THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

DIANE COWAN *et al.*, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. BOLIVAR COUNTY BOARD OF EDUCATION *et al.*, Defendants.	Civil Action No. 2:65-CV-00031-GHD

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO ALTER OR AMEND JUDGMENT
BY PLAINTIFF-INTERVENOR UNITED STATES OF AMERICA

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INTRODUCTION

Plaintiff-Intervenor United States of America (the "United States") respectfully submits this Memorandum of Law in support of its Motion to Alter or Amend Judgment. The United States' Motion requests that the Court reconsider the portion of its January 24, 2013 Order [Doc. 77] ("Order") requiring the Cleveland School District ("Cleveland" or the "District") to adopt an "open enrollment" or "true freedom-of-choice" plan for its two middle schools and two high schools. The Court correctly held that the "District's proposed desegregation plan does not meet the constitutional requirements for desegregation." Order at 1. However, the "freedom of choice" plan ordered by the Court is itself constitutionally unsound and is not likely to be effective in attracting white students to the all-black D.M. Smith Middle School ("D.M. Smith") and East Side High School ("East Side"). Since "freedom of choice" was not proposed by any party, or otherwise raised during briefing or at hearing, the United States did not heretofore have the opportunity to address squarely the constitutionality of "freedom of choice." The United States therefore urges the Court to reconsider the ordered relief in light of the applicable law, as briefed below, and to direct the parties to engage in negotiations to agree on a plan within constitutionally acceptable parameters.

SUMMARY OF ARGUMENT

On March 28, 2012, this Court held that two schools in the District—D.M. Smith and East Side—had never been "meaningfully desegregated." Mem. Op., Mar.28, 2012 [Doc. 43] ("2012 Mem. Op."), at 25-26. The Court directed the District to propose a plan to desegregate the student bodies at those schools and the faculties at all schools in the District. Order, March 28, 2012 [Doc. 42], at 1; 2012 Mem. Op. at 40. In response, the District proposed a plan [Doc. 44] to use expanded magnet programs to desegregate D.M. Smith and East Side High School,

despite the fact that similar magnet programs previously adopted by the District had consistently failed to desegregate these schools. The United States objected to the District's proposal as constitutionally inadequate because of the District's "well-documented inability to integrate East Side and D.M. Smith through voluntary measures" and because the District failed to meet its burden to demonstrate that the "reconfigured magnet programs can 'realistically' overcome the barriers that have diverted nearly every white student in the District away from East Side and D.M. Smith for more than 47 years," and to "'promise[] realistically to work now.'" United States' Objections to Proposed Desegregation Plan [Doc. 48] ("United States' Objections"), at 3 (quoting *Green v. County Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 439 (1968)).

The Court agreed. Order at 1. On January 24, 2013, this Court ruled that "Defendant Cleveland School District's proposed desegregation plan does not meet the constitutional requirements for desegregation" of East Side and D.M. Smith, which "have remained racially identifiable as African-American schools." Order at 1; Mem. Op., Jan. 24, 2013 [Doc. 78] ("Op."), at 3. Furthermore, the Court held that the existing middle school and high school attendance zones "perpetuate vestiges of racial segregation." Op. at 8. The attendance zones were ordered by the Court as remedial relief earlier in this case, but have instead served to reinforce segregation because of their close alignment with historic and current residential housing patterns in the communities comprising the Cleveland School District. The United States agrees with the Court's findings, and concurs that the existing remedial framework has failed to achieve the constitutionally mandated desegregation at East Side and D.M. Smith, and that additional relief is necessary to accomplish those objectives once and for all.

After rejecting the District's plan, this Court ordered the District to adopt an "open-enrollment" or "freedom-of-choice" plan instead, concluding that "this true freedom-of-choice

arrangement will meet the constitutional requirements." Order at 1; Op. at 9. The United States respectfully submits that simply offering "freedom of choice" in student assignment does not meet the constitutional minimum, especially when that remedy was tried before with no success. The remedy ordered by the Court will be insufficient to achieve a meaningful level of desegregation at D.M. Smith and East Side. Indeed, given the procedural history and factual record in this case, the Court's directive is incorrect as a matter of law and does not satisfy the constitutional mandate that a desegregation plan must "'promise[] realistically to work, and promise[] realistically to work now.'" 2012 Mem. Op. at 17 (quoting *Green*, 391 U.S. at 439).

