

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DIANE COWAN, *et al.*,

Plaintiffs

and

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellant

v.

CLEVELAND SCHOOL DISTRICT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument will assist the Court in resolving this appeal.

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IN THE UNITED STATES COURT OF APPEALS
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No. 13-60464

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Plaintiffs

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v.

CLEVELAND SCHOOL DISTRICT,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLANT

STATEMENT OF JURISDICTION

Private plaintiffs filed this lawsuit pursuant to 42 U.S.C. 1983 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, seeking to desegregate Bolivar County, Mississippi, public

schools. USCA5 52, 904-921.¹ The district court had jurisdiction under 28 U.S.C. 1343(a)(3). The United States subsequently intervened in the case as of right pursuant to, *inter alia*, Federal Rule of Civil Procedure 24(a) and 42 U.S.C. 2000h-2. USCA5 67; RE Tabs 9a-10. The district court had jurisdiction over the United States' claims under 28 U.S.C. 1345. In the present appeal, the United States challenges the district court's *sua sponte* entry of a freedom of choice desegregation plan, and the court's April 30, 2013, denial of the United States' motion to alter or amend the freedom of choice decree. USCA5 1306-1307, 1315-1316, 1638-1640; RE Tabs 2-4. The United States filed a timely notice of appeal on July 1, 2013. USCA5 1657-1659; RE Tab 2. This Court has jurisdiction pursuant to 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in ordering a public school district to adopt a freedom-of-choice desegregation plan as a remedy for failing to desegregate formerly *de jure* African-American schools, where evidence showed

¹ "USCA5 ___" refers to pages of the consecutively-paginated Record on Appeal bearing Bates stamp "USCA5." "RE Tab ___" refers to document(s) in the United States' Record Excerpts at the identified tab. "RE Tab ___ at ___" refers to specific pages of, or exhibits or attachments to, the document(s) enclosed at the identified tab within the Record Excerpts. Due to the age of this case, the documents enclosed at RE Tabs 5-7 and 9-10 are not electronically available on the district court's docket sheet, and were not included in the Record on Appeal. Many, but not all, of these documents are identified on the district court's original docket sheet. See USCA5 4, 52-72.

that such a plan would not effectively desegregate the schools and another available remedy was more likely to result in immediate desegregation.

STATEMENT OF THE CASE

In 1965, African-American students and their parents filed this action against the Bolivar County Board of Education, Bolivar County School Districts Nos. 1-6, and various education officials, to preliminarily and permanently enjoin the defendants from operating a racially segregated public school system. USCA5 52, 904-921. In 1965, the district court entered a preliminary injunction, and ordered the defendants to submit desegregation plans. USCA5 53. In 1967, the district court entered a decree setting out a freedom-of-choice desegregation plan for Bolivar County schools. USCA5 53-60; RE Tab 5 at 6-8.

In 1969, the district court suspended the former decree (USCA5 59-60; RE Tab 5 at 6-8), and entered an order that permanently enjoined Bolivar County School District No. 4 (now known as the Cleveland School District (USCA5 28, 167-168) (the District)) from discriminating based on race or color in the operation of the school system, and ordered the District to desegregate and eliminate the effects of the dual school system (USCA5 12-19, 61, 809-816; RE Tab 8).

In 1985, the United States intervened as a matter of right pursuant to Federal Rule of Civil Procedure 24(a) and 42 U.S.C. 2000h-2, *inter alia*, alleging that the District continued to operate a racially segregated public school system. USCA5

67; RE Tabs 9a-10. Thereafter, the district court entered a series of consent orders between the United States and the District in 1989, 1992, and 1995. USCA5 28-51.

In 2011, the United States moved for further relief on the grounds that the District had failed to comply with the student and faculty assignment components of the extant desegregation and consent orders. USCA5 95-514. The district court granted the United States' motion in part, and ordered, *inter alia*, the District to submit a desegregation plan for student assignment at the District's formerly *de jure* African-American junior high and high schools. USCA5 935, 972.

On January 24, 2013, the district court rejected the District's proposed student assignment plan and ordered relief that neither party had requested. The district court abolished the existing attendance zones and majority-to-minority transfer program, and ordered a desegregation plan for the District's junior high and high schools that consisted of "open-enrollment," so that students would have "true freedom-of-choice" to attend the school of their choosing. USCA5 1306, 1315-1316; RE Tabs 3a-3b. On April 30, 2013, the district court denied the United States' motion to alter or amend the court's January 24, 2013, order. USCA5 1638-1640; RE Tab 4.

STATEMENT OF THE FACTS

Cleveland is a small city of approximately 12,000 people, located in Bolivar County in the Mississippi Delta. USCA5 234, 937, 1310. The railroad tracks of the Louisville, New Orleans & Texas Railroad, later known as the Illinois Central Railroad, run north-south through Cleveland, and have served as the dividing line for school attendance in Cleveland and outlying areas. USCA5 169, 234, 938. When this case was first filed in 1965, Bolivar County schools were racially segregated by operation of State law, policy, custom, practice, and usage. USCA5 914-915, 938. The *de jure* white schools were on the west side of the railroad tracks and the *de jure* African-American schools were on the east side. USCA5 169, 938.

From 1965 through 2013, student enrollment at the formerly *de jure* African-American junior high school and high school has statically remained between 97.8% to 100% African-American, despite the fact that African-American students have represented only 55.7% to 67.8% of the school district's total student enrollment. See Addendum 1-4, *infra*.² At no time during the course of this litigation has the District petitioned the district court for a declaration of unitary status. USCA5 955.

² The Addendum provides statistical data on the District's total student enrollment and the student enrollment at each of the District's junior high and high schools.

In 2012, the district court held that the school district had failed to desegregate these two schools, and rejected the school district's proposed desegregation plan. USCA5 935-936, 1306-1307. These holdings, which the school district did not appeal (or cross-appeal), are unchallenged. The only issue presented in this appeal is the constitutionality of the district court's chosen remedy for the school district's failure to carry out its desegregation obligations.

1. Private Plaintiffs' Original Lawsuit And Early Proceedings

On July 24, 1965, African-American students and their parents, Diane Cowan, *et al.*, sued the Bolivar County Board of Education, Bolivar County School District Nos. 1-6, and various education officials, on behalf of themselves and similarly-situated African-American students and parents in the cities of Shaw, Rosedale, and Cleveland, to desegregate Bolivar County's public school system. USCA5 904-915. Although the original plaintiffs sued multiple school districts within the County, only the Cleveland School District (formerly Bolivar County School District No. 4) is at issue in this appeal. The District encompasses the southeastern section of Bolivar County, including the city of Cleveland, the towns of Boyle, Renova, and Merigold, and some outlying areas. USCA5 234, 702-704, 818, 938; RE Tab 5 at 4.

In their original complaint, plaintiffs alleged that the District had six white schools, including Margaret Green Junior High School and Cleveland High

School, which were staffed by white teachers, principals, and professional personnel and could be attended only by white students. USCA5 915. Plaintiffs further alleged that the District also had four African-American schools, including East Side High School, which was staffed by African-American teachers, principals, and professional personnel and could be attended only by African-American students. USCA5 916. At the time, African-American students in grades 7 to 12 attended East Side High School; there was no separate junior high school for African-American students. RE Tab 5 at 4-5.

