Nos. 07-6076, 07-6363

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLAUDE BERNARD ROBINSON, *et al.*,
Plaintiffs-Appellees

and

UNITED STATES OF AMERICA,
Plaintiff-Appellee/Cross-Appellant

v.

SHELBY COUNTY BOARD OF EDUCATION,
Defendant-Appellant/Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

PROOF BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with the appellant/cross-appellee that oral argument may help the court resolve the issues in this case.

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RULE:

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JURISDICTIONAL STATEMENT

The district court had jurisdiction based on 28 U.S.C. 1331 and 1343(3), and 42 U.S.C. 1983.[1] Appellate jurisdiction is based on 28 U.S.C. 1291. On

[1] "R. _" refers to documents in the district court record by docket number. Unnumbered documents are referenced by title and filing date. "Apx. _" refers to the Joint Appendix appellant will file following the submission of the parties' proof briefs. "Appellant Br. _" refers to pages in the Appellant's opening brief.

(continued...)

July 26, 2007, the court granted in part and denied in part plaintiffs' and defendant's August 14, 2006, Joint Motion to Dissolve Order of the Court and Declare Shelby County School System a Unitary System. (R. 460-1 Order, Apx. _). The defendant filed its Notice of Appeal on August 22, 2007, and the court denied the plaintiffs' Motion to Reconsider and to Alter or Amend Judgment on September 11, 2007. (R. 470 Notice of Appeal, Apx. _; R. 479 Order, Apx. _). The United States filed a separate Notice of Appeal on November 8, 2007. (R. 491 Notice of Appeal, Apx. _).

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in ordering that the racial composition of faculty in each school mirror the system-wide racial composition of the student body.

2. Whether the district court clearly erred in finding that the Shelby County Board of Education had not proven unitary status in the areas of student assignment, faculty assignment, and extracurricular activities.

3. Whether the court abused its discretion in setting flexible student

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(...continued)
"District Court docket" refers to the copy of the docket from June 12, 1963 though August 27, 2002, included in the appendix and not available electronically.

assignment goals from which to evaluate the Board's future compliance with its desegregation duties.

STATEMENT OF THE CASE

On June 12, 1963, black students filed a class action against the Shelby County Board of Education (Board or School System), alleging that the School System was segregated by race. (R. 1 Complaint, Apx. _). The United States intervened in 1966. (*Robinson* v. *Shelby County Bd. of Educ*., No. 63-4916, slip op. (W.D. Tenn. May 6, 1966), Apx. _). After several intermediate orders and an appeal to this Court, *Robinson* v. *Shelby County Bd. of Educ.*, 442 F.2d 255, 258 (6th Cir. 1971), the district court issued desegregation orders in 1971, setting boundaries for individual schools and requiring the Board to seek approval for subsequent changes. *Robinson* v. *Shelby County Bd. of Educ.*, 330 F. Supp. 837, 841-847 (W.D. Tenn. 1971). This Court upheld the 1971 orders. *Robinson* v. *Shelby County Bd. of Educ.*, 467 F.2d 1187 (1972).

On August 14, 2006, plaintiffs and the defendant Board moved to dismiss the desegregation order and declare Shelby County's school system unitary. (R. 423 Joint Motion to Dismiss, Apx. _). The district court held two fairness hearings. It granted unitary status in the areas of staffing, transportation, and facilities, and denied unitary status in the areas of student

assignment, faculty, and extracurricular activities. (R. 460-1 Order 56-57, Apx. _). The court also issued a modified decree ordering the School System to work toward a racial ratio of students at each school that reflected the racial composition of the system-wide student body within 15%. (R. 460-1 Order 59-60, Apx. _). The court ordered the appointment of a special master and required the Board to make yearly presentations including attendance figures and any mitigating evidence, such as demographic figures, that would show whether further desegregation was feasible. (R. 460-1 Order 59-60, Apx. _). It also ordered the faculty at each school to reflect the system-wide racial composition of the student body. (R. 460-1 Order 59, Apx. _).

STATEMENT OF THE FACTS

1. Background

When this suit was filed in 1963, Shelby County had "a long history of segregated education." *Robinson* v. *Shelby County Bd. of Educ.*, 442 F.2d 255, 257 (6th Cir. 1971). On March 17, 1964, the court ordered the school system desegregated. (*Robinson* v. *Shelby County Bd. of Educ*., No. 63-4916, slip op. (W.D. Tenn. Mar. 17, 1964), Apx. _). During the following school year, 38 of roughly 14,750 black students attended predominantly white schools; none of the approximately 26,000 white students attended predominantly black schools.

(Application for Civil Contempt 5 (filed Jan. 16, 1967), Apx. _). After two years under the order, of the nearly 40,000 students in the system, all white students still attended predominantly white schools, and more than 99.7% of the black students attended all-black schools. (Application for Civil Contempt 5, Apx. _; Motion for Supplemental and Modified Relief 3 (filed May 5, 1966), Apx. _).

The court entered a consent decree on May 20, 1966, creating a choice plan and ordering the Board to "take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system." (*Robinson* v. *Shelby County Bd. of Educ*., No. 63-4916, slip op. 2, 3-9 (W.D. Tenn. May 20, 1966) (May 20, 1966 Consent Decree), Apx. _; R. 460-2 Procedural History 4, Apx. _). The order required the Board to fill all faculty vacancies by assigning or reassigning teachers "in a manner that will correct the effects of the past pattern of assignments based upon race." (May 20, 1966 Consent Decree, Apx. _). The court also required the Board to submit a report of its recruiting efforts before filling any vacancy with a teacher of the over-represented race, and explained that faculty would be considered desegregated "when the ratio of white teachers to Negro teachers in the school is the same, with reasonable leeway of approximately ten percent (10%), as the ratio of

white teachers to Negro teachers in the number of certified personnel in the Shelby County Public School System." (*Robinson* v. *Shelby County Bd. of Educ*., No. 63-4916, slip op. 3, 5-6 (W.D. Tenn. Jan. 19, 1967) (Jan. 19, 1967 Order), Apx. _). Because African American teachers qualified in some high school subjects were scarce, the court required high schools to reach the guidelines to the extent feasible. (R. 460-2 Procedural History 18, Apx. _; *Robinson* v. *Shelby County Bd. of Educ*., No. 63-4916, slip op. 5-6, 15-16 (W.D. Tenn. Apr. 6, 1970), Apx. _, _-_).

By 1967, little desegregation had occurred in Shelby County's over 50 schools. (Modified Plan (filed Mar. 24, 1967), Apx. _). As of January 1967, only 1.3% of black students attended predominantly white schools and no white students attended predominantly black schools. (Application for Civil Contempt 7, Apx. _). No black teachers worked in formerly all-white schools, and no regular, full-time, white teachers worked in formerly all-black schools. (Application for Civil Contempt, 4-4a, Apx. _).