The "freedom of choice" plan ordered by the Court is identical to the plan previously rejected by this Court in 1969, when the Court ordered that, after a one-year period in which "students attending grades 7 through 12 shall be assigned on the basis of their freedom of choice previously exercised," that all students would then be required to attend school in one of the newly-created attendance zones, with limited exceptions. Order, July 22, 1969, at 3-4. The "freedom of choice" plan also suffers from the same constitutional defects as the District's rejected proposed plan, which the Court correctly held to be constitutionally inadequate. As explained below, the Supreme Court and the Fifth Circuit have long considered "freedom of choice" plans to be constitutionally suspect, in large part because of their demonstrated ineffectiveness in attracting white students to formerly *de jure* black schools. *See infra* at 7-11.

The case law mandates that "freedom of choice" be rejected when other workable alternatives exist. *See infra* at 7-9. The Court itself recognized that consolidation would be "[o]ne obvious remedy." 2012 Mem. Op. at 40 n.9. As the United States briefed and argued at hearing, consolidating the District's middle schools and high schools into a single-grade structure for grades six through twelve offers the greatest promise of meaningful desegregation

for all students in shortest order—and the clearest path to full unitary status. Given the good condition and close proximity of the two middle school and two high school facilities, Op. at 3-5, consolidation could take various forms without the need for new construction or school closures. Prompt implementation of a consolidation plan by the beginning of the 2013-2014 school year would put the District on a path to full unitary status—and permit dismissal of this case—as early as 2016. Given the availability and viability of consolidation, "freedom of choice" must be rejected as a matter of law.[1]

Accordingly, the United States submits this Motion for the narrow purpose of requesting reconsideration of the "freedom of choice" plan ordered by the Court. The United States is fully willing to work with the District, private plaintiffs, and the Court to devise a plan that meets both constitutional requirements and local needs, taking account of the history of Cleveland's schools and the demonstrable loyalty to existing schools shown by some community members.

To that end, and to avoid the prospect of future litigation on these and any other issues in the case, the United States respectfully requests that the Court replace its "freedom of choice" plan with a directive that (1) the parties negotiate and propose to the Court a comprehensive consent order to be implemented by the beginning of the 2013-2014 school year that would include a mutually-agreeable and constitutionally adequate plan that would meaningfully desegregate the District's middle and high schools, and (2) if the parties are unable to reach agreement within a reasonable period of time, that the District devise and implement a consolidation plan in which all students in the middle school and high school grades would attend the same schools in a single-grade structure beginning in the 2013-2014 school year.

[1] The United States previously noted that "[r]ezoning existing attendance boundaries could also produce meaningful integration," United States' Objections at 10, and there may be other viable approaches that are not discussed herein.

LEGAL STANDARD

A party may file a motion to alter or amend a judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure no later than 28 days after the entry of the judgment in question. Fed. R. Civ. P. 59(e).[2] "Under Rule 59(e), amending a judgment is appropriate (1) where there has been an intervening change in the controlling law; (2) where the movant presents newly discovered evidence that was previously unavailable; or (3) to correct a manifest error of law or fact." *Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 182 (5th Cir. 2012); *see also Hood v. Central United Life Ins. Co.*, 664 F. Supp. 2d 672, 674-75 (N.D. Miss. 2009) (similarly listing as a possible ground for granting a motion for reconsideration, *inter alia*, "the need to correct a clear error of law or prevent manifest injustice"). For the reasons explained herein, the "freedom of choice" plan ordered by the Court falls short of the constitutional mandates for an acceptable desegregation plan. It is unlikely to result in meaningful desegregation of East Side High School and D.M. Smith in the immediate term, resulting in continuing harm for many Cleveland schoolchildren.