Plaintiffs alleged that the defendants provided a superior education to white students; that the scholastic program offered at African-American schools was inferior, was taught in schools that were inadequate in size and facilities, and in larger classes than found at white schools; that the teachers at white schools were better paid and more qualified; and that the defendants spent more money on the education of white students than African-American students. USCA5 917-918. Plaintiffs further alleged that they had petitioned the District to desegregate the schools, but the District had not replied. USCA5 919.

On August 9, 1965, the district court held a hearing on the plaintiffs' motion for a preliminary injunction, and ordered the defendants to submit desegregation plans. USCA5 53. On August 11, 1965, the district court entered a preliminary injunction. USCA5 53. Upon receiving the defendants' desegregation plans and

plaintiffs' objections, on August 27, 1965, the district court entered a temporary injunction. USCA5 53. After discovery and additional litigation, on November 17, 1967, the district court entered a decree setting out freedom-of-choice desegregation plans for Bolivar County schools. USCA5 54-57, 59-60; RE Tab 5 at 6-8.

On May 16, 1969, the district court made findings of fact and conclusions of law with regard to, among other things, the District's schools and student enrollment. The district court found that the District had an enrollment of 2897 African-American students, 2214 white students, and 55 students of other races.³ RE Tab 5 at 4. The District operated three formerly all white schools, each of which had a small number of African-American students, and four schools with student enrollments that were entirely African-American. RE Tab 5 at 4-5.

The district court found that although the District had been operating under a freedom-of-choice desegregation plan for several years, the far greater proportion of African-American students continued to attend wholly African-American schools.⁴ RE Tab 5 at 6. Not a single white student had chosen to attend a

³ This equates to a total enrollment of 5166 students that was 56.1% African-American, 42.9% white, and 1.1% "other races."

⁴ The district court found that during the 1966-1967 school year, 23 African-American students chose to attend an all white school. RE Tab 5 at 5. This number increased to 41 African-American students for the 1967-1968 school

(continued...)

formerly *de jure* African-American school. RE Tab 5 at 5. The district court concluded that “[d]espite the fact that freedom of choice has been honestly and fairly carried out by each of these districts, that method has failed to produce genuine desegregation.” RE Tab 5 at 6-7. Based on these and similar findings for the other school districts in the County, the district court rescinded the freedom-of-choice desegregation plan and ordered the defendants to submit new desegregation plans. USCA5 59-60; RE Tab 5.

On July 2, 1969, the district court rejected the District’s desegregation plan with regard to student attendance, which continued to rely on freedom-of-choice, but approved the plan in all other respects. USCA5 60; RE Tab 6 at 6-7, Tab 7 at 1-2. The district court ordered the District to submit a revised plan for student attendance, instructing the District that “no longer may the effectiveness of any plan depend upon the wishes or choice of students or their parents.” USCA5 60; RE Tab 6 at 2, 6-7. The District’s amended desegregation plan with regard to student attendance continued to rely, in part, on freedom-of-choice. RE Tab 7, Ex. A.

On July 22, 1969, the district court entered a desegregation order (the 1969 Desegregation Order) that permanently enjoined the District from discriminating

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year, and then to 43 African-American students for the 1968-1969 school year. RE Tab 5 at 5.

on the basis of race or color in the operation of its public schools, and ordered the District to take affirmative steps to eliminate segregation and the effects of the dual school system. USCA5 12-19, 809-816; RE Tab 8. To that end, the 1969 Desegregation Order, among other things, established attendance zones for each of the District's schools. USCA5 12-13, 809-810; RE Tab 8 at 1-2. Under this plan, Cleveland High School, which had been consolidated with Margaret Green Junior High School (both formerly *de jure* white), covered all of the District's territory to the west of the railroad tracks, and East Side High School (formerly *de jure* African-American) covered all of the territory to the east of the railroad tracks. USCA5 13, 169, 810, 940; RE Tab 8 at 2. Each of these schools served grades 7 to 12. USCA5 13, 810; RE Tab 8 at 1-2.

The 1969 Desegregation Order also established a majority-to-minority transfer program, whereby "any student [could] transfer from a school where students of his race [were] * * * a majority to any other school within the system where students of his race [were] * * * a minority," as long as there was no school overcrowding. USCA5 15, 812; RE Tab 8 at 4. Under this transfer program, which was available from 1969 until 2013, the vast majority of District students retained the freedom to choose their preferred junior high school or high school: between 80.5% to 87.6% of African-American students could freely transfer from East Side High School to Cleveland High School, and between 74.3% to 87.7% of

white students could freely transfer from Cleveland High School to East Side High School.⁵ USCA5 15, 709-710, 718, 812, 1307, 1316, 1487, 1502-1503; RE Tab 8 at 4. Yet, the available data reveals that no white student opted to transfer to a formerly *de jure* African-American school in the 44 years this transfer program was in place. USCA5 15, 31-33, 156-164, 1306-1308, 1315-1316. In fact, not a single student, white or otherwise, chose to enroll in a formerly *de jure* African-American junior high school or high school using the transfer program. USCA5 156-164, 220, 245-246, 258, 267-268, 326, 345-348, 534, 561-562, 582, 591-592, 657, 676-679, 1035.⁶

⁵ According to data provided by the District, in 1969, the population of the east side of Cleveland was 82.7% African-American (5251) and 17.3% white (1097). USCA5 718, 1487. From 1980 to 2010, the population in the East Side High School attendance zone was between 80.5% to 87.6% African-American and 11.3% to 19.0% white, whereas the population in the Cleveland High School attendance zone was between 74.3% to 87.7% white and 11.0% to 21.6% African-American. USCA5 709-710, 1502-1503.

⁶ The District's 1985 report to the court documented that only African-American students had used the majority-to-minority transfer program, and, at the junior high and high school level, they all transferred to Margaret Green Junior High or Cleveland High School. USCA5 156-164. For the 2005-2006 school year, no student, white or otherwise, transferred to D.M. Smith Middle School or East Side High School. USCA5 220. For the 2007-2008 school year, at the junior high or high school level, all transfers were to Margaret Green Junior High School or Cleveland High School. USCA5 245-246, 561-562. For the 2008-2009 and 2009-2010 school years, at the junior high and high school level, only African-American students used the transfer program, and they all transferred to the formerly *de jure* white junior high and high schools. USCA5 258, 267-268, 326, 345-348, 582, 591-592, 657, 676-679. The District's majority-to-minority transfer
(continued...)

From 1969 to 1984, the student enrollment at the District's formerly *de jure* African-American schools on the east side of the railroad tracks was between 97.8% and 100% African-American. USCA5 171, 1492-1493, 1512-1513. During this same timeframe, all of the schools on the west side of the railroad tracks, except one, were predominantly white. USCA5 172.

