. also* 413 U.S. at 203.

system" which it inherited at the time of *Brown.* Pet. App. 94; *also* Pet. App. 60-61.

2. The trial court also carefully examined all aspects of the administration of the Columbus Public Schools following *Brown* and detailed in its findings "a variety of post-1954 Board decisions and practices, such as creating and maintaining optional attendance zones and discontiguous attendance areas and choosing sites for new schools which had the natural, foreseeable and anticipated effect of enhancing rather than mitigating the racially separate schools which were purposefully established by the Board prior to 1954." Pet. App. 94; *also* Pet. App. 12-42. Among the classic segregation devices utilized by the Columbus Board after *Brown,* the following were prominent:

- the longstanding and system-wide assignment of faculty and staff on a racially segregated basis through 1974 (when the Columbus Board finally entered into a conciliation agreement with the Ohio Civil Rights Commission) and thereafter the continued, system-wide assignment of administrators on a racially segregated basis. Pet. App. 14-15, 18, 61, 152-154, 173-174, 198.

- a general pattern, with full knowledge of the racial consequences (and in tandem with the then-existing system-wide policies of staff and faculty segregation), of segregative site selection and school construction and a series of specific school construction projects in racially mixed "fringe" and "racial pocket" areas that systematically maximized school segregation in the face of the known, available, nondiscriminatory and nonsegregative alternatives. *E.g.,* Pet. App. 20-25, 35-42, 61, 94, 166-173, 198.

- persistent deviation from and systematic manipulation of any arguable "neighborhood school concept" in such racially mixed "fringe" and "racial pocket" areas in order to segregate black and white students

> in separate schools through the use of dual overlapping (or optional) zones, discontiguous attendance areas, gerrymandering, and alteration of grade structures in circumstances where the racially neutral implementation of any "walk-in" school concept would have resulted in racially mixed schools. *E.g.*, Pet. App. 26-42, 61, 94, 174-195, 198.

Expressly applying the intent requirements of *Keyes*, 413 U.S. 189, 198 (1973), *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *MHDC*, 429 U.S. 252, 265-268 (1976) (*see* Pet. App. 42-46), the trial court conducted the requisite sensitive inquiry into, for example, the persistent history of invidious discrimination, substantive departures based on race from normal practice, contemporaneous notice to school officials about the discriminatory effects of their actions, contemporaneous statements evidencing segregative intent, and the non-segregative alternatives to school board actions which were available. Pet. App. 11-60. Based on this examination, the district court found that the Board's acts and omissions following *Brown* through the time of trial were, in fact, also motivated by "segregative intent." Pet. App. 61.[2] Far from acting either to dismantle the continuing

[2] Thus, the Board's strained attempt (Pet. 26-33) to suggest that the trial court's inquiry into all the relevant circumstances concerning intent is in conflict with the decisions of this Court or any Circuit is unsupportable. For example, it is hardly for the Columbus Board to claim any error in the trial court's finding that the school board here chose to implement a supposedly neutral "neighborhood school concept" with the systemwide intent to segregate students, particularly in view of the circumstances here: an underlying dual structure of system-wide intentional segregation that the Board intentionally perpetuated rather than dismantled following *Brown*; the Board's long-standing and system-wide racial assignment of staff and segregated siting of schools; and racially motivated deviation from or manipulation of any arguable "neighborhood school concept" whenever it ordinarily might be expected to lead to racially mixed schools. Pet. App. 7-11, 14-15, 26-42, 60-63; *aff'd* Pet. App. 155-160, 165-166, 173-175. *See, e.g., Swann*, 402 U.S. at 28; *Keyes*, 413 U.S. at 206-208, 211-213; *Arlington Heights*, 429 U.S. at 265-

dual system or even in a neutral fashion, the "school board . . . since 1954 has by its official acts intentionally aggravated" the original system of intentional segregation inherited by the Board. Pet. App. 94.