By 1971, the Board had made some limited progress; there were no more single-race schools and only four of 36 schools had fewer than ten percent black students. (R. 460-1 Order 48, Apx. _). There was some progress in teacher desegregation as well. By the fall of 1969, the Board reported that all

but one school had at least some faculty members of each race. (Report to the District Court, Attach. 1 (filed Oct. 1, 1969), Apx. _).

2. *The 1971 Desegregation Decrees*

In response to new Supreme Court decisions, the court issued further orders in 1968 and 1970, and, after an appeal and remand of the 1970 order, settled on a final series of decrees in 1971. (R. 460-2 Procedural History 4-5, Apx. _). The court's May 28, 1971 order urged the Board to "reach toward the establishment of the system-wide pupil ratio in the various schools so that there will be no basis for contending that one school is racially different from the others." (*Robinson* v. *Shelby County Bd. of Educ*., No. 63-4916 slip op. 2 (W.D. Tenn. May 28, 1971) (May 28, 1971 Order), Apx. _; R. 460-2 Procedural History 5, Apx. _). The court declared that "the ratio of white to black pupils in a school, as compared with the ratio in the system as a whole, is a highly important factor in determining whether a school is racially identifiable."[2] *Robinson* v. *Shelby County Bd. Of Educ.*, 330 F. Supp. 837, 841-842 (W.D. Tenn. 1971), aff'd 467 F.2d 1187 (6th Cir. 1972); (R. 460-2

[2] In 1968, and again on May 28, 1971, the court ordered the Board to meet target student ratios. (May 28, 1971 Order, Apx. _; R. 460-1 Order 45, 48-49 Apx. _). The court's June and August 1971 orders did not reiterate the requirement.

Procedural History 65, Apx. _); The court acknowledged that "it is not constitutionally required that each school in the system have approximately the same ratio of whites to blacks as does the system as a whole and some all-black (or white) or nearly all-black (or white) schools may exist in a desegregated system." 330 F. Supp. at 842. Nonetheless, the court stated, "where a school board's plan proposes the continuation of schools that are all or predominately of one race, there is [a] presumption that the racial composition of such schools is a vestige of *de jure* segregation which places the burden on the school board to show that such assignment of pupils is genuinely nondiscriminatory." *Id*. at 841.

Under earlier decrees, the Board was still required to report regularly on its faculty desegregation efforts and to fill faculty vacancies by transferring teachers of the underrepresented race in each school. (R. 460-1 Order 38, Apx. _; Jan. 19, 1967 Order 3-6, Apx. _). Before filling a vacancy with a teacher of the overrepresented race, the Board was required to notify the court and report its recruitment efforts.

3. The Board's Compliance With The 1971 Orders

a. School Construction And Rezoning

After 1971, the Board continued to file faculty reports and proposals for new construction and boundary changes. (R. 460-1 Order 45, Apx. _). In July 1977, the United States filed an objection to the Board's proposal to build a vocational education facility on the site of the predominantly black Bolton High School, suggesting that the Board close Bolton instead. (R. 460-1 Order 30-31, Apx. _; District Court Docket, Apx. _). Unrenovated since the 1920s, the school was small, inferior to others in the system, and had a 75% black student population although the system-wide black student population was only 22%. (R. 460-1 Order 31, Apx. _). The court allowed construction to proceed, but entered a consent decree conditioning construction on improvements and expansion at Bolton, as well as a commitment to assign overflow of neighboring schools to Bolton to achieve a more racially balanced student body. (R. 460-1 Order 31-32, Apx. _).

In 1985, the United States objected to the Board's plan to expand the 93% white Lucy Elementary. For several years, the Board had been using portable classrooms at Lucy, accommodating 150 students. *Robinson* v. *Shelby County Bd. of Educ.*, 643 F. Supp. 111, 118 (W.D. Tenn. 1986). The Board

proposed building ten new classrooms at Lucy to accommodate 600 students, even though three neighboring schools, 36%, 27%, and 18.5% black, had more that 600 empty desks. *Id.* at 117-119. To justify the plan, the Board claimed it was responding to parents' demands, fostering "community pride" and preserving "community identity." *Id*. at 114, 115.

The court reviewed the Board's decision and found that the impact of the construction at Lucy on desegregation and alternative methods of accommodating the overcrowding by using neighboring schools had "never actually been considered by the Board." 643 F. Supp. at 113. The court denied the request to expand Lucy, reminding the Board of its "continuing duty to eliminate all vestiges of the dual system and to refrain from taking actions which serve to reestablish the dual system." *Id*. at 121. Implementation of the 1971 desegregation plan, the court explained, "did not automatically desegregate the Shelby County schools." *Ibid*.

In 1987, the Board proposed building a new high school in east Shelby County. (R. 460-1 Order 33, Apx. _; District Court Docket, Apx. _). Plaintiffs objected to the new school, complaining that it was only eight percent black while the system-wide student population was 14% black. (R. 460-1 Order 33-34; District Court Docket, Apx. _). The United States did not contest the new

school, but opposed accompanying changes to nearby Bartlett High School's zoning because the changes conflicted with the court's 1977 decree that white students be shifted from Bartlett to the predominantly black Bolton High. (R. 460-1 Order 34, Apx. _; District Court Docket, Apx. _). The Board amended its proposal so that the new high school's zoning would not affect Bartlett's zoning. (R. 460-1 Order 34, Apx. _; District Court Docket, Apx. _).

Throughout the past three decades, the School System's population has expanded rapidly. (R. 485 Jan. Hearing Tr. 47, 90-95, 167-168, Apx. _, _-_, _-_,_, _-_). Although the minority population in Shelby County had been growing, Memphis' periodic annexations of mostly black neighborhoods had caused sudden, steep declines. (R. 486 July Hearing Tr. 45-47, Apx. _). The black population was roughly 28% in 1969, but fell to 15% in 1984 after Memphis annexed the Hickory Hills area. (R. 460-1 Order 21, 49, Apx. _); *Robinson* v. *Shelby County Bd. of Educ.*, 311 F. Supp. 97, 101 (W.D. Tenn. 1970).

Minority enrollment increased dramatically at most schools between 2002 and 2007. Appellant Br. 12. Some schools with the greatest increases in African American enrollment now have enrollments substantially above the system-wide average of 34% black. (R. 485 Jan. Hearing Tr. 91, 157, Apx.