2. *The United States' Motion To Intervene And Consent Decrees*

In 1983, the United States Department of Justice investigated complaints from African-American and white parents alleging that the District had violated the 1969 Desegregation Order and engaged in practices designed to maintain the District schools as racially identifiable with regard to student and faculty assignment. RE Tab 9c at 3-4. The Department of Justice determined that these complaints were meritorious, and that the District had engaged in practices that perpetuated, rather than eliminated, the vestiges of desegregation. RE Tab 9c at 3-4, and Tab 9d at 3-5.

On January 23, 1985, the United States moved to intervene as plaintiff against Bolivar County Board of Education, the District, and various education officials. USCA5 67; RE Tabs 9a-9e. With regard to student attendance, the

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program data for the 2010-2011 and 2011-2012 school years do not report the race of the transferring student, but all transfers at the junior high school and high school level were to Margaret Green Junior High School or Cleveland High School. USCA5 534, 1035.

United States alleged that the District had instituted an informal dual-residency policy that allowed white students who lived in the attendance zones of predominantly African-American schools to establish a second residence during the school week in another attendance zone to attend predominantly white schools. USCA5 189, 200-205, 970; RE Tab 9d at 3-5. In addition, the United States alleged that the District had constructed new schools in areas so that African-American students would continue to attend schools with 100% African-American enrollment. RE Tab 9d at 5. The United States asserted that, as a result of these policies, African-American students remained heavily concentrated in the formerly *de jure* African-American schools: the student enrollment of six schools was 99% African-American, and the student enrollment at these six schools represented 83% of the District's African-American students. RE Tab 9d at 5 & Att. B.

On March 19, 1985, the district court granted the United States' motion to intervene. USCA5 67; RE Tab 10. The United States and the District engaged in discovery and settlement discussions for the next several years. USCA5 67-70. On September 21, 1989, November 13, 1992, and February 3, 1995, the district court entered consent decrees between the United States and the District regarding the District's desegregation obligations. USCA5 28-51.

3. *The United States' Motion For Further Relief And Recent Proceedings*

a. In 2006, the United States initiated a periodic review to determine if the District was in compliance with the existing orders in this case and federal law. USCA5 97, 120. As part of this review, the United States requested documents and conducted a site visit in 2008. USCA5 97, 120. This review revealed that nearly every school in the District remained racially identifiable as an African-American or white school, and that the District had failed to eliminate the vestiges of its former dual school system. USCA5 97, 120-121. Therefore, on May 2, 2011, the United States moved for further relief, arguing that the District had violated the extant desegregation orders and federal law in the areas of student and faculty assignment. USCA5 95-514.

Regarding student assignment, the United States argued that the schools on the east side of the railroad tracks remained virtually all African-American and that the schools on the west side of the railroad tracks had an enrolled student body that was at least 20% more white than the student population for the District as a whole.⁷ USCA5 121-123. The United States argued that the racial segregation of the District's junior high and high schools was particularly pronounced. USCA5 111. During the 2009-2010 school year, the student body at D.M. Smith Middle

⁷ At the time of the United States' motion, the District's total student enrollment was 66.4% African-American, 30.2% white, 2.4% Hispanic, 0.9% Asian, and 0.1% Native-American. USCA5 531.

School was 100% African-American, despite the fact that it was 1.2 miles away from Margaret Green Junior High School, the formerly *de jure* white junior high school. USCA5 111, 126. Similarly, during that same year, the student body at East Side High School was 99.7% African-American, even though it was only 1.3 miles away from Cleveland High School, the formerly *de jure* white high school. USCA5 111, 127.

The United States argued that the District's failure to desegregate these schools was further borne out in the school board's proposed plan to reorganize several district schools for the 2010-2011 school year. This plan called for, among other things, the closure of D.M. Smith Middle School. USCA5 130, 138-139, 499-500. Instead of consolidating the District's two junior high schools, so that all junior high school students, regardless of race, would attend the same school, the plan proposed consolidating D.M. Smith Middle School and East Side High School, which would have recreated a virtually all African-American school for grades 7 to 12, similar to that which existed under the *de jure* segregated system. USCA5 127, 130, 138-139. Due to community opposition, this plan was not carried out. USCA5 504-506, 824.

Regarding faculty assignment, the United States argued that the District continued to assign faculty to schools in a racially disproportionate manner that

contributed to the racially identifiable nature of the District's schools. USCA5 131-132, 145-146.

b. On March 28, 2012, the district court granted in part the United States' motion for further relief, and ordered the District to submit a plan to desegregate D.M. Smith Middle School and East Side High School, and to achieve greater racial balance among the District's faculty.⁸ USCA5 935-936, 976. The district court found that during the 2011-2012 school year, the District's overall student population was 67.0% African-American, 29.2% white, 2.7% Hispanic, 0.9% Asian, and 0.2% Native-American. USCA5 958-959. The racial composition of the District's junior high and high schools during this same school year did not comport with these overall demographics.

The district court found that although the District's formerly *de jure* white junior high and high schools were racially mixed,⁹ the District had never desegregated its formerly *de jure* African-American junior high and high schools, each of which had a student enrollment that was 99.7% African-American.

⁸ The district court held that the District had complied with its desegregation obligations at District elementary schools. USCA5 972-973.

⁹ During the 2011-2012 school year, the student enrollment at Cleveland High School was 47.0% African-American, 47.1% white, 3.6% Hispanic, 2.3% Asian, and 0.0% Native-American. USCA5 1034. The student enrollment for Margaret Green Junior High School for that same year was 45.1% African-American, 48.9% white, 4.2% Hispanic, 1.4% Asian, and 0.4% Native-American. USCA5 1034.

USCA5 960-962. The court found that neither of these schools had attracted a significant white enrollment, despite the fact that there was, in the 1960s and 1970s, a 15% to 26% white population within the schools' attendance zones.

USCA5 969. The district court found that a "likely" reason for the failure of white students to enroll in the formerly *de jure* African-American junior high and high schools was the District's policy allowing white families to establish a "fictitious 'weekday residence' on the west side of the railroad tracks so that their children could attend predominantly white west side schools." USCA5 970.

The district court found that East Side High School and D.M. Smith Middle School remained racially identifiable as African-American schools, despite the District's efforts to attract white students to the two schools through the magnet programs, arts and International Baccalaureate programs, and the majority-to-minority transfer program. USCA5 960-962, 970. The district court found it "troubling" that the District's junior high and high schools had such "distinct racial composition" despite the fact that the junior high and high schools are only 1.2 and 1.3 miles apart, respectively. USCA5 961-962. The court also found the District's proposed merger of D.M. Smith Middle School and East Side High School "peculiar," given that the merger would have "resulted in a revival of a one-race school for grades 7 through 12," similar to that which existed in "the days of *de jure* segregation." USCA5 968.

The district court also found that during the 2010-2011 school year, the District's teachers were 36% African-American and 64% white, yet "[n]ot a single school within the District reflected the districtwide faculty ratio." USCA5 974.

Based on this, the district court ordered the District to submit a plan to desegregate D.M. Smith Middle School and East Side High School, and to achieve a better racial balance among the District's faculty. USCA5 972, 975-976. The district court noted that "[o]ne obvious remedy would be consolidation of the two high schools * * * and consolidation of the two junior high schools." USCA5 976 n.9.