"A motion under Rule 59 cannot be used to raise arguments or claims 'that could, and should, have been made before the judgment issued.'" *Demahy*, 702 F.3d at 182 (quoting *Marseilles Homeowners Condo. Ass'n v. Fidelity Nat'l Ins. Co.*, 542 F.3d 1053, 1058 (5th Cir. 2008)). Because "freedom of choice" was not proposed by the District in its plan, and thus not the subject of the United States' Objections, or the subsequent briefing and hearing on the District's plan on December 11, 2012, the United States did not have the opportunity to brief the Court on the constitutional arguments against "freedom of choice" plans where, as here, they have failed to result in desegregation of schools. It is therefore appropriate to do so now.

[2] The Federal Rules of Civil Procedure were amended in 2009 to expand the time to file a Rule 59(e) motion from 10 days to 28 days after entry of judgment. *See* Fed. R. Civ. P. 59, Comm. Notes on Rules—2009 Amendment.

Reconsideration of the ordered relief is appropriate and necessary to correct an error of law, namely, the Court's conclusion that "this true freedom-of-choice arrangement will meet the constitutional requirements," Op. at 9, in order to prevent the manifest injustice of continued racial segregation in student assignment at these two schools.

ARGUMENT

The "freedom of choice" plan ordered by the Court in this case does not meet constitutional requirements. The Supreme Court and Fifth Circuit have consistently held that "freedom of choice" plans that have not worked, or do not promise to work, must be rejected when other workable desegregation alternatives are available that promise immediate desegregation. Indeed, in 1969, this Court required the District to replace its former "freedom of choice" plan with attendance zones and other remedial measures, which have all proved insufficient to desegregate D.M. Smith and East Side. Where a "freedom of choice" plan, or any other desegregation measure, has already been discarded as ineffective, as it was in this case, a school district must adopt structural remedies, such as consolidation, that promise to work, rather than returning to a previous failed approach.

As it stands, the majority of Cleveland's middle school and high school students already have the freedom to choose to attend school outside of their attendance zone through the majority-to-minority transfer plan. Not a single white student currently exercises that choice to attend D.M. Smith or East Side as a full-time student. Thus, there is no evidence in the record that abolition of the attendance zone boundaries will compel any white students to opt to enroll at those schools going forward. Consolidation of the middle school and high schools is an available and workable solution; the case law thus requires that "freedom of choice" be rejected in favor of a consolidation plan.

I. After many school districts failed to achieve desegregation through "freedom of choice" plans, the Supreme Court and Fifth Circuit routinely found such plans constitutionally inadequate.

In *Green*, a keystone of school desegregation jurisprudence, the Supreme Court held that "freedom of choice" plans—which had been implemented as initial desegregation measures by many school districts, including Cleveland—were constitutionally unsound if they did not result in meaningful desegregation of formerly *de jure* black schools. 391 U.S. at 439-42; *see also Raney v. Board of Educ. of Gould Sch. Dist.*, 391 U.S. 443, 447-48 (1968). At issue in *Green* was whether "respondent School Board's adoption of a 'freedom-of-choice' plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility to 'achieve a system of determining admission to the public schools on a non-racial basis * * *.'" 391 U.S. at 431-32 (quoting *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294, 300-01 (1955)). The Court held that it did not. *Green*, 391 U.S. at 441-42. Noting the school board's argument "that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may 'freely' choose the school he will attend," the Court held that the board's "'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system" where "[i]n three years of operation not a single white child has chosen to attend [the formerly *de jure* black school]" and the majority of black students still attend the all-black, and formerly *de jure* black, school. *Id.*

Simply opening the doors of a formerly *de jure* black or *de jure* white school to students of the other race is constitutionally inadequate if it does not result in actual desegregation at all schools. Under *Green*, "[i]n the context of the state-imposed segregated pattern of long standing, the fact that . . . the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board

has taken steps adequate to abolish its dual, segregated system." *Id.* at 437. Noting "the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation," the Court held that such a plan could be permissible "[w]here it offers real promise of aiding a desegregation program." *Id.* at 440-41. Nevertheless, even where such a plan might "prove itself in operation," the Court held that "if 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." *Id.* at 441.

A. The Fifth Circuit has repeatedly rejected "freedom of choice" as inadequate where it has failed to desegregate all-black schools.