_,_); Appellant Br. 12. In all, 19 of 44 schools which experienced minority growth between 2002 and 2008 (becoming, in the Board's parlance, "more racially diverse") currently have black student populations above the system-wide average. Appellant Br. 12-13.

In addition, some of the Board's construction and rezoning plans appeared to increase racial disparities between some schools. For the 1999-2000 school year, for example, the system proposed a new elementary school in Collierville which was projected to serve a higher concentration of black students than existing schools in the area and to reduce black enrollment at neighboring schools. (Consent Order Approving Attendance Zone Changes Related to the New Elementary School in the Collierville Area (filed Sept. 21, 1998), Apx._; R. 460-2 Procedural History 107, Apx. _).

In 2004, the Board planned to build Bon Lin Elementary School and rezone four nearby schools. (R. 418 Consent Order, Apx. _; R. 460-2 Procedural History 113-114, Apx. _). Racial enrollment disparity between the four schools increased under the rezoning. (R. 418 Consent Order, Apx. _; R. 461 Response to Court's Order, Exh. B, Apx. _).

b. Faculty Desegregation

The Board did not fully comply with the requirement to notify the court before filling a faculty vacancy with a member of the overrepresented race. (R. 460-1 Order 45, Apx. _ ("A careful review of the record reveals that no such notification has ever been filed."); see also District Court Docket, Apx. _). In the late 1980s, the Board stopped including numbers of vacancies filled by members of the overrepresented race in each school in its semiannual reports. (R. 460-1 Order 45 n.11., Apx. _; Report to the District Court (filed Oct. 17, 1989), Apx. _).

In 1989, the court requested the parties' input about the School System's declining percentage of black faculty. (R. 460-1 Order 34, Apx. _; Pls.' Resp. to the Court's Aug. 17, 1989 Mem. 1 (filed Oct. 5, 1989) , Apx. _; U.S. Reply to the Shelby County Board 1 (filed June 6, 1990), Apx. _). Over 20 years, the percentage of black teachers in the system had fallen by one-third (30% to 19%). (U.S. Resp. to the Court's Aug. 17, 1989 Mem. 2 (filed Oct. 2, 1989), Apx. _).

The Board responded that the numbers simply reflected a declining percentage of black teachers entering the profession. (R. 460-1 Order 34-35, Apx. _; U.S. Reply to the Shelby County Board 2 (filed June 6, 1990), Apx. _).

In the three preceding school years, however, the Board's job offer rate was lower for black applicants than for white applicants. For the 1989-1990 school year, the system hired 28% of white applicants and only 14% of black applicants. (U.S. Resp. to the Court's Aug. 17, 1989 Mem. 2-3, Apx. _).

The court ordered supplemental annual filings on minority faculty numbers and recruiting practices. (*Robinson* v. *Shelby County Bd. of Educ*., No. 63-4916, slip op. (W.D. Tenn. July 3, 1990) (July 3, 1990 Order), Apx. _). The Board stepped up its recruiting in the years following the 1990 order, visiting twice as many colleges in 1993 as it did in 1989 and adding several historically black institutions to the list. (R. 460-1 Order 47-48, Apx. _). But the number of African American teachers in the system continued to decline from 20% in 1990 to 15% in 2005 and 17% in October 2007. (R. 460-1 Order 32 n.4, Apx. _; R. 460-2 Procedural History 98-115, Apx. _; R. 488 Status Report Exh. A, Apx. _). Moreover, the Board's job offer rate for black applicants was consistently lower than that for white applicants. (R. 460-2 Procedural History 98-115, Apx. _).

4. The Joint Motion For Unitary Status And Fairness Hearings

On August 14, 2006, the Board and plaintiffs moved to dismiss this case, dissolve the desegregation order, and declare Shelby County's school system

unitary. (R. 423 Joint Motion to Dismiss, Apx. _; R. 424-1 Joint Motion Memorandum, Apx. _; R. 424-2 Joint Motion Exhibits, Apx. _; R. 460-1 Order 37, Apx. _). The Board submitted statistics showing the current racial makeup of its students and teachers, and described its efforts to recruit minority teachers, including recruiting visits to 15 historically black colleges. (R. 424-1 Joint Motion Memorandum 7, Apx. _; R. 424-2 Joint Motion Exh. B. Attach. 4, Apx. _).

On November 29, 2006, the court set a fairness hearing for January 26, 2007, and ordered the parties to publicize notices of the hearing. (R. 427 Setting Letter, Apx. _; R. 428 Minute Entry, Apx. _; R. 483 Status Conf. Tr. 17-18, 23, Apx. _-_, _). The court also requested that parties serve the United States with notice of the hearing.[3] (R. 483 Status Conf. Tr. 21-23, Apx. _- _).

At the hearing, school officials highlighted the system's educational success and rapid growth. They explained that the Board routinely worked with plaintiffs' counsel in designing new school zones. (R. 485 Jan. Hearing

[3] The government was not present at the January hearing, and only learned of the motion through the court's orders in February 2007. (R. 442 U.S. Response 1-2, Apx. _; R. 483 Status Conf. Tr. 21-23, Apx. _-_). The government eventually informed the court that its experience with the case indicated that the school system was entitled to a declaration of unitary status (R. 442 U.S. Response, Apx. _).

Tr. 28, 63-66, Apx. _, _-_). Superintendent Webb testified that the Board did "as well as * * * anyone could have done" to "have good community-based schools" and make attendance zones "as diverse as we possibly can." (R. 485 Jan. Hearing Tr. 28, 29, Apx. _, _). Assistant Superintendent Sullivan also testified that the Board consulted plaintiffs' counsel and considered race, enrollment capacity, and public feedback in considering new zoning plans. (R. 485 Jan. Hearing Tr. 63-66, Apx. _). The court received no written submissions in response to the pre-hearing public notice, and no individual citizens testified except Lasimba Gray, a local pastor and president of Rainbow Push of Memphis. (R. 485 Jan. Hearing Tr. 11, Apx. _; R. 486 July Hearing Tr. 110, Apx. _). Mr. Gray opposed the motion. (R. 485 Jan. Hearing Tr. 11-12, 160-163, Apx. _, _).

At the hearing, school officials answered specific questions about the system's new Southwind High School, projected to serve an 88% black student body. (R. 485 Jan. Hearing Tr. 72, Apx. _). When the court asked the school's principal whether "people [would] be inclined to consider [Southwind] a black school," she acknowledged that "[t]hey may be inclined to look at the demographics and say so." (R. 485 Jan. Hearing Tr. 150, Apx. _).