4. *The District's Proposed Desegregation Plan*

a. The District's proposed desegregation plan relied on creating new magnet programs and revitalizing the International Baccalaureate programs at the formerly *de jure* African-American junior high and high schools. USCA5 978-981, 1328-1329. The District would also make courses uniquely offered at these two schools (*e.g.*, remedial courses, choral music) available to students at the formerly *de jure* white junior high and high schools, and would provide transportation to students seeking to participate in any of these programs. USCA5 978-981, 1328-1329. As to faculty assignment, the District proposed instituting a voluntary, then mandatory, transfer program. USCA5 981.

The United States objected to the student assignment component of the District's plan on the grounds that it continued to rely on a method of desegregation that had failed previously and white students were unlikely to enroll full-time at the formerly *de jure* African-American junior high and high schools under the District's plan. USCA5 1044-1047. White students had not used the majority-to-minority transfer program to enroll in the schools, and very few white students had taken courses at these schools. USCA5 1052. During the 2012-2013 school year, only nine white students from Cleveland High School took more than one course at East Side High School, and no white student took more than two courses. USCA5 1048, 1050, 1057-1058, 1342. The United States argued that the District's plan would take a minimum of three school years to implement, and other, more effective remedies could have been implemented immediately. USCA5 1044-1045, 1052. Specifically, the United States suggested that the District consolidate the two junior high schools into one school and the two high schools into one school, or rezone existing attendance boundaries. USCA5 1052.

b. On December 11, 2012, the district court held a hearing on the District's proposed desegregation plan. USCA5 1317-1434. The District called two witnesses, Beverly Hardy, an elementary school principal and director of the District's magnet program, and Maurice Lucas, the District's school board president. USCA5 1319, 1323-1325, 1353. Hardy testified about District student

enrollment demographics and provided information about how the District's proposed desegregation plan would operate. USCA5 1325-1341. Hardy acknowledged that no white students had enrolled full-time at East Side High School, even though the school offered an International Baccalaureate program and was the only school offering AP level courses in the District. USCA5 1341-1343, 1346-1347.

Lucas testified that he was in favor of the District's desegregation plan, which relied on magnet programs. USCA5 1354. Lucas stated that D.M. Middle School and East Side High School already had magnet programs, yet no white students had enrolled full-time in either school. USCA5 1364.

Lucas acknowledged that Cleveland High School and Margaret Green Junior High School are adjacent to each other, and that the combined facilities would have the capacity to serve all of the District's students in grades 9 to 12. USCA5 1361-1362. Lucas also acknowledged that D.M. Smith Middle School was located behind East Side High School, and that it would be possible to combine the facilities into a single school for all District junior high school students. USCA5 1362. Yet, Lucas testified that the school board had not considered consolidation of schools, even though the district court had suggested it as an obvious remedy. USCA5 1355, 1360, 1363-1364. According to Lucas, who is African-American, the school board did not consider consolidation because it was not his "goal" to

“do[] away with East Side High,” his alma mater. USCA5 1351, 1362-1363.

Lucas testified that he believed that the identities of the two high schools were important to the community, although he admitted that the school board did not hold public hearings or meetings to discuss the proposed desegregation plan with anyone in the community. USCA5 1355, 1360, 1365. Lucas’s claim of community support for the proposed revitalized magnet program appears to have been based on public hearings and the work of a biracial committee in 1988, some 25 years ago. USCA5 1354.

The United States called three African-American parents and District residents, Reverend Edward Duvall, Lenden Sanders, and Tonya Short, all of whom testified that they would prefer that the District have one junior high school and one high school. USCA5 1371-1372, 1378-1379, 1382, 1384-1386, 1388-1393, 1399-1402, 1404-1406, 1409.

Reverend Duvall, who is a veteran, pastor, and East Side High School alumnus, testified that he favored consolidation because there is a stigma in the community that has attached to East Side High School and D.M. Smith Middle School. USCA5 1400-1401, 1405-1406. As Reverend Duvall explained, “for the past 50 years, [] kids [have] always been taught that East Side was a bad school.

* * * [K]ids on the west side of town have no desire to cross those railroad tracks.

* * * I don’t care what kind of program you bring to East Side; they don’t want to

come, period.” USCA5 1406. Reverend Duvall testified that he had withdrawn his daughter from Cleveland High School and had enrolled her at East Side High School because teachers had been speaking negatively about children on the east side of town. USCA5 1403-1404. Reverend Duvall testified that he and his neighbors had tried to share their opinions with the School Board, but there was never any public discussion of the issues or opportunity for public comment. USCA5 1408-1409. Instead, “anything of [a] sensitive nature dealing with consolidation and race has always been dealt with in executive session.” USCA5 1409.

Sanders, a local business owner and parent of District students, also testified to strong community support for consolidated schools and opposition to the District’s plan. USCA5 1385-1386, 1390-1392. Specifically, Sanders attended a community meeting of approximately 50 parents and grandparents, where no one supported the District’s proposed plan. USCA5 1391-1392. Although Sanders is an East Side High School alumna, she would “give [the school] up in a heartbeat if it mean[t] the kids will get a better education.” USCA5 1388-1389, 1393, 1399.

Short, who is a member of the D.M. Smith Middle School PTSA and a former counselor at the school, testified that her honor-roll-student son was not being academically challenged at D.M. Smith Middle School, and that the school “had a negative rating in the community in terms of academics.” USCA5 1372-

1373, 1375. Short did not think that additional course offerings would entice students to enroll at D.M. Smith Middle School or East Side High School. USCA5 1378.

c. On January 24, 2013, the district court held that the District’s proposed desegregation plan did not meet constitutional requirements. USCA5 1306; RE Tab 3a at 1. The district court found that although D.M. Smith Middle School and East Side High School had newer and superior facilities and offered specialized courses (including arts and performing arts magnet programs and the International Baccalaureate program), the District had never meaningfully desegregated these two schools. USCA5 1312-1313; RE Tab 3b at 5-6. The district court rejected the District’s plan as inadequate, and held that “the attendance zones, as defined by the former railroad tracks in Cleveland, perpetuate vestiges of racial segregation.” USCA5 1315; RE Tab 3b at 5.¹⁰

The court then ordered the District to implement a plan of the court’s own devising. USCA5 1315-1316; RE Tab 3b at 5-6. The district court abolished the attendance zones and majority-to-minority transfer program, and ordered the District to establish “an open-enrollment procedure,” so that District junior high

¹⁰ The district court held that the District had complied with its desegregation obligations at the other District schools. USCA5 972-973. The district court also ordered the District to submit a plan to desegregate the faculty and staff at District schools. USCA5 935, 975-976.

and high school students would have “true freedom of choice to attend either high school and either junior high school.”¹¹ USCA5 1315; RE Tab 3b at 5.