Following *Green*, the Fifth Circuit summarily rejected "freedom of choice" plans as constitutionally inadequate where such plans had earlier failed to achieve meaningful desegregation and where other alternatives were available. *See Hall v. St. Helena Parish Sch. Bd.*, 417 F.2d 801, 808-09 (5th Cir. 1969) ("Since *Green* this court explicitly has rejected freedom of choice plans that were found to be demonstrably unsuitable for effectuating transition from dual school systems to unitary non-discriminatory systems.") (citing cases); *Adams v. Mathews*, 403 F.2d 181, 188 (5th Cir. 1968) (requiring school districts to replace ineffective "freedom of choice" plans with attendance zones, consolidation of schools, pairing of schools, or majority-to-minority transfers in the 1968-1969 and 1969-1970 school years). As the Fifth Circuit explained, "[i]f under an existent plan there are no whites, or only a small percentage of whites, attending formerly all-Negro schools, or only a small percentage of Negroes enrolled in formerly all-white schools, then the plan, as a matter of law, is not working." *Hall*, 417 F.2d at 807. Furthermore, "[i]f there are reasonably available other ways promising speedier and more effective conversion to a unitary non-racial system, freedom of choice must be held unacceptable." *Id.* at 809. In addressing the constitutionally suspect nature of "freedom of

choice" plans after *Green*, the Fifth Circuit pointedly remarked that such plans had stymied, rather than furthered, timely desegregation of schools:

> 'The method has serious shortcomings. Indeed, the 'slow pace of integration in the Southern and border States is in large measure attributable to the manner in which free choice plans * * * have operated'. When such plans leave school officials with a broad area of uncontrolled discretion, this method of desegregation is better suited than any other to preserve the essentials of the dual school system while giving paper compliance with the duty to desegregate.'

Adams, 403 F.2d at 186 n.4 (quoting *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 888 (5th Cir. 1966)). With regard to "freedom of choice" plans previously used in a number of Mississippi school districts, the Fifth Circuit ruled that the district court erred in approving such plans in 25 school districts where, *inter alia*, "[n]o white students have ever attended any traditionally Negro school in any of the school districts" and a minority of black students attended formerly *de jure* white schools. *United States v. Hinds Cnty. Sch. Bd.*, 417 F.2d 852, 855-56 (5th Cir. 1969). The Court thus held, in light of *Green* and its progeny, that "these school districts will no longer be able to rely on freedom of choice as the method for disestablishing their dual school systems." *Id.* at 856.

The Fifth Circuit issued similar rulings in numerous other cases after *Green*. *See, e.g.*, *Lee v. Marengo Cnty. Bd. of Educ.*, 588 F.2d 1134, 1135-36 (5th Cir. 1979) (reversing district court's order of a "freedom of choice" plan where the "plan is not working to achieve desegregation" and where one-race black schools and predominantly white schools continued to exist in small, majority-black school district); *Beaumont Indep. Sch. Dist. v. Department of Health, Educ. & Welfare*, 504 F.2d 855, 857 (5th Cir. 1974) (rejecting "freedom of choice" plan "since it is apparent that this method has not been successful in desegregating the schools" and directing district court "to institute an effective plan which is constitutionally sound"); *United States v. Board of Educ. of Baldwin Cnty.*, 423 F.2d 1013, 1014 (5th Cir. 1970) (rejecting school

