No. 13-60464

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

REPLY BRIEF FOR THE UNITED STATES

JOCELYN SAMUELS
Acting Assistant Attorney General

DENNIS J. DIMSEY
ERIN ASLAN
Attorneys
Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station, P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-2773

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ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION BY ORDERING A FREEDOM-OF-CHOICE PLAN AS A REMEDY FOR THE CLEVELAND SCHOOL DISTRICT'S FAILURE TO DESEGREGATE ITS FORMERLY *DE JURE* AFRICAN-AMERICAN JUNIOR HIGH AND HIGH SCHOOLS

Three important points narrow the focus of this appeal. First, the Cleveland School District (the District) has not challenged the district court's finding that it

has failed to desegregate its formerly *de jure* African-American junior high and high schools, which "remain[] [] racially identifiable African-American school[s] with an attendance of 99.7% African-American students." ROA.961-962. [1] Second, the District has not contested the district court's rejection of its proposed desegregation plan as constitutionally inadequate. ROA.1315. Third, the District has never sought a declaration of unitary status, and does not claim to be a unitary school system. ROA.955; District Br. 17. Therefore, much of the factual background and arguments advanced in the District's brief are irrelevant to this appeal. See, *e.g.*, District Br. 2-6, 13, 17-22, 25-26.

The only issue before this Court is whether the district court's chosen remedy to redress the District's uncontested failure – for more than four decades – to desegregate its formerly *de jure* African-American junior high and high schools is constitutionally permissible. As set out more fully in the United States' opening brief, the district court abused its discretion by ordering a remedy that relies on choice, where current and historical enrollment data reveal, and the District acknowledges (District Br. 29-31), that white students have not chosen and will not choose to enroll in D.M. Smith Middle School and East Side High School. US Br.

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[1] "ROA.__" refers to pages of the consecutively-paginated Record on Appeal bearing Bates stamp "USCA5." "US Br. __" refers to pages of the United States' opening brief as appellant. "District Br. __" refers to pages of the District's brief as appellee.

Br. 8-12, 16-17, 21-23, 25, 27-39; U.S. Br. Addendum 3-4. Consolidation of the District's two junior high schools into one junior high school, and two high schools into one high school, is an available remedy that promises to result in desegregation, and an end to the need for federal judicial supervision. Therefore, this Court should reject the district court's freedom-of-choice plan as an abuse of discretion, reverse the district court's January 24, 2013, order, and remand the case for the district court to order a constitutionally adequate remedy.

A. The District Court Abused Its Discretion By Relying On Freedom-Of-Choice As A Remedy For The District's Failure To Desegregate, Not By Eliminating Attendance Zones

The District attempts to construe the district court's remedy as merely abolishing attendance zones. District Br. 1, 12, 14-17, 32. Eliminating attendance zones was part of, but not the entirety of, the district court's decision. In actuality, the district court's remedy consists of a freedom-of-choice desegregation plan of the court's own devising:

> The high school and junior high school students should have a true freedom of choice to attend either high school and either junior high school. Accordingly, the Court orders that the heretofore-established attendance zones shall be abolished, thus establishing an open-enrollment procedure. * * * Also, the majority-to-minority transfer program * * * is hereby abolished. The requirement for his race to be a minority in the transferee school is eliminated, thus permitting any child within the District to enroll in either of the high schools or junior high schools, regardless of the racial composition of the student body at such schools. The Court is of the opinion that this arrangement will permit a true freedom-of-choice enrollment as to both the high school and junior high school grades. In the opinion of the Court, this true

> freedom-of-choice arrangement will meet the constitutional requirements.

ROA.1315-1316; see also ROA.1306-1307. As the text of the court's January 24, 2013, decision makes clear, abolishing the attendance zones and the majority-to-minority transfer program for the District's junior high and high school students was simply the means of implementing the court's freedom-of-choice plan. The district court's plan is an abuse of discretion, not because it eliminates attendance zones,[2] but because it relies on white students choosing to enroll in the formerly *de jure* African-American junior high and high schools.

The district court's remedy must do more than make enrollment available to all junior high and high school students regardless of race. See *Green* v. *County Sch. Bd. of New Kent Cnty*., 391 U.S. 430, 437 (1968). Removing the attendance zone boundary line dividing the District's east-side and west-side junior high and high schools and allowing students to choose which school to attend will not change the racially identifiable nature of the east-side schools. The district court's unchallenged finding is that D.M. Smith Middle School (formerly known as Eastwood Junior High School) and East Side High School have never been anything other than racially identifiable African-American schools. ROA.960-961.