Southwind was jointly funded with Memphis City Schools, and the attendance zone was drawn to roughly match an area slated for eventual annexation to Memphis.[4] (R. 485 Jan. Hearing Tr. 31-32, 69, Apx. _-_, _). The Shelby County Superintendent testified that students usually were allowed to finish their education at the school they attended, despite annexation. (R. 485 Jan. Hearing Tr. 46, Apx. _); see also *Robinson*, 311 F. Supp. at 103-104 (noting that some Shelby County students were attending a recently annexed Memphis City School through a contract with the city).[5] After Southwind opened, the black population at nearby Germantown High School would drop from 62% black to 20% and Houston High would go from 32% black to 16%.

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[4] The city controls annexation of schools, which requires a vote by the city council. (R. 485 Jan. Hearing Tr. 169, Apx. _; R. 486 July Hearing Tr. 47, Apx. _). An attempted annexation failed in December 2006, but a new effort is expected. (R. 485 Jan. Hearing Tr. 35-36, 169, Apx. _-_, _). The record does not indicate when annexation will occur. (R. 485 Jan. Hearing Tr. 169, 35-36, Apx. _-, _-_; R. 486 July Hearing Tr. 46-47, Apx. _-_).

[5] The assistant superintendent gave conflicting testimony, claiming that Southwind students living outside the annexed area would have to leave Southwind after annexation. (R. 485 Jan. Hearing Tr. 77, Apx. _). Contrary to the Board's assertions in its brief, Appellant Br. 9-10, 13 n.1, the funding agreement with Memphis City does *not* dictate Southwind's attendance zone. It merely requires that the school building be located in southeast Shelby County, within the Memphis reserve. (Jan. Hearing Exh. 1 at 5 (filed Jan. 26, 2007), Apx. _).

(R. 485 Jan. Hearing Tr. 155-156, Apx. _).[6] System officials explained that if the new school zone were drawn to preserve the African American population at neighboring Germantown and decrease it at Southwind, students who lived in the densely populated area within walking distance of the new school would have to be bused six or seven miles. (R. 485 Jan. Hearing Tr. 45, 74, Apx. _). To achieve a black student population of about 45% at Southwind, they stated, some 500 students would have to be transported. (R. 485 Jan. Hearing Tr. 75, Apx. _).

The Board also presented testimony about efforts to recruit minority teachers, stating that it has added historically black colleges to recruitment visits. (R. 485 Jan. Hearing Tr. 118-120, Apx. _). Officials explained that declining numbers of minority graduates and high demand, however, make

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[6] Appellant claims that if Memphis takes control of the entire "reserve annexation area" during the 2007-2008 school year, county schools will be only 7.68% African American. Appellant Br. 9-10; (R. 485 Jan. Hearing Tr. 91, Apx. _). There is nothing in the record to show when Memphis will take various parts of the total reserve area. (R. 485 Jan. Hearing Tr. 71, 73, _, Apx. _, _ (noting the reserve is taken over a "staggered period of time" and is part of a "20 year growth plan")). When it annexes the southeast reserve discussed at the January hearing, Memphis will leave Shelby County's schools with a 25% to 30% black student body. (R. 485 Jan. Hearing Tr. 92, Apx. _; but see R. 466 Plaintiffs' Motion to Reconsider 1-2, Apx._ (claiming, without citation to the record, that the southeast annexation would reduce black enrollment to 18%)).

recruitment of black teachers difficult. (R. 460-1 Order 34-35, Apx. _; R. 485 Jan. Hearing Tr. 117, 139, Apx. _, _).

In February 2007 the court requested "demographic data on students participating in *all* extra curricular activities" between 1998 and 2006. (R. 439 Order 2, Apx. _). The Board responded that it did not keep such records, but had attempted to collect statistics in June 2006 in response to a request from the Tennessee Board of Education. (R. 444 Response to Court's Order 1-2, Apx. _). The schools submitted a chart giving a racial breakdown of participation for only 30 of its 48 schools. (R. 444 Response to Court's Order, Exh. 1-A, Apx. _). The Board also submitted letters and emails showing that some schools included remedial academics, such as after-school tutoring, in their extracurricular totals. (R. 444 Response to Court's Order, Exh. 1-B, Apx. _).

For example, the Board reported that at Chimneyrock Elementary blacks made up 29% of participants in extracurricular activities. (R. 444 Response to Court's Order, Exh. 1-A, Apx. _). A closer look at the school's submission shows that blacks formed a majority of students in teacher-recommended remedial tutoring, but were a minority in the accelerated reader club, Spanish club, and all other activities. (R. 444 Response to Court's Order, Exh. 1-B,

Apx. _). Appling Middle School simply provided a list of extracurricular activities, noting that "[a]ll ethnic groups were represented." (R. 444 Response to Court's Order, Exh. 1-B, Apx. _). Some principals were confused about the request and did not participate. (R. 444 Response to Court's Order, Exh. 1-B, Apx. _).

The court stated that the January hearing "dealt insufficiently with the extent of the County's compliance with the Court's past orders delineating the County's constitutional obligation to dismantle all vestiges of *de jure* segregation." (R. 450 Setting Letter 1, Apx. _; R. 439 Order, Apx. _). The court scheduled a new hearing for July, 2007. (R. 450 Setting Letter 1, Apx. _).

No school officials were called at the July 23 hearing (R. 459 Exhibit and Witness List, Apx. _).[7] Plaintiff's counsel again explained that he and the Board's counsel had negotiated construction plans and boundary changes throughout the case's history by looking at the racial impact of each plan, and

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[7] Two parents, a state representative, and representatives of Rainbow Push testified, offering anecdotal evidence about the Board's achievements and the region's demographics. (R. 486 July Hearing Tr. 18-19, 23, 63, Apx. _, _, _, _). Parent and PTA member Brenda Gipson, for example, noted that school administrators "value diversity." (R. 486 July Hearing Tr. 23-24, Apx. _-_).

"if there was a way to adjust it to get it closer to the systemwide ratio, we['d] do that. But * * * in many cases we didn't have to." (R. 486 July Hearing Tr. 126, Apx. _). The Board presented no minutes or other records documenting its decision making and provided no demographic statistics or census maps beyond enrollment figures and charted attendance zones.

At both hearings, school officials, counsel, representatives from Rainbow Push, a community organization, and parents presented their demographic observations. Assistant Superintendent Sullivan agreed that but for income, housing in the county was "well integrated" and explained that high growth areas showed roughly equal rising rates in black and white enrollment. (R. 485 Jan. Hearing Tr. 95-96, Apx. _). Lasimba Gray, a religious leader and representative of Rainbow Push, noted that "the southeast area * * * has become majority black residents" and claimed that "developers have a lot to say about where schools are going to go, and, of course, back and forth, and that is to make sure that there is a segregated housing pattern." (R. 486 July Hearing Tr. 53, 98, Apx. _, _). State Representative G.A. Hardaway noted that there had been "historical black communities in several parts of the county" but that "future growth patterns are always changing." (R. 486 July Hearing Tr. 49, Apx. _). Another representative of Rainbow Push observed

that "housing patterns are * * * affected by decisions made by the county schools." (R. 486 July Hearing Tr. 142, Apx. _). No expert witnesses or demographers testified at either hearing.