d. The United States moved to alter or amend the district court’s January 24, 2013, order on the ground that the court’s freedom-of-choice plan was constitutionally inadequate. USCA5 1435. The United States argued that, under Supreme Court and Fifth Circuit precedent, a freedom-of-choice plan that has not worked, or did not promise to work in the future, must be rejected in favor of an alternative remedy that could provide more immediate desegregation. USCA5 1448-1453. The United States argued that the vast majority of District students effectively had freedom-of-choice under the majority-to-minority transfer program. USCA5 1448, 1456-1457. Yet not a single white student had chosen to enroll in D.M. Smith Middle School or East Side High since at least the 2007-2008 school year, and there was no evidence that white students would do so in the future. USCA5 1448, 1456-1457. The United States argued that the schools’ failure to attract white students was due to the stigma attached to these two schools as racially identifiable African-American schools, which was a lasting vestige of segregation. USCA5 1459. Therefore, the United States urged the court to order a

¹¹ The district court noted that “[i]n the event that the existing facilities are inadequate to meet the projected registration, the Court will then address the matter with the parties as to an appropriate utilization of existing facilities.” USCA5 1315-1316; RE Tab 3b at 5-6.

more viable means of desegregation: consolidation of the schools. USCA5 1448, 1450-1453, 1460-1463.

e. While the United States' motion was pending, the district court ordered the District to submit data regarding pre-enrollment at the District's junior high and high schools. USCA5 1614. The pre-enrollment data for the 2013-2014 school year, although incomplete, revealed that only African-American students had pre-enrolled in the formerly *de jure* African-American junior high and high school. USCA5 1617. Not a single white student had pre-enrolled to attend D.M. Smith Middle School or East Side High School, just as no white students had enrolled at these schools during the prior school year. USCA5 1617, 1649.

During the 2012-2013 school year, all 510 white junior high and high school students were enrolled at Margaret Green Junior High School or Cleveland High School. USCA5 1649. At the time the District submitted its pre-enrollment data for the 2013-2014 school year, all of the 479 white junior high and high school students who had pre-enrolled did so at these formerly *de jure* white schools. USCA5 1617. Thus, according to the available data, the vast majority of white junior high and high school students had pre-enrolled under the district court's freedom of choice plan, and not a single one had chosen to attend a formerly *de jure* African-American school.

f. On April 30, 2013, the district court denied the United States' motion without significant discussion of the issues. USCA5 1638-1640; RE Tab 4. The district court found that the pre-enrollment data did not warrant consolidation of the District's junior high and high schools, and noted that it "g[ave] credence" to the testimony of Lucas, the District's school board president. USCA5 1353, 1639; RE Tab 4 at 2. Thus, at the time the district court entered this order, the record showed that no white student had ever chosen to transfer to the District's formerly *de jure* African-American junior high school or high school, whether it was under the original freedom-of-choice plan, the majority-to-minority transfer program, or the district court's most recent freedom-of-choice plan. See pp. 8-11, 24-25, and notes 4-6, *supra*.

SUMMARY OF THE ARGUMENT

The District has a continuing duty to desegregate its schools and eliminate vestiges of its *de jure* racially segregated school system, including the racially identifiable nature of schools. The district court correctly held that the District never desegregated its formerly *de jure* African-American junior high and high schools. These schools – which have had a 97.8% to 100% African-American student enrollment for more than four decades – have persisted as racially identifiable African-American schools. The district court also properly rejected the District's proffered desegregation plan as inadequate to desegregate these schools.

The district court, however, abused its discretion in ordering its freedom-of-choice desegregation plan as a remedy for the District's continuing constitutional violation. The district court's freedom-of-choice plan will not result in desegregation. The pre-enrollment figures for the 2013-2014 school year, corroborated by historical data on student transfers within the District, establish that white students have not chosen – and will not choose in the future – to enroll in the District's formerly *de jure* African-American junior high and high schools.

The record also demonstrates that consolidation of the District's two junior high schools into one school and two high schools into one school will result in immediate desegregation. The District has consolidated schools in the past, and any community loyalty to the identities of these former schools cannot trump the District's constitutional obligations to its students. This Court should reject the district court's freedom-of-choice desegregation plan as an abuse of discretion, and reverse the district court's January 24, 2013, order.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING THE DISTRICT TO USE A FREEDOM-OF-CHOICE PLAN AS A REMEDY FOR THE DISTRICT'S FAILURE TO DESEGREGATE SCHOOLS

A. Standard Of Review

This Court reviews a district court's desegregation remedy for abuse of discretion. *Ayers v. Fordice*, 111 F.3d 1183, 1193 (5th Cir. 1997), cert. denied,

522 U.S. 1084 (1998). The district court's factual findings are accepted unless clearly erroneous, while its conclusions of law are reviewed *de novo*. *Ibid*.

B. The District Has A Continuing Duty To Desegregate All Of Its Schools And Eliminate All Vestiges Of The Dual School System

It is axiomatic that schools that are segregated by race by operation of law are unconstitutional. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954), supplemented by 349 U.S. 294 (1955). To remedy this constitutional violation, a school district must do more than merely make school enrollment available to all students, regardless of race. *Green v. County Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 437 (1968); *United States v. Jefferson Cnty. Bd. of Educ.*, 380 F.2d 385, 389 (5th Cir.) (en banc), cert. denied, 389 U.S. 840 (1967) (*Jefferson Cnty. II*). A school district is “clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.” *Green*, 391 U.S. at 437-438; accord *Freeman v. Pitts*, 503 U.S. 467, 485-486 (1992); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *United States v. Texas Educ. Agency*, 467 F.2d 848, 853 (5th Cir. 1972) (en banc).

This duty exists “to ensure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present.” *Freeman*, 503 U.S. at 485. The racially identifiable nature of schools is one of the vestiges of a racially discriminatory, dual school system that a school

district must eliminate. *United States v. Lawrence Cnty. Sch. Dist.*, 799 F.2d 1031, 1043 (5th Cir. 1986); *Valley v. Rapides Parish Sch. Bd.*, 702 F.2d 1221, 1226 (5th Cir.), cert. denied, 464 U.S. 914 (1983). A school district remains in violation of the Fourteenth Amendment when it fails to adequately discharge its duty to desegregate and eliminate the vestiges of racial discrimination, including racially identifiable schools. *United States v. Fordice*, 505 U.S. 717, 727-728 (1992); *Lawrence Cnty. Sch. Dist.*, 799 F.2d at 1044.

C. *The District Court Correctly Held That The District Did Not Fulfill Its Desegregation Obligations*

The district court in this case correctly held that the District had failed to carry out its continuing desegregation obligations with respect to student assignment at the District's formerly *de jure* African-American junior high and high schools, and faculty assignment District-wide. USCA5 961-962, 966, 972, 974-976, 1313. Despite the District's efforts to attract white students to these two schools through specialized academic offerings and magnet programs, the schools continued to have a student enrollment that was virtually all African-American. USCA5 961-962. The faculty at these schools also has been disproportionately African-American. USCA5 974. The district court properly found that the District had never desegregated these schools, which have "never been anything other than [] racially identifiable African-American" schools. USCA5 961-962.