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[2] The United States does not object to the abolition of attendance zones; indeed, consolidation of the District's two junior high schools into one school and two high schools into one school will necessitate eliminating the same junior high and high school attendance zones.

As Reverend Duvall[3] testified, these two schools are stigmatized in the Cleveland community. ROA.1405-1406. As the pre-enrollment data demonstrates, see pp. 6-7, *infra*, erasing the attendance zone boundary line and allowing students to choose their junior high and high schools will not erase the decades of entrenched segregation at the District's formerly *de jure* African-American junior high and high schools.

"The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." *Freeman* v. *Pitts*, 503 U.S. 467, 485 (1992). When the District failed to desegregate its formerly *de jure* junior high and high school, and then failed to propose an adequate plan to do so in the future, it was incumbent on the district court to use "its broad and flexible equitable powers to implement a remedy that, while sensitive to the burdens that can result from a decree and the practical limitations involved, promises 'realistically to work *now*.'" *United States* v. *DeSoto Parish Sch. Bd.*, 574 F.2d 804, 811 (5th Cir.) (quoting *Green*, 391 U.S. at 439), cert. denied, 439 U.S. 982 (1978). This the district court failed to do.

[3] Reverend Duvall is a veteran, pastor, East Side High School alumnus, and lifelong resident of Cleveland. ROA.1400-1401.

B. The District Court's Freedom-Of-Choice Remedy Will Not Result In Desegregation

The United States' objection to the district court's freedom-of-choice plan is not, as the District claims, based on a desire to achieve "maximum desegregation" or "because 'freedom of choice' was implemented in the District nearly fifty years ago." District Br. 22, 29. The district court's freedom-of-choice plan is an abuse of discretion because it will not desegregate D.M. Smith Middle School or East Side High School. See, *e.g.*, *Beaumont Indep. Sch. Dist.* v. *Department of Health, Educ. & Welfare*, 504 F.2d 855, 857 (5th Cir. 1974) ("[F]reedom of choice is an unacceptable method of desegregation if it does not produce a unitary school system.").[4]

This Court need look no further than the pre-enrollment figures for the 2013-2014 school year (ROA.1617), which demonstrate that under the district court's freedom-of-choice plan, the formerly *de jure* African-American junior high and high schools will remain virtually all African-American, as they have for decades. The pre-enrollment figures, which were before the district court when it denied the

[4] The freedom-of-choice cases on which the District relies (District Br. 27) stand for the same legal principle: freedom-of-choice plans are unacceptable where they do not result in desegregation. See *United States* v. *Hinds Cnty. Sch. Bd.*, 417 F.2d 852, 854-856 (5th Cir.) (per curiam), supplemented by 423 F.2d 1264 (1969); *Anthony* v. *Marshall Cnty. Bd. of Educ.*, 409 F.2d 1287, 1290 (5th Cir. 1969); *United States* v. *Greenwood Mun. Separate Sch. Dist.*, 406 F.2d 1086, 1091 & n.5 (5th Cir.), cert. denied, 395 U.S. 907 (1969).

United States' motion to alter or amend the court's January 24, 2013, decision, show that white students will not choose to enroll in these two schools as they are currently constituted. U.S. Br. 25, 27, 33-34. These contemporaneous figures thus reveal that the court's freedom-of-choice plan will not result in desegregation. Although the United States relied heavily on the pre-enrollment figures in its opening brief (U.S. Br. 25, 27, 33-34), the District failed to mention these figures in its brief as appellee.

The current pre-enrollment figures are buttressed by witness testimony and decades of enrollment data, which further demonstrate that white students have not chosen to enroll in these two schools, whether it was under the majority-to-minority transfer program or the court's original freedom-of-choice plan. U.S. Br. 10-12, 17, 21-23, 27, 30-31, 34-35; U.S. Br. Addendum 3-4. The District itself acknowledges that white students have not chosen, and will not choose, to enroll in D.M. Smith Middle School or East Side High School. District Br. 29-31 ("[T]he Eastside zone has always contained a white population, yet there has never been any significant white enrollment," and "[e]ven today, there are 1,000 whites living in the former Eastside zone, yet none attend Eastside or D.M. Smith.").