3. Consistent with the admonitions in *Swann*, 402 U.S. 1, 26 (1971); *Keyes*, 413 U.S. at 210-214; and *Dayton*, 433 U.S. at 420, concerning the required inquiry into causation in general, and any alternative or supervening causes for the existing condition of segregation in particular, the trial court also carefully evaluated the evidence to rule on the Board's claim that, regardles of any intentionally segregative Board practices, "the racial imbalance which admittedly exists in the Columbus Public Schools is the sole result of housing segregation and other factors which are beyond the control of school officials." Pet. App. 50. First, the trial judge found that the Board's intentional racial identification of schools and neighborhoods in Columbus, with the Board's full foreknowledge

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268; *Dayton*, 433 U.S. at 414. Moreover, as noted by both the district court and the Court of Appeals, the finding of segregative intent infecting the Board's entire operation is also supported by direct evidence (e.g., Pet. App. 7-11, 28-29, 34, 36-42, 50-54, 170-175), as well as the drawing of reasonable inferences by the trier of fact from his sensitive inquiry into all the relevant circumstances (e.g., Pet. App. 61, 94). Unlike the situation at the time of Supreme Court review in *Brennan* v. *Armstrong*, 433 U.S. 672 (1977), therefore, there is here no "unexplained hiatus between specific findings of fact and conclusory findings of segregative intent;" and unlike the original Court of Appeals decision in *School District of Omaha* v. *United States*, 433 U.S. 667-668 (1977), therefore, the trial court here found segregative intent based not on a *per se* rule or unrebuttable "presumption" but on wide-ranging findings which regarded the foreseeable and anticipated effect of Board practices as one factor. In sum, the trial judge's determination of segregative intent was expressly guided by, and is therefore entirely consistent with, *Washington* v. *Davis*, 426 U.S. at 242, and *Arlington Heights*, 429 U.S. at 265-268. *See also*, *Milliken* v. *Bradley*, 418 U.S. at 725-726 and 738 n.18; *NAACP* v. *Lansing Board of Education*, 559 F.2d 104, 1046-1047 (6th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); and *United States* v. *School Dist. of Omaha*, 565 F.2d 127, 128 (8th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978).

(and intentional promotion) of the consequences for housing, also contributed substantially to residential segregation by race and "had a significant impact upon the housing patterns" in Columbus; the Court further found that the interaction of intentionally discriminatory housing and schooling operated to promote further segregation in each. Pet. App. 58.[3]

Second, the trial judge found that the evidence fell "far short" (Pet. App. 95) of showing that the present racial segregation in the Columbus Public Schools "is the result of social dynamics or of the acts of others for which defendants owe no responsibility" (Pet. App. 60-61); rather, the Columbus school authorities, "despite ample opportunity at trial" (Pet. App. 95), failed to prove that anything like the current level of almost complete pupil segregation in the Columbus schools "would have occurred even in the absence of their segregative acts and omissions, *see Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 286-287 (1977)." Pet. App. 61; *also* Pet. App. 95.[4]

Recognizing the broad impact of the Board's intentionally segregative actions directly affecting particular schools and the system-wide scope and impact of other Board policies of intentional segregation, the trial court therefore ultimately found "system-wide liability" (Pet. App. 95):

> The finding of liability in this case concerns the Columbus school district as a whole. Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter. . . . [quoting *Keyes*,

[3] This evidentiary finding is far from novel and forms a causal link for a finding of intentional school segregation that this Court has expressly held warrants complete relief. *See, e.g., Keyes*, 413 U.S. at 202-203; *Swann*, 402 U.S. at 7, 20-21, 28.

[4] *See also, e.g., Keyes*, 413 U.S. at 210-214; *Swann*, 402 U.S. at 26.

> *supra*]. The evidence in this case and the factual determinations made earlier in this opinion support the finding that [all] 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 defendant local and state school boards.