These are not two isolated schools in a large metropolitan school system. The District has only two junior high schools and two high schools; prior to the court's January 24, 2013, order, the formerly *de jure* African-American junior high and high schools served the entire east side of the school district. USCA5 13, 960-962, 1310-1312; RE Tab 8 at 2. Whatever strides the District may have made with regard to its other schools (USCA5 960, 964, 972), the fact that it has failed, for more than 40 years, to dismantle the former *de jure* segregated school system with regard to these two schools means that it has failed to carry out its duty to eliminate racial discrimination and the vestiges of the dual school system. This failure is a continuing violation of the Fourteenth Amendment, and one that the district court properly sought to rectify.

The district court also correctly rejected the District's proposed desegregation plan with regard to student attendance at these schools as inadequate. USCA5 1315; RE Tab 3b at 5. The District's proposal was simply more of the same measures that previously had failed to desegregate these schools. It is not the course offerings, but the racially identifiable nature of the formerly *de jure* African-American junior high and high schools that has impeded desegregation. Witnesses testified at the hearing on the District's plan that white students would not enroll at the formerly *de jure* African-American junior high and high schools regardless of course offerings. USCA5 1378, 1405-1406. These

schools, as racially identifiable African-American schools, are stigmatized in the community. USCA5 1405-1406. As Reverend Duvall explained, “for the past 50 years, [] kids [have] always been taught that East Side was a bad school. * * * [K]ids on the west side of town have no desire to cross those railroad tracks. * * * I don’t care what kind of program you bring to East Side; they don’t want to come, period.” USCA5 1406.

This testimony is buttressed by stark statistical data. In the more than four decades since the district court first ordered the District to “take affirmative action to disestablish all school segregation and to eliminate the effects of the dual schools system” (USCA5 12, 809; RE Tab 8 at 1), the formerly *de jure* African-American junior high and high schools have never had a student enrollment that was less than 97.8% African-American. Addendum 3-4. Most often, the student enrollment has remained fixed between 99% and 100% African-American. Addendum 3-4. The only year in which either school had more than five white students enrolled was 1970, the year after the district court granted permanent injunctive relief and first established attendance zones. Addendum 3-4; USCA5 12-14, 809-811; RE Tab 8 at 1-3. Since the 2005-2006 school year, neither school has had more than two enrolled white students. Addendum 3-4.

This testimony and data reveal that white students have not enrolled in these schools, regardless of the available course offerings or magnet programs. The

student enrollment is nearly all African-American; the faculty is disproportionately African-American. As the district court found, these schools have perdured as racially identifiable African-American schools, a condition that is directly attributable to the District's action – as evidenced by its prior dual-residence program and recent proposal to consolidate these two racially identifiable schools, rather than consolidating the District's two junior high schools. USCA5 126, 130, 138-139, 189, 200-205, 499-500, 970.

D. The District Court's Freedom-Of-Choice Desegregation Plan Must Be Rejected Because It Will Not Result In Desegregation

As we show below, the district court's chosen remedy in this case falls far short of the court's constitutional mandate to “implement [a] plan[] that promise[s] ‘realistically to work now.’” *Milliken v. Bradley*, 433 U.S. 267, 280 n.15 (1977) (quoting *Green*, 391 U.S. at 439). The district court's freedom-of-choice plan will not desegregate the schools, and there is an alternative method of desegregation that promises more realistic and timely success. Therefore, the district court's plan was an abuse of discretion.

1. There is no pattern solution to the complex task of desegregation, but there is one consistent refrain easily discerned from precedent: “[t]he only school desegregation plan that meets constitutional standards is one that works.” *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966) (*Jefferson Cnty. I*), adopted with clarification en banc, *Jefferson Cnty. II, supra*; accord

Freeman, 503 U.S. at 489; *Green*, 391 U.S. at 439. The remedy must “dismantle dual school systems,” *Swann*, 402 U.S. at 22, at “the earliest practicable date,” *Brown*, 349 U.S. at 300.

The Supreme Court has expressed skepticism as to the efficacy of freedom-of-choice desegregation plans. *Green*, 391 U.S. at 439-441. Similarly, this Court has “time and again disapproved the use of freedom of choice where it has failed effectively to desegregate public schools.” *Beaumont Indep. Sch. Dist. v. Department of Health, Educ. & Welfare*, 504 F.2d 855, 857 (5th Cir. 1974) (collecting cases). Generally speaking, freedom-of-choice plans are permissible – but only when they actually result in desegregation. *Green*, 391 U.S. at 339-441; *Texas Educ. Agency*, 467 F.2d at 868. Where “there are reasonably available other ways * * * promising speedier and more effective conversion to a unitary, nonracial school system, ‘freedom of choice’ must be held unacceptable.” *Green*, 391 U.S. at 441; see also *Hall v. Saint Helena Parish Sch. Bd.*, 417 F.2d 801, 809 (5th Cir. 1969).

2. The evidence that supports the district court’s rejection of the District’s proffered desegregation plan (see pp. 10-11, 19-23, and notes 5-6, *supra*; Addendum 1-4) also demonstrates that the court’s freedom of choice plan is inadequate. Pre-enrollment data for the 2013-2014 school year illustrates that the district court’s plan has no chance of success. At the time the district court denied

the United States' motion to alter or amend judgment, the vast majority of the District's white junior high and high school students had pre-enrolled for the 2013-2014 school year. USCA5 1617; see p. 25, *supra*. Not a single one of these students chose to enroll in the District's formerly *de jure* African-American junior high and high schools. USCA5 1617. These figures are entirely consistent with historical patterns of enrollment. See Addendum 3-4.

A large majority of District students have had freedom to choose a junior high school and high school since 1967, when the district court first entered a desegregation plan for the District. USCA5 57. This choice expressly existed in the early years of this case under the first freedom-of-choice plan. USCA5 59-60; RE Tab 5 at 4-5. Given the racial segregation of the District's residences along the east-west divide, many of the District's junior high and high school students had the ability to transfer to a different school from 1969 to 2013 under the District's majority-to-minority transfer program. USCA5 15, 812, 1307, 1316; RE Tab 8 at 4. For more than 40 years, between 80.5% to 87.6% of African-American students and between 74.3% to 87.7% of white students could freely choose to transfer across the railroad tracks to enroll in the junior high or high school outside their residential attendance zone. See pp. 10-11, and notes 5-6, *supra*. African-American students have chosen to enroll in the formerly *de jure* white junior high and high school in increasingly significant numbers. Addendum 5-6. In the last

four decades, however, not a single white student has chosen to transfer to the formerly *de jure* African-American junior high and high school through the majority-to-minority transfer program. See pp. 10-11, and note 6, *supra*.

The racial composition of the District's formerly *de jure* African-American junior high and high schools further demonstrates that the various iterations of choice-based desegregation plans, regardless of whether they were expressly labeled as such, have failed to desegregate the District's formerly *de jure* African-American junior high and high schools, and will continue to do so. See Addendum 1-6. Cf. *United States v. Pittman*, 808 F.2d 385, 389 (5th Cir. 1987) ("Any expectation that white students would voluntarily transfer to [a virtually all black school] seems unrealistic in view of the last twenty-one years, when no white elementary student exercised his freedom of choice or majority-to-minority 'right' to attend * * * any * * * black school.").