At the conclusion of the July hearing, the United States told the district court that, in light of the record from both hearings, "it would appear on [the] whole that the defendant has complied in good faith with the deseg[regation] orders and * * * under applicable legal principles they are entitled to a dismissal." (R. 486 July Hearing Tr. 129, Apx. _).

5. The District Court's July 2007 Order

The court granted unitary status for transportation, staffing, and facilities, and denied unitary status for student assignment, faculty, and extracurricular activities. (R. 460-1 Order 57, Apx. _).

a. Findings

The district court found the Board's compliance with its desegregation obligations to be "decidedly mixed." (R. 460-1 Order 41, 49, Apx. _,_). The court pointed out that the Board initially denied its system was unconstitutional, and then resisted desegregation for several years, making few teacher transfers and proposing zoning plans that provided only minimal integration. (R. 460-1 Order 16-21, 27-29, 41-42 Apx. _-_, _-_, _-_). It

"virtually ignored" early court orders in the 1960s. (R. 460-1 Order 43, Apx. _).

After the 1971 desegregation orders, the court held, the Board made rezoning decisions at Bolton High School and Lucy Elementary that prompted objections from plaintiffs and the government, and in both cases, the court amended the decisions. (R. 460-1 Order 30-33, Apx. _-_, _-_). Construction plans for a new high school in east Shelby County in 1987 were also disputed and were again altered to comply with desegregation obligations. (R. 460-1 Order 34, Apx. _).

The court stated that the Board's past and present filings for rezoning and construction permission often presented "boilerplate language to the effect that the proposal in question was expected to have no adverse impact on the desegregation plan." (R. 460-1 Order 49, Apx. _,_). The court found the proposals did not provide adequate information for the court to evaluate its compliance with desegregation duties. (R. 460-1 Order 49-50, Apx. _). The court concluded that the Board had "lost sight" of the court's role in overseeing the Board's progress toward unitary status, and noted that recent zoning proposals made "not a single mention" of desegregation. (R. 460-1 Order 50, Apx. _). Because the record was replete with "anecdotal evidence" and

"assurances" rather than facts, the court explained, it could not fully evaluate the Board's compliance and therefore could not determine whether it had achieved unitary status. (R. 460-1 Order 52, Apx. _).

Over the course of desegregation, the court noted, "[t]he racial balance in the schools continued to be uneven." (R. 460-1 Order 49-50, Apx. _). In recent statistics, the court observed, "unevenness has become far more prevalent" with six schools having an enrollment between 56% and 90% black. (R. 460-1 Order 50, Apx. _). Accordingly, the court concluded that "the effects of past *de jure* segregation are still manifest" in the system. (R. 460-1 Order 56, Apx. _). The court held that the Board had made "no showing that racial balance is infeasible either generally or with regard to certain schools" and that "further inquiry" was required to evaluate the Board's achievements in the area of extracurricular participation. (R. 460-1 Order 53, 57 n.17, 62, Apx. _, _, _).

The court also expressed concern about faculty desegregation and minority recruitment. Falling numbers of minority teachers in the 1980s, the court found, seemed to be "largely due to [the Board's] less proactive approach to recruiting minority candidates." (R. 460-1 Order 47, Apx. _). The court stated that while the Board had "reinvigorate[d]" minority recruitment in the early 1990s, rates of minority hires in Shelby County continued to fall, while

the neighboring Memphis School System maintained a 50/50 black-to-white teacher ratio. (R. 460-1 Order 34-37, 47-48, Apx. _). In a procedural history appended to its opinion, the court cited figures showing lower offer rates to black applicants than to white applicants. (R. 460-2 Procedural History 94-115, Apx. _). The percentage of black teachers had fallen from 36% in 1967 to 19% in 1990 and 15% in 2006. (R. 460-1 Order 48, Apx. _).

By neglecting faculty transfer provisions, the court held, the Board also failed to achieve faculty desegregation. "Strict compliance with the new faculty integration requirement would have almost surely effected a very rapid transition to a system where the faculty at each school was reflective of the systemwide racial composition," the court explained. (R. 460-1 Order 44, Apx. _). Instead, the court found, faculty ratios were still unbalanced, ranging roughly from 5% to 30% black from school to school. (R. 460-1 Order 54, Apx. _; R. 424-2 Joint Motion Exh. C, Apx. _).[8] The Board had "utter[ly]

[8] The court presumably took these figures from the Board's exhibits submitted with the Joint Motion. (R. 424-2 Joint Motion Exh. B, Apx. _). The Board's later filings, showing figures for October 2007, show that African American faculty numbers range from 5% to 55% from school to school. (R. 488 Status Report Exh. A, Apx. _).

disregard[ed]" the court's reporting requirements for teacher assignments. (R. 460-1 Order 45, Apx. _; R. 460-2 Procedural History 90, Apx. _).

b. The Remedial Order

In reviewing previous orders, the court stated it had been "insufficiently clear and forthright both in defining 'racial balance' and in setting forth the circumstances under which 'unbalanced' schools would be permissible." (R. 460-1 Order 51, Apx. _). The court also acknowledged its lack of recent involvement in the case, admitting that "the Court's role in this case has largely been limited to approving unchallenged, or 'consent,' proposals * * * accepting without scrutiny the parties' agreement that such proposals would not impair desegregation efforts." (R. 460-1 Order 46, Apx. _). "Relying on the adversarial process, the Court has largely served to 'rubber-stamp' the County's unopposed construction and zoning requests with little or no meaningful review." (R. 460-1 Order 58, Apx. _).

In its decision, the court ordered the Board to "work towards a racial balance in all its schools" with the "flexible goal" of achieving a racial makeup of students *and* faculty within 15% of the system-wide student body composition. (R. 460-1 Order 59 Apx. _). The court required the Board to present student and faculty data yearly and to include "mitigating factors,

including infeasibility of further desegregation and shifting demographics." (R. 460-1 Order 60, Apx. _). It ordered the parties to select a special master to evaluate the Board's submissions. (R. 460-1 Order 59-60, Apx. _). The court recognized that students have "no 'substantive constitutional right [to a] particular degree of racial balance or mixing,'" and stated that the ratios were only a "beginning point" in the special master's analysis of the Board's achievements. (R. 460-1 Order 51, 52, Apx. _) (quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971)). Because of the lack of evidence in the record, the court sought to impose an "objective means" to "gauge [the] school board's fulfillment of its constitutional obligations." (R. 460-1 Order 52, Apx. _).