Pet. App. 73; *also* Pet. App. 94-95.[5]

C. Remedy

1. In considering remedy, the trial court embraced no stringent, perpetual racial balance requirement but directed the defendants to consider the racial composition of the school district as a whole only as a "useful starting point." Pet. App. 73-74 (citing *Swann*, 402 U.S. at 24-25). Although, as noted above, the district court had found that all of the predominantly black schools in

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[5] As a result, the district court conducted the very inquiry into intent and causation subsequently described by this Court in *Dayton Board of Education* v. *Brinkman*, 433 U.S. at 419-420. The controlling principles for first conducting the inquiry into the nature and extent of violation and then tailoring the scope of remedy to fit the current impact of the violation were directly addressed by the evidence introduced at the trial on the merits, were already established by the decisions of this Court, and these rules were expressly applied by the district judge. *See, e.g., Swann*, 402 U.S. at 16; *Keyes*, 413 U.S. at 201-204, 210-214; *Milliken I*, 418 U.S. 717, 738, 744 (1974); *Arlington Heights*, 429 U.S. at 265; *Mt. Healthy*, 429 U.S. at 286-287. The legal propriety of the district court's determination turns on the substance of its inquiry and decision on causation *not* on the semantical presence or absence of the phrase "incremental segregative effect." *Contrast* Pet. 16-22. The trial judge's examination and findings concerning causation, therefore, stand in stark contrast to the situations in *Omaha*, 433 U.S. at 668, and *Brennan*, 433 U.S. at 672, where the lower courts at the time of Supreme Court review had *never* addressed the inquiry into causation at all, and *Dayton*, where the Court of Appeals ruling at the time of Supreme Court review inexplicably jumped from violation findings "only with respect to high school districting," 433 U.S. at 413, to a "system-wide remedy," 433 U.S. at 417.

Columbus "have been substantially and directly affected by the intentional acts and omissions" of the Board and that such conduct had "the reciprocal effect of making white schools whiter" (Pet. App. 73), the district judge cautioned against any remedy greater than necessary to redress the impact of the violation. The court expressly advised the defendant school authorities (quoting *Swann*, 402 U.S. at 26) of the remedial standard by which their plan to remedy their system-wide liability would be judged insofar as it might "contemplate the continued existence of some schools that are all or predominantly of one race":

> 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.

Pet. App. 74. By order, the responsible school authorities were therefore required to submit plans to remedy the system-wide violation, with full implementation scheduled for no later than September 1977. Pet. App. 76-77.[6]

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[6] Subsequent to the district court's March 8, 1977 liability ruling, this Court issued its opinion in *Dayton* and the trial court determined its impact on the prior ruling. Pet. App. 90-96. In view of the district court's previous understanding and steadfast application of the rule that equitable relief was permitted and required only to the extent necessary to remedy any existing school segregation caused by defendants' intentionally segregative conduct, the trial judge held that he had already expressly utilized and applied the standards articulated in *Dayton* (Pet. App. 93); and based on *Dayton*, the trial court reiterated the system-wide scope of defendants' liability (Pet. App. 94-95). *See also* Note 5, *supra*. The district court concluded its application of *Dayton* by cautioning as follows:

> [T]he Court has no real interest in any remedy plan which is more sweeping than necessary to correct the constitutional wrongs plaintiffs have suffered. Nor will the Court order implementation of a plan which fails to take into account the system-wide nature of the liability of the defendants.

Pet. App. 95.

2. Although the staff of the Columbus Public Schools recommended a system-wide desegregation plan, the Columbus Board first submitted a plan preserving 22 all-white schools and then filed an amended plan leaving the majority of Columbus schools one race. Despite every opportunity, and the express obligation if they had any proof, defendants offered *no* evidence in support of either Board plan to show that *any* of the proposed one-race schools were genuinely nondiscriminatory and not the result of the system-wide violation. In the face of this default, the district court found that the two Board alternatives failed to overcome the current segregative impact of the system-wide violation. Pet. App. 102, 105.