Thus, it is uncontested that white students will not choose to enroll in the District's formerly *de jure* African-American junior high and high school as they are presently constituted. These two schools are, and have always been, racially

identifiable African-American schools that are stigmatized in the community. ROA.961-962, 1405-1406. Under the district court's freedom-of-choice plan, these two schools undeniably will remain one-race schools. The district court's remedy is therefore constitutionally inadequate. See, *e.g.*, *Boykins* v. *Fairfield Bd. of Educ*., 457 F.2d 1091, 1095 (5th Cir. 1972) ("In the conversion from dual school systems based on race to unitary school systems, the continued existence of all-black or virtually all-black schools is unacceptable where reasonable alternatives exist.").

C. The District Has A Continuing Duty To Desegregate Its Formerly De Jure *African-American Junior High And High Schools*

When faced with the obvious consequence of the district court's order, the District seeks to insulate the district court's freedom-of-choice plan and evade responsibility for the continued segregation of these two schools by blaming the "private choices" of white students and their parents. District Br. 31. This argument is directly refuted by the district court's unchallenged finding that the District has failed to fulfill its obligation to desegregate its formerly *de jure* African-American junior high and high schools. ROA.961-962. The District, which did not appeal (or cross-appeal) this finding, cannot now credibly claim that the "failure of white students to enroll is not the responsibility of the District." District Br. 31.

Ross v. *Houston Independent School District*, 699 F.2d 218 (5th Cir. 1983), provides no support for the District's position. First, *Ross* involved a declaration of unitary status, not the adequacy of a desegregation remedy. *Id.* at 219-220. Here, the District has not sought, nor is it seeking, a declaration of unitary status, and therefore stands on substantially different footing than the Houston Independent School District. ROA.955; District Br. 17.

Second, the Houston Independent School District, the fifth largest district in the nation, had experienced substantial demographic shifts, most notably a decrease in white students and a large influx of Hispanic students. *Ross*, 699 F.2d at 220, 224. The school district in this case is relatively small, providing services to a town of approximately 12,000 people and educating approximately 761 junior high school and 950 high school students. ROA.937, 1310, 1649. The District's west-side junior high and high school pair is little more than one mile away from its east-side junior high and high schools. ROA.111, 961-962. The District is therefore similar to the school district in *Boykins*, where this Court held that a "school system with fewer than two thousand elementary school students, encompassing an area of only three square miles is not the type of 'metropolitan area' the Supreme Court envisioned when * * * it said that one-race schools may, in some circumstances, be acceptable because of segregated housing patterns." 457 F.2d at 1095. Moreover, unlike the demographic shift in *Ross*, the District has

experienced modest student enrollment changes, and the percentage of white student enrollment has held steady since the late 1980s. U.S. Br. Addendum 1.

Finally, the district court in *Ross* specifically found "that the homogeneous student composition of the schools d[id] not stem from the unconstitutional segregation practiced in the past but from population changes that ha[d] occurred since th[e] litigation commenced." 699 F.2d at 219. Here, in contrast, the district court made the opposite finding, concluding that "no data before the Court shows that" D.M Smith Middle School and East Side High School were "at any point desegregated and demographics intervened." ROA.961-962. The district court's undisputed finding is that these two schools have "never been anything other than [] racially identifiable African-American school[s]." ROA.961-962.

Having failed to appeal any of these findings, the District cannot now disavow its responsibility for the continuing segregation at its formerly *de jure* African-American junior high and high schools. The enduring racially identifiable nature of these schools is a direct result of the District's former dual system and a vestige of racial discrimination that the District must eliminate. *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1434 (5th Cir. 1983) ("[T]he continued existence of one-race schools is constitutionally unacceptable when reasonable alternatives exist."); *Lemon* v. *Bossier Parish Sch. Bd.*, 566 F.2d 985, 987 (5th Cir. 1978) (same). Rather than redress the District's failure with regard to

these two schools, under the district court's freedom-of-choice plan, the segregation that existed under the District's dual system will continue. This, together with the existence of a viable alternative, makes the district court's freedom-of-choice plan an abuse of discretion. See *Green*, 391 U.S. at 441 ("[I]f 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.").

D. Consolidation Will Result In Desegregation

As set forth more fully in the United States' opening brief, consolidation is an alternate remedy that promises to result in desegregation of the District's formerly *de jure* African-American junior high and high schools. U.S. Br. 36-39. The District's two junior high schools and two high schools were created under the dual system of state-imposed racial segregation. ROA.938. By operation of law, white students attended the west-side junior high and high school, and African-American students attended the east-side junior high and high school. ROA.914-915, 938; District Br. 16. Over 45 years later, the east-side junior high and high school remain racially identifiable African-American schools in which white students will not choose to enroll. ROA.961-962, 1617; U.S. Br. 10-12, 17, 21-23, 27, 30-31, 34-35; U.S. Br. Addendum 3-4; District Br. 29-31.