The court explained it would consider construction and attendance zone plans in the future only if they included "comprehensive projections as to the proposal's expected impact" on desegregation. (R. 460-1 Order 61, Apx. _). By October 2012, the court said, it expected full compliance with the decree, and stated it would grant unitary status after three years of full compliance. (R. 460-1 Order 61, Apx. _).

SUMMARY OF ARGUMENT

In the district court, the Shelby County School Board sought a declaration of unitary status. To be entitled to such a declaration, the Board was required to show that it has complied in good faith with desegregation obligations and that it has eliminated, to the extent feasible, the vestiges of *de jure* segregation. Although the United States joined the Board's motion for unitary status in the district court, we have chosen not to appeal the denial of unitary status in light of the deferential clear error standard of review that applies to that determination.

Similarly, the United States is not appealing the district court's establishment of flexible student assignment goals as a "starting point" for evaluating the Board's future compliance with its desegregation obligations. That ruling is subject to review for abuse of discretion. Although we agreed below with the Board that it has met all of its obligations under the applicable desegregation decrees, we are hard pressed to argue on appeal that the district court's ruling to the contrary was clear error, or that the student assignment goals that the court put in place to remedy the remaining racial imbalance in Shelby County's schools are an abuse of discretion.

We are, however, appealing the district court's order that the racial

composition of faculty in each Shelby County school must mirror the racial composition of the system's student body. This ruling was an abuse of discretion. There is no remedial basis for tying faculty ratios to student ratios. Indeed, such orders run counter to Supreme Court precedent and have been explicitly rejected in this Circuit.

STANDARDS OF REVIEW

This Court reviews the district court's determination that Shelby County has not achieved unitary status for clear error. *NAACP* v. *Duval County Sch*., 273 F.3d 960, 965 (11th Cir. 2001); *Manning* v. *School Bd.*, 244 F.3d 927, 940 (11th Cir.) cert denied, 534 U.S. 824 (2001) ("A declaration of a school system's unitary status is a finding of fact and thus falls under the clearly erroneous standard of Rule 52(a)."); Fed. R. Civ. P. 52(a)(6). The district court's modifications of the desegregation decree are reviewed for abuse of discretion. *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 437 (1976) ("sound judicial discretion may call for the modification of the terms of an injunctive decree"); *United States* v. *School Dist*., 577 F.2d 1339, 1350-1351 (6th Cir. 1978).

ARGUMENT

I

THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING THAT EACH SCHOOL ACHIEVE FACULTY RACIAL RATIOS THAT REFLECT THE RACIAL IDENTITY OF THE SYSTEM-WIDE STUDENT BODY

The district court abused its discretion when it ordered Shelby County Schools to establish faculty goals tied to the racial composition of the system's student body. The court ordered that "rather than tying the racial composition of a school's faculty to that of the population of teachers in the system as a whole, it should be linked instead to the racial composition of the *student* population." (R. 460-1 Order 56, Apx. _). This ruling is legally unsupportable and thus an abuse of discretion.

As this Court explained in striking down a similar student-based racial hiring plan in *Oliver*, "students * * * do not have a constitutional right to attend a school with a teaching staff of any particular racial composition." *Oliver* v. *Kalamazoo Bd. of Educ.*, 706 F.2d 757, 762 (6th Cir. 1983).[9] The Fifth Circuit likewise rejected a requirement that faculty ratios be tied to student body composition, holding that "a formerly segregated school system need not

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[9] *Oliver* was an employment case. The court struck down a hiring quota when teachers' organizations intervened in an ongoing desegregation action.

employ a faculty having a racial composition substantially equivalent to that of its student body in order effectively to desegregate its schools and attain unitary status" and that "[t]he district court erred in imposing such a requirement." *Fort Bend Indep. Sch. Dist.* v. *City of Stafford*, 651 F.2d 1133, 1138 (5th Cir. 1981). Instead, the court's orders should require that "faculty of each school reflect the *systemwide racial ratio of faculty members*." *United States* v. *DeSoto Parish Sch. Bd.*, 574 F.2d 804, 816 (5th Cir.) (emphasis added), cert. denied, 439 U.S. 982 (1978); see also *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, 232 (1969).

The district court's assertion that each child is constitutionally entitled to "educational guidance which includes teachers of the student's own race" is incorrect. (R. 460-1 Order 56, Apx. _). The Constitution requires only that schools be staffed so that no school is racially identifiable based on governmental action. Taken to heart, the court's "role model" principle could lead to an *increase* in racially identifiable schools as majority black schools are increasingly staffed with black faculty. Conversely, the "role model" theory "could be used to escape the obligation to remedy [hiring discrimination] by justifying the small percentage of black teachers by reference to the small percentage of black students." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267,

276 (1986). In *Wygant*, the Supreme Court explicitly rejected the "role model theory" as a basis for race-based layoff protections because it "allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose." *Id.* at 275.

Imposition of the proposed hiring goal clearly would violate legal principles established in anti-discrimination cases. *Singleton* v. *Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211 (5th Cir. 1969) (en banc), rev'd in part on other grounds *sub nom*. *Carter* v. *West Feliciana Parish Sch. Bd.*, 396 U.S. 290 (1970); *Lujan* v. *Franklin County Bd. of Educ*., 766 F.2d 917, 921 (6th Cir. 1985). In *Singleton*, the Fifth Circuit reiterated *Montgomery*'s requirement that faculty be assigned such that the racial composition of a school's staff will not indicate that the school is intended for, or predominantly serves, white or black students. It also required that faculty not be hired, promoted, or dismissed on the basis of race. Under *Singleton* and *Oliver*, the court may demand only nondiscriminatory hiring and recruitment. The district court's order would effectively turn the purpose of the desegregation remedy on its head. As the Supreme Court stated in *Swann*, "where it is possible to identify a 'white school' or a 'Negro school" simply by reference to the racial composition of teachers and staff," there is a prima facie constitutional violation. *Swann* v.

Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); see also *Green* v. *County Sch. Bd.*, 391 U.S. 430, 434-435 (1968).

Compliance with the district court's new faculty assignment plan in this case could require racially discriminatory hirings and firings. If, in any given year, the Board has too few black faculty to staff each school within 15% of the systemwide student body, it must fire non-black faculty and hire an equivalent number of black faculty in order to meet the court's requirements. This bizarre and unconstitutional reshuffling would be repeated as the student population in Shelby County shifts as a result of annexation or changing residential patterns, leaving more teachers jobless with every racial recount of the student body.