The trial court also found that the original Columbus staff plan of system-wide scope, as well as a system-wide plan submitted by the State Board, fit the pervasive impact of the system-wide violation (Pet. App. 106-107). But the court permitted the Columbus Board yet another opportunity to submit an effective plan of the Board's own making rather than approve either of the available system-wide alternative plans or develop a Court plan. The district court also granted the Board a delay in implementation to January and September 1978 for elementary and secondary schools respectively. Pet. App. 108-114.

3. Upon the Columbus Board's submission of a system-wide plan, there being no objection from any party as to its effectiveness, the district court approved its implementation but granted a second delay in implementation, at the Board's request, to September 1978. Pet. App. 126-127, 131-134.[7]

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[7] The court of appeals denied defendants' application for further delay in implementation (Pet. App. 210); but Mr. Justice Rehnquist granted a stay to the Columbus Board pending certiorari. Pet. App. 217.

D. Appeal

Mindful of the nature of appellate review under Rule 52(a), F.R.Civ.P., as detailed for school cases in this Court's opinion in *Dayton*, 433 U.S. at 409-410, 417-418, the court of appeals reviewed the evidence, fact-findings, and law applied by the trial court in support of its judgment. The court of appeals carefully reviewed the record and found that substantial evidence supported each of the trial court's subsidiary violation findings. Pet. App. 154-196. The court of appeals also examined the legal standards employed by the trial court in making its determination of system-wide liability requiring a remedy of comparable scope and found no misapprehension in the law applied by the trial judge to the substantial evidence and detailed findings with respect to intent, causation, and the standards for equitable relief. Pet. App. 196-200.

In particular, the court of appeals affirmed the trial court's system-wide violation findings: a systematic program of intentional segregation making the Columbus Public Schools a "northern" dual school system at the time of *Brown* (Pet. App. 160) that had never been dismantled and was not attenuated by the time of trial following the 1975-76 school year (Pet. App. 165-166, 198); other system-wide policies of intentional segregation in the siting and construction of new schools and additions (Pet. App. 173, 198) and the assignment of faculty and administrators (Pet. App. 174, 198); and a facially neutral but racially motivated geographic zoning policy that was manipulated in practice (by gerrymandering, optional zones, and discontiguous attendance areas and the like, Pet. App. 175-195) that also contributed to "the large majority of racially identifiable schools" at the time of trial (Pet. App. 198).[8]

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[8] While each of the manipulations of the geographic zoning policy had its own wide-ranging segregative impact as described above, the court of appeals also noted that the variety of deviant tech-

The Court of Appeals undertook this careful review of the subsidiary findings and evidence below "to determine whether the segregation in the Columbus schools [at the time of trial] was intentionally and, hence, unconstitutionally created [as found by the district court] or whether, as claimed by the Columbus Board of Education, it resulted from neighborhood housing segregation which the Columbus Board of Education could not control, and the [allegedly] racially 'neutral' Columbus Board policy of neighborhood schools." Pet. App. 166. That review convinced the court of appeals that the Columbus Board's system-wide policies and practices of intentional segregation had a continuing system-wide causative impact that "thoroughly justified the District Judge in ordering a system-wide remedy" (Pet. App. 199) under *Dayton* and *Keyes*. Pet. App. 197-200, 207.[9]

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niques were so varied that they could "properly be classified as isolated in the sense that they do not form any system-wide pattern." Pet. App. 175. As we develop more fully in the discussion, *infra*, pp. 17-20, the significance of such patent racial aberrations from any arguably neutral geographic zoning principles for the court of appeals (as stated in its very next sentence) was as additional evidence that the Board's claim of administering a neutral neighborhood school policy was nothing but a sham and a pretext for a policy of intentional segregation: "They are significant, however, 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." Pet. App. 175; (*also* Pet. App. 94-95, 61, 34, and 29). *See, e.g., Arlington Heights*, 429 U.S. at 267 and n.17 and *Keyes*, 413 U.S. at 201-202, 207-208, 212. It is therefore simply incorrect to say "that the Court of Appeals employed legal presumptions of intent to extrapolate system-wide violations from what was described in the Columbus case as 'isolated' instances." 47 U.S.L.W. at 3090 (Rehnquist, J.).