3. Moreover, it is not sufficient that African-American students have chosen to attend the formerly *de jure* white junior high and high schools. The Supreme Court explained that the early focus of desegregation was on "making an initial break in a long-established pattern of excluding [African-American] children from schools attended by white children. * * * [T]hat immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Green*, 391 U.S. at 435-436. As

this Court has instructed, “[r]elief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes.”

Jefferson Cnty. I, 372 F.2d at 868. So, too, is the goal here: transition to a unitary school system in which there are no racially identifiable, segregated schools.

E. Consolidation Of District Schools Is More Likely To Result In Immediate Desegregation

The record also indicates that there is another means of desegregation that is more likely to result in immediate desegregation: consolidation of the District’s two junior high schools into one school and two high schools into one school.

Indeed, this was the very remedy the district court suggested when it ordered the District to submit a desegregation plan for these schools in 2012. USCA5 976.

The record indicates that in the 2012-2013 school year, the District served a total of approximately 761 junior high and 960 high school students. USCA5 1649. On the east side of Cleveland, D.M. Smith Middle School and East Side High School are housed in adjacent facilities. USCA5 234, 1362, 1389.

Likewise, on the west side of Cleveland, Margaret Green Junior High School and Cleveland High School are located in adjacent buildings. USCA5 234, 1361, 1389. The two east-side schools are little more than a mile away from the two west-side schools. USCA5 234, 961-962, 1389-1390. As the school board president acknowledged, the District can repurpose the east-side and west-side buildings and combine the two junior high schools and two high schools, so that

the District has one junior high school and one high school to serve all of the District's students. USCA5 1362. The United States identified several possible configurations in its motion to alter or amend the district court's January 24, 2013, order. USCA5 1461-1463.

The District's school board did not consider consolidation in drafting its proposed desegregation plan. The school board president acknowledged that the Board's failure to consider this option was based on his personal loyalty to his alma mater. USCA5 1362-1363. The school board president testified that he believed the identity of the individual schools was important to the community. USCA5 1365. Yet, as the school board president acknowledged, this belief was based on 25-year-old data. USCA5 1354. When faced with the renewed prospect of drafting a desegregation plan, the school board did not hold a public meeting or solicit input from community members, many of whom now favor consolidation. USCA5 1359-1360. The school board president's assertion of community loyalty is further undermined by the testimony of two other witnesses, both of whom are alumni of east-side schools and favor consolidation as a means of providing District school children with a more equal and better education. USCA5 1388-1389, 1393, 1399-1400, 1404-1407.

The district court noted that it "g[ave] credence" to the school board president's testimony. USCA5 1639; RE Tab 4 at 2. To the extent that it was his

testimony regarding alleged community loyalty to the identity of the individual schools, such testimony was an insufficient justification for the court's plan. "[C]ommunity values," even worthy ones, "may not serve to supersede the constitutional imperative of desegregation." *Valley*, 702 F.2d at 1229. Reliance on "community values" is particularly troublesome, given the well-documented history of community opposition to desegregation efforts. See, e.g., *Valley v. Rapides Parish Sch. Bd.*, 646 F.2d 925, 929, 934-936, supplemented by 653 F.2d 941 (5th Cir. 1981), cert. denied, 455 U.S. 939 (1982). The District, and its school board, have an obligation to ensure that "new and subtle forms" of "discrimination and racial hostility" are eliminated and "do not shape or control the policies of its school system." *Freeman*, 503 U.S. at 490. Given the racially identifiable nature of the District's formerly *de jure* African-American junior high and high schools, the district court should have scrutinized any claim of community loyalty to the separate identity of the District's east-side and west-side schools to ensure that it would not serve to perpetuate the vestiges of the dual school system.

Consolidation of the District's two junior high schools into one school and two high schools into one school is a reasonably available, constitutionally-sound remedy that will desegregate the schools now. The schools are in close proximity to one another. The student population and geographic area are relatively small. Moreover, a consolidation remedy is not new to the District. At various times, the

District has consolidated schools, although typically it has consolidated the formerly *de jure* white schools or the formerly *de jure* African-American schools. See pp. 7, 10, *supra*; Addendum 3, 5, and Addendum notes 14, 36. While consolidation may require an initial logistical investment, the Supreme Court has acknowledged that “[t]he remedy for [] segregation may be administratively awkward, inconvenient, and * * * may impose burdens on some.” *Swann*, 402 U.S. at 28. In addition, consolidation realistically promises a unitary school system – and an end to the need for federal judicial supervision.

In sum, if the district court’s freedom of choice order is allowed to stand, the District will be required to abdicate its constitutional obligations by carrying out a desegregation plan that has failed in the past, and will continue to fail. The mere passage of time, decades even, does not relieve a school district of its desegregation obligations or permit the court to order relief that does not adhere to constitutional requirements. Because the district court’s freedom-of-choice plan will not result in a unitary school system, it must be rejected as constitutionally infirm.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's January 24, 2013, order requiring the District to use a freedom-of-choice desegregation plan, and remand the case for further proceedings.

Respectfully submitted,

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ADDENDUM

District-Wide Student Enrollment					
	African- American	White	Hispanic	Asian	Native- American
1967-1968 ¹	55.7%	43.2%	0.3%	0.7%	0.0%
1969 ²	56.1%	42.9%	1.1%		
1970 ³	56.1%	42.7%	0.5%	0.7%	0.0%
1980 ⁴	59.5%	39.7%	0.4%	0.4%	0.0%
1987 ⁵	67.4%	32.6%	--	--	--
2005-2006 ⁶	67.2%	30.8%	1.2%	0.7%	0.1%
2006-2007 ⁷	70.3%	27.7%	1.2%	0.7%	0.1%
2007-2008 ⁸	66.1%	31.2%	1.8%	0.9%	0.0%
2008-2009 ⁹	67.8%	29.4%	2.0%	0.8%	0.0%
2009-2010 ¹⁰	67.4%	29.6%	2.1%	0.9%	0.0%

¹ USCA5 165.

² RE Tab 5 at 4. The district court identified non-African-American, non-white students as “other races.” RE Tab 5 at 4.

³ USCA5 1492-1493.

⁴ USCA5 1512-1513.

⁵ USCA5 153-154. This data included only African-American and white students.

⁶ USCA5 219.

⁷ USCA5 243-244, 559-560.

⁸ USCA5 242-244, 558-559.

⁹ USCA5 236, 261-262, 585-586.

¹⁰ USCA5 328, 659.

District-Wide Student Enrollment (<i>continued</i>)					
	African- American	White	Hispanic	Asian	Native- American
2010-2011 ¹¹	66.4%	30.2%	2.4%	0.9%	0.1%
2011-2012 ¹²	67.1%	29.0%	2.8%	1.0%	0.1%
2012-2013 ¹³	66.5%	29.1%	3.1%	1.2%	0.1%

¹¹ USCA5 531.