district's proposed "freedom of choice" plan and ordering a zoning plan recommended by the federal government); *Hall v. St. Helena Parish Sch. Bd.*, 424 F.2d 320, 322-23 (5th Cir. 1970) (reversing district court's decision to accept "freedom of choice" plan submitted by school district and ordering plan proposed by federal government); *Boykins v. Fairfield Bd. of Educ.*, 421 F.2d 1330, 1331 (5th Cir. 1970) (reversing district court's approval of plan in which "freedom-of-choice, as operating, is not acceptable" and ordering the development of a new plan); *United States v. Greenwood Mun. Separate Sch. Dist.*, 422 F.2d 1250, 1251 (5th Cir. 1970) (same); *Steele v. Board of Pub. Instruction of Leon Cnty.*, 421 F.2d 1382, 1382-83 (5th Cir. 1969) (reversing district court's approval of "a freedom of choice plan proposed by the school board which does not establish a racially unitary school system"); *United States v. Choctaw Cnty. Bd. of Educ.*, 417 F.2d 838, 841-42 (5th Cir. 1969) (finding "it is apparent that in Choctaw County freedom of choice has not 'worked' and as proposed has little chance of working," reversing district court's approval of such plan over motions by United States and intervenors seeking a zoning and pairing plan, and directing the district court to approve such a plan); *United States v. Jefferson Cnty. Bd. of Educ.*, 417 F.2d 834, 836-37 (5th Cir. 1969) (finding "[i]t is clear that the freedom of choice has not disestablished the dual school systems in Bessemer or Jefferson County," reversing approval of such plan, and requiring consideration of other alternatives); *Davis v. Board of Sch. Comm'rs of Mobile Cnty.*, 414 F.2d 609, 610 (5th Cir. 1969) (finding "[t]he freedom of choice for the rural schools approved by the District Court has singularly failed" where "no white children chose to attend traditionally Negro schools" and only a minority of black children chose to attend formerly *de jure* white schools); *Anthony v. Marshall Cnty. Bd. of Educ.*, 409 F.2d 1287, 1289 (5th Cir. 1969) (reversing district court's approval of "freedom of choice" over a pairing or zoning plan, where no white children opted to attend

formerly *de jure* black schools, noting the fact that the district court "based its ruling in part on the fact that white students would flee from public schools where Negro pupils heavily preponderated . . . is precluded by the clear mandate of the Supreme Court in *Green*").

B. The constitutional infirmities of "freedom of choice" are not remedied by the part-time attendance of white students at all-black schools for individual courses.

It is undisputed that no white students are currently enrolled at D.M. Smith or East Side, and that virtually no white students have enrolled at D.M. Smith or East Side in the last decade.[3] And it is not enough that a small number of white students enrolled at Margaret Green Junior High School ("Margaret Green") or Cleveland High School ("Cleveland High") attend D.M. Smith or East Side for one or more advanced or magnet program classes per day, or may do so in the future. The Court noted that "the District also buses students who attend East Side High and Cleveland High to each other's schools to take certain classes to further enrich and equalize the educational experiences of the two schools." Op. at 5. To the extent such practices continue, however, such "part-time" enrollment does not and cannot satisfy the District's desegregation obligations. *See, e.g.*, *Bivins v. Bibb Cnty. Bd. of Educ.*, 424 F.2d 97, 98 (5th Cir. 1970) (reversing district court's approval of "freedom of choice" plans in two school districts where no white students enrolled in formerly *de jure* black schools "except on a part-time basis" for certain courses); *Hilson v. Ouzts*, 425 F.2d 219, 220 (5th Cir. 1970) (reversing district court's approval of a "freedom of choice" plan in which the only white students enrolled at formerly *de jure* black high school did so on a part-time basis); *United States v. Hinds Cnty. Sch. Bd.*, 433 F.2d 622, 625 (5th Cir. 1970) (rejecting "what is in effect a freedom of choice plan, partially

[3] *See* District's annual reports for 2007-2008 [Doc. 21-1], at 7 (data for 2005-2006, 2006-2007, and 2007-2008); 2008-2009 [Doc. 22-1], at 4; 2009-2010 [Doc 23-1], at 9-10; 2010-2011 [Doc. 16-1], at 1; and 2011-2012 [Doc. 47-1], at 1; and Student Enrollment by School by Race as of 11/26/2012 [Doc. 64], at 1 (2012-2013 data). As reflected in these reports, since 2005-2006, no more than two white students have enrolled at either D.M. Smith or East Side in a given school year. For the last two school years, no white students have enrolled at either school.

desegregated under a course-exchange program" as "not acceptable under the decisions of the Fifth Circuit"); *United States v. Board of Educ. of Webster Cnty.*, 431 F.2d 59, 61-62 (5th Cir. 1970) (finding "[d]ualism in student assignment is not removed by a freedom of choice plan which simply perpetuates the dual system previously in effect" and that "[d]isestablishment of an otherwise segregated student assignment system is not achieved by the sole device of minimal part-time desegregation under a course-exchange program," and directing the district court to close a formerly *de jure* black school and creating a single school for all students in the district).