[9] As a result, this Court's two-court rule counsels acceptance of the factual determinations of the trial court as to the nature and extent of the Board's intentionally segregative conduct and the scope of its impact. *Amer. Const. Co.* v. *Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *United States* v. *Johnston*, 268 U.S.

REASONS FOR DENYING THE WRIT

I.

The Judgment of the Courts Below Turns on the Evidence and Fact-Findings *Not* on Any Conflict With Decisions of This Court.

In view of the proceedings and rulings in the trial court, as affirmed by the court of appeals, this is obviously not a case where limited proof of violation or findings of isolated violations were misused by a trial judge (or appellate court) to order system-wide relief. *Compare* Statement, *supra*, pp. 8-10, 13-14 *with* Pet. App. 23-24. To the contrary, on the issues of whether the school board acted with segregative intent and whether such intentionally segregative conduct is a proximate cause of the existing segregation throughout the Columbus Public Schools, the trial judge found in favor of the plaintiffs based not just on the preponderance, but rather on the overwhelming weight of the evidence. In carefully reviewing and analysing the "volume of evidence presented in this case" in order to make its factual determinations on the critical issues of intent and causation, the trial court stated:

> I am firmly convinced that the evidence clearly and convincingly weighs in favor of the plaintiffs.

Pet. App. 2. And the trial court's opinions represent not only detailed fact findings supporting the ultimate determination of system-wide liability, but also the results of a sensitive inquiry into the intent and causation issues. The court's judgment embodies no more and no less than the restrained exercise of equitable discretion, finally approving a system-wide remedy drawn by the local school

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220, 222 (1925); *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948); *Graver Manufacturing Co.* v. *Linde*, 336 U.S. 271, 275 (1949); *Milliken* v. *Bradley* 418 U.S. 717, 738 n.18 (1974).

authorities only as proven necessary by their own default, in the first instance, in failing to come forward either with a plan to overcome the demonstrated impact of the system-wide violation or with evidence to show in what respects the system-wide impact of the violations found was not pervasive. *See Swann*, 402 U.S. at 7-9, 15-16, 24-25 and n.8, 26, 28, and *Keyes*, 413 U.S. at 213-14.

Petitioners have no claim of error to make in this Court. This is simply a case where the lower courts have applied the controlling legal standards to the record evidence, properly concluding that the Columbus Board, in its operation of its school district, has been motivated by segregative purpose and has acted to implement a variety of intentionally segregative policies and practices that have proximately caused the existing segregation in the Columbus Public Schools. To overcome the system-wide impact of this system-wide violation, a system-wide remedy has therefore been approved by the courts below (after giving the petitioners every additional opportunity to show in what respects, if any, a more limited plan would overcome the effects of the violation demonstrated at the liability hearing). *Swann*, 402 U.S. at 26; *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971); *Keyes*, 413 U.S. at 213-14; and *Dayton*, 433 U.S. at 410-11, 419-20. Hence, no legal issue meriting this Court's review is presented by this case; the lower courts have held only that the Columbus Board must effectively dismantle its own system-wide, intentional segregation.

II.

The Decision Below is *Not* Based on the Use of Legal Presumptions to Jump From Isolated Violations to Sweeping Relief; As a Result, the Issue for Supreme Court Review Suggested by Mr. Justice Rehnquist's Stay Opinion is Not Presented.