Furthermore, even a less ambitious race-based employment program (such as a recruitment goal) must be grounded on a finding of wrongdoing in hiring. *Wygant*, 476 U.S. at 277. So far, the record shows that the number of black teachers in Shelby County's system and in the state system as a whole is falling; it does not demonstrate that the decline is due to discrimination by the Board or its recruitment or hiring practices. While there has been a demonstrable drop in African American faculty in the Shelby County system, there is no finding of discriminatory hiring since *de jure* segregation was eliminated. The Board was never ordered to hire minorities at a certain level.

The court's initial decrees required only that the School System employ teachers "without regard to race," and the court's 1990 order simply added the provision that the Board report minority recruitment. (*Robinson* v. *Shelby County Bd. of Educ*., No. 63-4916, slip op. (W.D. Tenn. July 3, 1990); R. 460-1 Order 42, 47, Apx. _, _, _).

While Shelby County's schools have not matched the success of the neighboring Memphis City's schools in hiring African Americans, Shelby's percentage of African American faculty is similar to those of several other nearby systems and greater than the annual state-wide percentage of black teaching graduates. (R. 424-2 Joint Motion Exh. B, Apx. _; R. 444 Response to Court's Order, Apx. _; R. 444 Response to Court's Order Exh. 4-B at 4, Apx. _). Moreover, the Board makes campus visits to historically black colleges and has dedicated staff to pursue faculty recruitment. (R. 460-1 Order 47-48, Apx. __).

Additional fact finding would be needed to justify any use of race in hiring teachers. The court would be required to determine whether Memphis City or another area represents an appropriate comparative labor market for purposes of a disparate impact analysis, and the court must then determine the number of qualified minority candidates available. *International Bhd. of*

Teamsters v. *United States*, 431 U.S. 324, 342 n.23 (1977). The number of minority students is not a substitute for a labor market analysis. *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 308 (1977).

The district court, therefore, clearly abused its discretion in entering faculty guidelines that are contrary to law. Previous decrees in this case appropriately provided for a balanced distribution of teachers among schools in the system. See *Montgomery*, 395 U.S. at 232. Assignment of teachers according to flexible guidelines would not be an abuse of discretion if the Board never fully desegregated its faculty by proper transfers. *United States* v. *Wilcox County Bd. of Educ.*, 494 F.2d 575, 579 (5th Cir.), cert. denied, 419 U.S. 1031 (1974).

II

THE COURT DID NOT CLEARLY ERR IN FINDING THAT THE BOARD FAILED TO PROVE UNITARY STATUS

Once a court places a school system under remedial desegregation orders, the school board must show that it has properly implemented the orders in good faith for a reasonable period of time before it can seek dissolution of the remedial decrees. *Freeman* v. *Pitts*, 503 U.S. 467, 493 (1992); *Board of Educ.* v. *Dowell*, 498 U.S. 237, 247 (1991). A school system has achieved

unitary status when the board no longer enforces separation by race and has eliminated, *where practicable*, the vestiges of the segregated system. Current disparities may remain, provided they are caused by external factors beyond the school board's control and are "not traceable, in a proximate way" to the board's prior violations. 503 U.S. at 494. The school board bears the burden of proving unitary status. *Missouri* v. *Jenkins*, 515 U.S. 70, 150 (1995).

Many courts have assessed racial imbalance using a 10% to 20% deviation from the system-wide average as a starting point. *Freeman*, 503 U.S. at 481-482 (10%); *Manning* v. *School Bd.*, 244 F.3d 927, 935 (11th Cir.) (accepting experts' use of 20% assessment guideline) cert denied, 534 U.S. 824 (2001). When the Board filed its motion seeking unitary status, the School System as a whole was 34% black. (R. 485 Jan. Hearing Tr. 91, 157, Apx. _,_). In 2007, about 60% of the schools varied by more than 15% from the system-wide racial ratio, with some as high as 90% black. (R. 461 Response to Court's Order Exh. B, Apx. _; R. 488 Status Report, Apx. _); Appellant Br. 9, 12-13, 36-38).

Even where racial imbalances exist, a school board is entitled to unitary status if it proves "that the imbalances are not the result of present or past discrimination on its part." *Lockett* v. *Board of Educ.*, 111 F.3d 839, 843 (11th

Cir. 1997). Thus, if demographic shifts are a substantial cause of imbalances, unitary status can still be granted. *Manning*, 244 F.3d at 944.

The Board argues that annexations and voluntary housing patterns are the cause of racial imbalances. Appellant Br. 15. This evidence, however, was brief and anecdotal. The Board did not provide any formal population data or expert testimony. Cf. *Manning*, 244 F.3d at 936 (school board retained demographic expert and presented "considerable evidence" during a seven-day hearing). On the sparse record here, it is difficult to argue that the district court's ruling on this point was clear error.

Nor can we say that the district court clearly erred in finding that the Board failed to prove that the vestiges of *de jure* segregation have been eliminated from faculty assignment. According to the Board's most recent filings, the faculties of individual schools ranged from 5% to 55% black, and schools with the highest black student enrollments had the higher ratios of black faculty. (Compare Appellant Br. 12-13 with R. 488 Status Report Exh. A, Apx. _). This imbalance, and the correlation between the schools with higher black student enrollment and a higher percentage of black faculty, create a presumption against unitary status for faculty. *Reed* v. *Rhodes*, 607 F.2d 714,

725 (6th Cir. 1979) (citing *Swann*, 402 U.S. at 25), cert. denied, 445 U.S. 935 (1980).

The Board offered several explanations for this racial imbalance. For example, it acknowledged that it allows tenured teachers to transfer to schools in the communities in which they live, and sometimes assigned black teachers to schools that were more heavily black. (R. 485 Jan. Hearing Tr. 126-127, 139-140, Apx. _, _-_(noting schools try to "staff with a minority applicant" where the faculty was "not reflective of student body")). But this Court has rejected similar arguments to justify a failure to integrate faculty. *Reed*, 607 F.2d at 724. The Board also pointed out that the number of qualified black teachers has fallen. But that does not justify racial imbalances among the current faculty. *Id.* at 724. On this record, we are hard pressed to argue that the district court committed clear error.

Finally, when asked to provide recent data about white and black students' participation in extracurricular activities between 1998 and 2006, the Board presented incomplete statistics covering some of its schools for only one year. (R. 439 Order 2, Apx. _; R. 444 Response to Court's Order 1, Apx. _). On this record, the district court did not commit clear error in concluding that

"further inquiry" was required to evaluate the Board's compliance. (R. 460-1 Order 57 n.17, 62, Apx. _, _).