Consolidation of the District's two junior high schools and two high schools, for example, will solve this problem.[5] The east-side and west-side junior high and high school pairs are located in adjacent facilities and are little more than a mile apart. ROA.234, 961-962, 1361, 1389-1390. The District can repurpose the existing buildings to create a single junior high school and a single high school to serve all of the District's students. ROA.1362. The district court initially suggested consolidation, and the United States argued in the proceedings below that consolidation would be an appropriate remedy. ROA.976, 1052, 1461-1463. Consolidation is a practical solution that promises to desegregate the District's former *de jure* African-American junior high and high schools.

E. "White Flight" Is Not A Likely Result Of Consolidation Or A Justification For Continued Segregation

The District's principal objection to consolidation is fear of "white flight." Although the District acknowledges that the potential loss of white students is not a justification for failing to desegregate,[6] it nevertheless argues that "[m]andatory desegregation plans" have caused school districts to "forfeit[ ] their entire white

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[5] As the United States noted in the proceedings below, consolidation is not the only alternative to the district court's freedom-of-choice desegregation plan. See ROA.1052, 1446 n.1 (suggesting consolidation or rezoning existing attendance boundaries).

[6] *E.g.*, *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 491 (1972); *Davis*, 721 F.2d at 1438; *Ross*, 699 F.2d at 226.

populations." District Br. 23 n.16; see also District Br. 10 (alleging that "mandatory reassignment plans (like consolidation) result in significant white enrollment loss"). In other words, the District contends that consolidation will result in "white flight." This argument is flawed both factually and legally.

First, the District's repeated assertion that its white student enrollment is "ever-decreasing," "shrinking," "diminishing," "decreasing on a yearly basis," and "dwindling" is not borne out in the record. District Br. 1-2, 19, 21-23 & n.16. For approximately the last 25 years, white student enrollment has remained between 27.7% to 32.6% of the District's total student enrollment. U.S. Br. Addendum 1-2; see also ROA.1340 (District school official testified that the District's student enrollment was 30% white); ROA.761 (graph depicting white student enrollment as hovering around 30% since the late 1980s); ROA.755-756 (table setting out, among other things, the District's white student enrollment as ranging between 27.1% to 32.4% from 1987 to 2011).

Second, the District's claim is premised on the data and analysis of its expert, Dr. Christine Rossell, who was the subject of the United States' vigorous objections in the proceedings below. Dr. Rossell produced unsworn reports, which consist of legal conclusions beyond the purview of a witness, expert or otherwise, and which advocate the use of desegregation measures that fall outside the established constitutional standards for evaluating desegregation. ROA.870-876,

1156-1169, 1245-1246, 1282-1289; District Br. 20-21. The legal standards governing this appeal are simple and longstanding. The district court's remedy must implement a plan to desegregate the District's formerly *de jure* African-American junior high and high schools and dismantle the District's dual school system at the earliest practicable date. *Milliken* v. *Bradley*, 433 U.S. 267, 280 n.15 (1977); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971); *Green*, 391 U.S. at 439; *Brown* v. *Board of Educ.*, 349 U.S. 294, 300 (1955). Whatever claims Dr. Rossell makes regarding the District's success at desegregating other schools, or the effects of "mandatory" reassignment plans in other school districts, they are irrelevant to the single issue presented in this appeal.

Finally, the District's claim that consolidation of its junior and senior high schools will result in "significant white enrollment loss" (District Br. 10) is not supported by the record. Rather, it is speculative to suggest that substantial numbers of the District's white junior high and high school students would withdraw from the school system if consolidation were ordered, or if another constitutionally permissible remedy were entered. Moreover, as the District itself acknowledges, it is settled law that fear of a loss of white students is not a justification for continuing segregation. *Scotland Neck City Bd. of Educ.*, 407 U.S. at 491.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the United States' opening brief, 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 the district court to order a constitutionally permissible plan to desegregate the District's formerly *de jure* African-American junior high and high schools.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Erin Aslan
DENNIS J. DIMSEY
ERIN ASLAN
Attorneys
Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station, P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-2773

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing Reply Brief For The United States 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
ERIN ASLAN
Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Reply Brief For The United States:

(1) contains 3199 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: December 9, 2013