The Columbus Board primarily argues that the lower courts jumped from isolated incidents of segregation

and/or limited violation findings, to a determination of system-wide liability (and requirement of system-wide relief), and seeks support for its assertion in Mr. Justice Rehnquist's August 11, 1978 stay opinion, Pet. App. 217 (*e.g.*, Pet. 20-21). The crux of the stay opinion is its suggestion that "the Court of Appeals employed legal presumptions of intent to extrapolate system-wide violations from what was described in the Columbus case as 'isolated' instances." Pet. App. 213. The stay opinion quotes one word from a section of the court of appeals' affirmance discussing (Pet. App. 174-89) some of the examples of the Columbus Board's most blatant, selective manipulation of geographic zoning practices through gerrymandering, optional attendance zones, and discontiguous assignment areas.[10] The court of appeals agreed with the district court that these practices revealed that the Columbus Board chose to adhere to or depart from the so-called "neighborhood school" concept of administration to achieve the underlying purpose of system-wide racial segregation throughout the Columbus Public Schools. *See* Statement, *supra*, p. 13, n.8.[11] *Compare, e.g.*, Pet. App. 175-95, 94-95,

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[10] The stay opinion is narrowly focused only upon that portion of the district court and court of appeals opinions discussing attendance zones, gerrymandering, discontiguous zoning and optional areas after 1954. It ignores the findings detailed elsewhere in those opinions of system-wide segregative practices, and the trial judge's conclusion that petitioners failed to show that the current segregation in the school system would have occurred in the absence of those violations. (See Statement *supra* pp. 8-12) Affirmance of the district judge's order requiring a system-wide remedy thus was not based upon inference and presumption; rather, it was grounded explicitly on findings of non-isolated, system-wide policies of segregation and discrimination. Only by disregarding these findings could the Court approach the issue described, in the stay opinion, as ripe for decision.

[11] Thus, even "isolated instances" of blatant manipulation in "pocket" or "fringe" areas demonstrate the motivation of the Columbus Board; and they were correctly regarded by the courts below as one—but only one—aspect of the substantial evidence which

61, 34, and 29 *with*, *e.g.*, *Arlington Heights*, 429 U.S. at 267 and n.17; *Milliken* v. *Bradley*, 418 U.S. at 725-26 and 738 n.18, *aff'g in pertinent part* 484 F.2d 215, 221-34 (6th Cir. 1972); *Keyes*, 413 U.S. at 201-02, 207-08, 212; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 340-41 (1960); *Morgan* v. *Kerrigan*, 509 F.2d 580, 588-90 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *NAACP* v. *Lansing Bd. of Educ.*, 559 F.2d 1042, 1049-52, 1055-56 (6th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); *Oliver* v. *Michigan State Bd. of Educ.*, 408 F.2d 178, 183-85 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Davis* v. *School Dist. of Pontiac*, 443 F.2d 573, 576 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1972); *Kelly* v. *Guinn*, 456 F.2d 100, 106-08 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).[12]

It is therefore wrong to assert that the lower courts in this case "evinced an unduly grudging application of *Dayton*" on the grounds that they "employed legal pre-

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supports the finding that the Columbus Board's claimed devotion to a "neighborhood school" concept has been and is but a pretext for a policy of official racial discrimination and intentional segregation system-wide. *See* Statement, *supra*, pp. 6-8.

[12] In addition, as summarized in the Statement, *supra*, pp. 4-6, substantial evidence concerning other system-wide aspects and direct evidence of the Columbus Board's racially discriminatory administration of its public schools also supports the ultimate finding of intentional system-wide segregation. The direct evidence and other intentionally segregative, system-wide practices include: the longstanding and intentionally racial assignment of faculty and staff that identified schools as for "blacks" or "whites" primarily (Pet. App. 14-15, 173-174, 176, 198); the intentional perpetuation of the *de jure*, dual school system inherited in 1954 right through the time of trial (Pet. App. 7-11, 60-61, 94, 155-159, 165-166, 198); the intentionally segregative construction and siting of new schools and additions throughout the school district from 1954 through the time of trial keep most blacks and whites in separate schools (Pet. App. 20-25, 94, 166-173, 198); and the segregative responses of the Columbus Board to notice of its segregative policies and practices in view of the available non-segregative alternatives (Pet. App. 10, 29, 35-42, 50-54).

sumptions" either "to extrapolate system-wide violations from . . . 'isolated instances' " or "to justify a system-wide remedy" in the absence of system-wide impact. *Contrast* Pet. App. 213-214. The legal issue posed by the stay opinion is simply not raised by this case.