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ESTABLISHING FLEXIBLE STUDENT ASSIGNMENT GOALS

In establishing new target student ratios in this case, the district court held that the "*flexible* goal of this effort, and a starting point in analyzing the Board's success in desegregation, shall be a racial composition of * * * students in each school that is reflective of the overall student population, with a margin of error of fifteen (15) percentage points." (R. 460-1 Order 59, Apx. _) (emphasis added). In *Swann*, the Supreme Court approved the use of flexible racial guidelines such as these because "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." *Swann* v. *Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).[10] The court noted here that it would use the guidlines as "a starting point in analyzing the Board's success in desegregation." (R. 460-1 Order 59, Apx. _).

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[10] The Board's extensive citation to *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738, 2759 (2007), is unavailing, as that case did not establish new law for ongoing desegregation cases or new limits on the remedial use of race.

Contrary to the Board's assertions, Appellant Br. 19, 20, 23, 26, 29, 30, 40, the district court did not impose "strict racial quotas" for student assignments. The special master will analyze statistical data and prepare recommendations for the court. (R. 460-1 at 59, Apx. _). The court ordered the Board to improve its evidentiary showing by including "raw student and faculty data for each school by race" and "evidence of mitigating factors, including infeasibility of further desegregation and shifting demographics, as appropriate." (R. 460-1 at 60, Apx. _). This language demonstrates that the Board will not be required to implement measures to achieve mathematically balanced schools that are not "feasible and pedagogically sound." *Robinson* v. *Shelby County Bd. of Educ.*, 442 F.2d 255, 258 (6th Cir. 1971).

In our view, the guidelines, combined with the order to produce demographic data, is a constructive way to conclude this litigation. Because the guidelines will focus the Board on schools that are substantially imbalanced, the Board can compile demographics and other factors explaining if and why these remaining disparities cannot practicably be eliminated. If the School System can show that it cannot reach the flexible guidelines at each school, or why the current situation does not implicate the effects of prior *de jure* segregation, it may very well be entitled to the unitary status it seeks

without substantial redistribution of students or redistricting. Accordingly, in light of the abuse-of-discretion standard of review, we have chosen not to appeal this aspect of the court's order.

CONCLUSION

For the foregoing reasons, this Court should (1) reverse the district court's order that faculty racial ratios should mirror the student body composition, (2) affirm the district court's order denying Plaintiffs' and Defendant's motion to dismiss the desegregation decree and declare Shelby County Schools a unitary system, (3) affirm the court's order establishing student assignment guidelines.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Microsoft Word and WordPerfect and contains no more than 8,580 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____

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Date: February 6, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2008, one copy of the foregoing PROOF BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT was served by first class mail, postage prepaid, upon the following:

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UNITED STATES' DESIGNATION OF APPENDIX CONTENTS

The United States, per Sixth Circuit Rule 28(d), 30(b), hereby designates the following portions of the record for inclusion in the Joint Appendix in addition to those selected by Appellant:

Description of Item	**Date filed in district court**	**Record Entry Number**
Complaint	June 12, 1963	1
Order	Mar. 17, 1964	N/A
Motion for Supplemental and Modified Relief,	May 5, 1966	N/A
Order	May 6, 1966	N/A
Order	May 20, 1966	N/A
Application for Civil Contempt	Jan. 16, 1967	N/A
Order that Defts. Shall Bring Themselves Into Compliance	Jan. 19, 1967	N/A
Modified Plan	Mar. 24, 1967	N/A
Report to the District Court of the United States in Compliance with the Court Order (with attachment 1)	Oct. 1, 1969	N/A
Order	Apr. 6, 1970	N/A
Order	May 28, 1971	N/A
Resp. of the U.S. to the Aug. 17, 1989 Mem. of Court	Oct. 2, 1989	N/A
Pls.' Robinson Resp. to the Court's Mem. of Aug.17, 1989	Oct. 5, 1989	N/A

Description of Item	**Date filed in district court**	**Record Entry Number**
Report to the district court	Oct. 17, 1989	N/A
Reply of the U.S. to the Resp. of the Shelby County Board	June 6, 1990,	N/A
Order	July 3, 1990	N/A
Consent Order Approving Attendance Zone Changes Related to the New Elementary School in the Collierville Area,	Sept. 21, 1998	N/A
District Court Docket June 12, 1963 though August 27 2002		N/A
Consent Order Approving Construction Notice	Aug. 3, 2004	R. 418
Joint Motion to Dismiss Court Order	Aug. 14, 2006	R. 423
Memorandum in Support of Joint Motion	Aug. 14, 2006	R. 424-1
Joint Motion Exhibits A, B, C	Aug. 14, 2006	R. 424-2
Setting Letter	Nov. 22, 2006	R. 427
Minute Entry	Nov. 29, 2006	R. 428
January Hearing Exhibits	Jan. 26, 2007	N/A
Exhibit and Witness List	Jan. 29, 2007	R. 433
Order to Show Cause	Jan. 29, 2007	R. 434
Order to Produce Statistical Data	Feb. 8, 2007	R. 439
United States' Response to the Joint Motion	Feb. 16, 2007	R. 442
Response to the Court's Order to Produce Statistics Exhibits 1-A, 1-B, 4-B	Feb. 26, 2007	R. 444

Description of Item	Date filed in district court	Record Entry Number
Exhibit and Witness List From June 23 Motion Hearing	July 25, 2007	R. 459
Order Granting in Part and Denying in Part Motion for Unitary Status	July 26, 2007	R. 460-1
Order Granting in Part and Denying in Part Motion for Unitary Status, attached procedural history	July 26, 2007	R. 460-2
Response to Order to Produce Statistics Exhibit B	July 26, 2007	R. 461
Plaintiffs' Motion to Reconsider with Supporting Memorandum	Aug. 9, 2007	R. 466
Shelby County Notice of Appeal	Aug. 22, 2007	R. 470
Memorandum in Support of Motion to Stay	Sept. 11, 2007	R. 478
Memorandum in Support of Motion to Stay, Attachment 3	Sept. 11, 2007	R. 478-3
Transcript of Status Conference Proceedings held on November 29 pp. 10-11, 17-23	Sept. 26, 2007	R. 483
Transcript of Motion Hearing January 26, 2007 pp. 1-184 Exhibit 1	Sept. 26, 2007	R. 485
Transcript Supplemental Motion Hearing July 23, 2007 pp. 1-143	Sept. 26, 2007	R. 486
Status Report Exhibit A	Oct. 5, 2007	R. 488