Where, as here, the Court has already rejected "freedom of choice"—and the current system, which already grants choice to the large majority of Cleveland's middle school and high school students, has demonstrably failed to attract any white students to East Side and D.M. Smith—prevailing case law clearly indicates that a return to "freedom of choice" is not constitutionally permissible.

II. The Court previously rejected "freedom of choice" in Cleveland in its 1969 Order, and may not order a return to a once-failed desegregation approach.

As previously briefed in the United States' Memorandum of Law in Support of its Motion for Further Relief [Doc. 6] ("United States' May 2, 2011 Brief"), in 1969, this Court squarely rejected the District's initial desegregation plan that included a "freedom of choice" system for grades 7-12. *See* United States' May 2, 2011 Brief at 5. The Court ordered that, after a one-year period of transition in which students in grades 7-12 could continue to choose which high school to attend, all students would be required to attend school in the attendance zone in which they resided, with limited exceptions. *See* July 22, 1969 Order at 3. Specifically, the Court ordered that,

> [f]or the school year 1969-70, each student attending elementary grades 1 through 6 shall be assigned to attend the school in the zone in which he resides; and students attending grades 7 through 12 shall be assigned on the basis of their freedom of choice previously exercised [and] . . . [f]or the school year 1970-71 and thereafter, each student in all grades 1 through 12 shall be assigned to attend the school in the zone in which he resides.

July 22, 1969 Order at 3. Importantly, the Court further held that "no longer may the effectiveness of any plan depend upon the wishes or choice of students or their parents." United States' May 2, 2011 Brief at 5 (quoting July 9, 1969 hearing transcript).

The United States has located no case in which a court, having once rejected "freedom of choice" and later finding a subsequent desegregation approach such as zoning also to be ineffective, ordered a return to the failed "freedom of choice" approach. Rather, the Fifth Circuit requires that the district court then consider other alternatives and order a remedy that promises to be more effective in desegregating a district's schools than those previously discarded. *See United States v. Greenwood Mun. Separate Sch. Dist.*, 406 F.2d 1086, 1092-93 (5th Cir. 1968). In *Greenwood*, the Fifth Circuit found that the school district's use of a combination of "freedom of choice" for most students, and a geographic attendance zone for students in part of the district, together failed to desegregate the district's schools. *Id.* at 1093. The Court held that "[t]he over-all plan is defective and must give way to something new," and ordered the district court to consider different attendance zone boundaries, majority-to-minority transfer policies, and the other structural mechanisms. *Id.* The Court did not prescribe a particular plan, but directed the district court to consider additional measures in the event it deemed district-wide attendance zones alone to be inadequate. *Id.* Similarly, in the Clarksdale, Mississippi desegregation case, once it was shown that both "freedom of choice" and attendance zones would not be successful in achieving desegregation, the Fifth Circuit held that other available and workable alternatives,

including school consolidation and other approaches, must be considered and implemented. *See Henry v. Clarksdale Mun. Separate Sch. Dist.*, 409 F.2d 682, 689-90 (5th Cir. 1969).

III. There is no evidence in the record to suggest that the "freedom of choice" plan will desegregate D.M. Smith or East Side because this plan is functionally identical to the District's existing majority-to-minority transfer system.

Not only has this Court already rejected "freedom of choice" in this case, there is nothing in the record that suggests that such a plan would work to attract white students to East Side and D.M. Smith by the start of the next school year, or at any point in the foreseeable future. To the contrary, all of the evidence in the record, including from the District's own expert, suggests that this approach will fail to achieve meaningful desegregation of these two schools.

A. Most Cleveland students already have freedom to choose their middle school and high school, but East Side and D.M. Smith remain segregated.