Justice Rehnquist's stay opinion is apparently also read by petitioners as a limiting interpretation of the Court's ruling in *Dayton*. We refer to the suggestion that *Dayton* "mandated . . . specific findings . . . on the impact discrete segregative acts [even system-wide segregative acts] had on the racial composition of individual schools within the system." Pet. App. 212. Such a "school-by-school" approach was specifically presented by the defendants to, and rejected by, the full Court in *Keyes*, 413 U.S. at 200; *Swann*, 402 U.S. at 20-21, 26-28; and *Davis* v. *Board of School Comm'rs*, 402 U.S. at 37. We do not perceive how *Dayton* can be read to reverse the express holdings of these three cases, particularly when *Dayton* so explicitly relies on *Swann* and *Keyes* for its own reasoning and holding.

Petitioners seek by this oft-rejected argument to halt school desegregation relief at the level of current residential segregation in Columbus, regardless of the Board's prior system-wide segregative intent, its historic contribution to residential segregation, its "loading of the game board" (*Swann*, 402 U.S. at 28) and nurturing an "environment for the growth of further segregation" (*Keyes*, 413 U.S. at 211). At a time when most of the nation has demonstrated its willingness to provide constitutional, non-segregated public schooling under the prior rulings of this Court, as faithfully carried out by most of the lower courts, such a result would require express reversal of *Swann*, 402 U.S. at 20-21, 28-29 and *Keyes*, 413 U.S. at 202-03, 211-14. Indeed, it would invite the reopening of settled cases in all regions of the country. At base, the petition of the Columbus Board asks this Court to deter-

mine that the rights declared in *Brown* are to be so limited that there is, in reality, no remedy at all.[13] This Court should decline the invitation.

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[13] In any event, even the implications that petitioners apparently read into the stay opinion do not support review of the judgment below. The system-wide policies and practices of intentional segregation in this case were found by the lower courts, based on the record evidence, to have affected *all* schools throughout the entire Columbus public school system. *See* Statement *supra*, pp. 9-12, 14. This evidence also showed that the Board's intentional school segregation identified residential areas as being for blacks or for whites, thereby causing residential segregation by families who choose or avoid particular homes based on the racial identification of nearby schools (which in turn causes further segregation, and so on). Pet. App. 58. This is precisely the "environment for the growth of further segregation" and "loaded game board" caused by the official policy and practice of system-wide intentional segregation of Columbus school authorities that has been the object of this Court's repeated commands to dismantle similar dual systems from *Brown II* through *Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 28; *Scotland Neck*, 407 U.S. at 490, 491-92; and *Keyes*, 413 U.S. at 211. Even as a matter of evidentiary burdens of proof (not irrebuttable legal presumptions), school cases are no different from other constitutional or federal equity cases. The perpetrator of the wrong, not the victim, bears the burden of demonstrating in what respects the current effects of his long-standing violation are more limited than the probable or intended consequences. *See, e.g., Village of Arlington Heights* v. *MHDC*, 429 U.S. at 270-71 and n.21; *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. at 286-87; *Franks* v. *Bowman Trans. Co.*, 424 U.S. 747, 771-73 (1976); *Keyes*, 413 U.S. at 210-14; *Ford Motor Co.* v. *United States*, 405 U.S. 562, 575 (1972); *Swann*, 402 U.S. at 26; *Zenith* v. *Hazeltine*, 395 U.S. 100, 123-24 (1969). The petitioners made no attempt to meet this burden with any convincing evidence following the plaintiffs' proof of longstanding and continuing system-wide violations substantially contributing to, and proximately causing, the current condition of segregation throughout the Columbus Public Schools.

CONCLUSION

The Columbus Board's Petition for a Writ of Certiorari should be denied and the stay vacated forthwith so that any further delay in implementation of the constitutional remedy for the system of racially dual schooling that continues at this time to fester in Columbus, as it has since at least 1954, will finally end "now." *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

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