¹² USCA5 1034.

¹³ USCA5 1649. The percentage of Asian students includes one student identified as Pacific Islander.

D.M. Smith Middle School ¹⁴ Student Enrollment					
	African-American	White	Hispanic	Asian	Native-American
1967-1968	--	--	--	--	--
1970	--	--	--	--	--
1980	--	--	--	--	--
1987 ¹⁵	99.4%	0.6%	--	--	--
2005-2006 ¹⁶	99.1%	0.9%	0.0%	0.0%	0.0%
2006-2007 ¹⁷	99.1%	0.9%	0.0%	0.0%	0.0%
2007-2008 ¹⁸	100.0%	0.0%	0.0%	0.0%	0.0%
2008-2009 ¹⁹	99.5%	0.5%	0.0%	0.0%	0.0%
2009-2010 ²⁰	100.0%	0.0%	0.0%	0.0%	0.0%
2010-2011 ²¹	100.0%	0.0%	0.0%	0.0%	0.0%
2011-2012 ²²	100.0%	0.0%	0.0%	0.0%	0.0%
2012-2013 ²³	99.7%	0.0%	0.3%	0.0%	0.0%

¹⁴ At times this school did not exist, was known as Eastwood Junior High School, and was consolidated with East Side High School. See pp. 6, 9, *supra*; USCA5 35, 117, 944, 1493, 1513.

¹⁵ USCA5 153-154. See Addendum note 5, *supra*.

¹⁶ USCA5 219.

¹⁷ USCA5 243, 559.

¹⁸ USCA5 242-243, 558-559.

¹⁹ USCA5 236, 261-262, 585-586.

²⁰ USCA5 333, 664.

²¹ USCA5 531.

²² USCA5 1034.

²³ USCA5 1649.

East Side High School Student Enrollment					
	African- American	White	Hispanic	Asian	Native- American
1967-1968 ²⁴	100.0%	0.0%	0.0%	0.0%	0.0%
1970 ²⁵	97.8%	2.1%	0.0%	0.1%	0.0%
1980 ²⁶	99.6%	0.4%	0.0%	0.0%	0.0%
1987 ²⁷	100.0%	0.0%	--	--	--
2005-2006 ²⁸	99.8%	0.2%	0.0%	0.0%	0.0%
2006-2007 ²⁹	99.8%	0.2%	0.0%	0.0%	0.0%
2007-2008 ³⁰	99.8%	0.2%	0.0%	0.0%	0.0%
2008-2009 ³¹	100.0%	0.0%	0.0%	0.0%	0.0%
2009-2010 ³²	99.7%	0.3%	0.0%	0.0%	0.0%
2010-2011 ³³	99.1%	0.6%	0.0%	0.3%	0.0%
2011-2012 ³⁴	99.7%	0.0%	0.0%	0.3%	0.0%
2012-2013 ³⁵	99.2%	0.0%	0.6%	0.3%	0.0%

²⁴ USCA5 165.

²⁵ USCA5 1492-1493.

²⁶ USCA5 1512-1513.

²⁷ USCA5 153-154. See Addendum note 5, *supra*.

²⁸ USCA5 219.

²⁹ USCA5 243, 559.

³⁰ USCA5 242-243, 558-559.

³¹ USCA5 236, 261-262, 585-586.

³² USCA5 334, 665.

³³ USCA5 531.

³⁴ USCA5 1034.

³⁵ USCA5 1649.

Margaret Green Junior High School ³⁶ Student Enrollment					
	African-American	White	Hispanic	Asian	Native-American
1967-1968 ³⁷	1.6%	96.2%	0.5%	1.7%	0.0%
1970	--	--	--	--	--
1980	--	--	--	--	--
1987 ³⁸	33.5%	66.5%	--	--	--
2005-2006 ³⁹	47.0%	50.8%	1.1%	1.1%	0.0%
2006-2007 ⁴⁰	42.2%	54.7%	1.2%	1.8%	0.0%
2007-2008 ⁴¹	40.4%	55.9%	2.8%	0.9%	0.0%
2008-2009 ⁴²	42.7%	53.6%	2.8%	0.9%	0.0%
2009-2010 ⁴³	46.2%	49.3%	2.6%	2.0%	0.0%
2010-2011 ⁴⁴	45.7%	48.2%	4.3%	1.6%	0.2%
2011-2012 ⁴⁵	45.1%	48.9%	4.2%	1.4%	0.4%
2012-2013 ⁴⁶	43.4%	49.9%	5.2%	1.3%	0.2%

³⁶ At times this school was consolidated with Cleveland High School. See p. 9, *supra*; USCA5 1493, 1513.

³⁷ USCA5 165.

³⁸ USCA5 153-154. See Addendum note 5, *supra*.

³⁹ USCA5 219.

⁴⁰ USCA5 243, 559.

⁴¹ USCA5 242-243, 558-559.

⁴² USCA5 236, 261-262, 585-586.

⁴³ USCA5 336, 667.

⁴⁴ USCA5 531.

⁴⁵ USCA5 1034.

⁴⁶ USCA5 1649.

Cleveland High School Student Enrollment					
	African- American	White	Hispanic	Asian	Native- American
1967-1968 ⁴⁷	0.8%	96.8%	0.0%	2.4%	0.0%
1970 ⁴⁸	18.2%	80.1%	0.4%	1.3%	0.0%
1980 ⁴⁹	23.8%	74.4%	0.9%	1.0%	0.0%
1987 ⁵⁰	36.8%	63.2%	--	--	--
2005-2006 ⁵¹	39.4%	58.4%	1.1%	1.1%	0.0%
2006-2007 ⁵²	39.4%	58.3%	1.6%	0.7%	0.0%
2007-2008 ⁵³	42.0%	54.6%	1.9%	1.4%	0.0%
2008-2009 ⁵⁴	46.2%	50.5%	1.6%	1.6%	0.0%
2009-2010 ⁵⁵	45.7%	50.7%	2.1%	1.5%	0.0%
2010-2011 ⁵⁶	45.2%	50.4%	2.3%	2.1%	0.0%
2011-2012 ⁵⁷	47.0%	47.1%	3.6%	2.3%	0.0%
2012-2013 ⁵⁸	45.5%	47.1%	4.4%	3.0%	0.0%

⁴⁷ USCA5 165.

⁴⁸ USCA5 1492-1493.

⁴⁹ USCA5 1512-1513.

⁵⁰ USCA5 153-154. See Addendum note 5, *supra*.

⁵¹ USCA5 219.

⁵² USCA5 243, 559.

⁵³ USCA5 242-243, 558-559.

⁵⁴ USCA5 236, 261-262, 585-586.

⁵⁵ USCA5 331, 662.

⁵⁶ USCA5 531.

⁵⁷ USCA5 1034.

⁵⁸ USCA5 1649.

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2013, I electronically filed the foregoing Brief for the United States as Appellant with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Erin Aslan
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Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Brief for the United States as Appellant:

(1) contains 9754 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font; and,

(3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

s/ Erin Aslan
ERIN ASLAN
Attorney

Date: September 16, 2013