First, as the District's own witnesses acknowledged at the hearing, the large majority of middle school and high school students in Cleveland already have the option to choose which school to attend through the existing majority-to-minority transfer program.[4] According to demographic data submitted by the District, the overall 2010 population in the predominantly white Zone 1 (the Cleveland High/Margaret Green zone) was 74.3 percent white and 21.6 percent black. Def's Response to Motion for Further Relief, Ex. 1 [Doc. 26-1], at 11. In the predominantly black Zone 2 (the East Side/D.M. Smith zone), the 2010 population was 11.3 percent white and 87.1 percent black. *Id.* Through the majority-to-minority transfer program, most black students, who predominantly reside on the east side, have the choice to attend Cleveland High or Margaret Green, and most white students, who predominantly live on the west

[4] The only students who cannot now exercise freedom of choice are the small number of black students on the west side and the even smaller number of white students on the east side. The Court's decision establishing "freedom of choice" and abolishing majority-to-minority transfers now permits even these students to attend school where their race is in the majority, which would only serve to impede the desegregation of the high schools and middle schools.

side, have the choice to go to East Side or D.M. Smith. As this Court has recognized, the significant numbers of African American students who reside in the east side but have exercised majority-to-minority transfers has resulted in meaningful integration of Cleveland High and Margaret Green. 2012 Mem. Op. at 24-26. However, as the Court further found, few if any white students have exercised their right to transfer to D.M. Smith or East Side. *Id.* at 25-26. Indeed, based on the District's annual reports to the Court, no white student has opted to transfer from Cleveland High to East Side, or from Margaret Green to D.M. Smith, since at least the 2007-2008 school year. *See* 2011-2012 Report, Ex. B [Doc. 47-2], at 1; 2010-2011 Report, Ex. C [Doc. 16-4], at 1; 2009-2010 Report [Doc. 23-1], at 15-24; 2008-2009 Report [Doc. 22-1], at 7-10; 2007-2008 Report [Doc. 21-1], at 9-10.

Under the "freedom of choice" system ordered by the Court, the black students who previously opted to exercise majority-to-minority transfers are likely to continue to do so (although black students who reside on the west side may now choose to attend East Side or D.M. Smith, which may decrease integration at Cleveland High and Margaret Green), but there is no evidence that white students who reside on the west side will now change course and decide to exercise their option to attend East Side or D.M. Smith. The dismal record of the existing system, which has already provided most students choice of where to go to school, strongly suggests that the "freedom of choice" plan ordered by the Court will be wholly unsuccessful in integrating East Side and D.M. Smith.

B. No empirical data exists to suggest white students will enroll in significant numbers at East Side or D.M. Smith with the abolition of existing zone lines.

Second, as the United States argued in objection to the District's proposed magnet plan, there is no data in the record to support the proposition that "a critical mass of white students

[will] take the unprecedented step of transferring to [East Side and D.M. Smith] as full-time students" or that "meaningful integration of these two segregated black schools can or will be achieved on a schedule required by this Court in reliance upon Supreme Court authority." United States' Objections at 7-8. The District conceded that it had undertaken no predictive analysis to determine the likely racial impact of its proposed choice-based magnet plan, Second Supplemental Report of Dr. Christine Rossell [Doc. 51-1] ("Second Supp. Report"), at 27, and no party has submitted evidence to the Court that "freedom of choice" alone would result in white enrollment at East Side and D.M. Smith. As the United States previously argued, at least 50 white students would need to enroll at East Side and at least 45 white students would need to enroll at D.M. Smith to result in 87 percent black student enrollment, which, at 20 percentage points above the district-wide black student enrollment, is the minimal level of acceptable desegregation that would typically be tolerated by federal courts. For "freedom of choice" to be permissible here, there must exist a real prospect that such a significant number of white students would exercise this choice. Yet not one white student, virtually all of whom currently have the option to attend East Side or D.M. Smith under the majority-to-minority transfer program, has chosen to do so.

To the extent that the magnet programs offered the prospect, if not the promise, of attracting white students to East Side and D.M. Smith with unique course offerings, a system in which the District is encouraged but not required to implement those programs, Op. at 9, is even less likely to attract white students to those schools. The District's own expert stated that she is "not aware of any school district that has been successful in attracting more than a handful of white students to a school in a black neighborhood without putting a magnet program in it." Second Supp. Report at 7. If, as is permitted by the Court's Order, the District now chooses to

halt the development of its magnet programs at the middle school and high school level, it is difficult to imagine a scenario in which "freedom of choice" alone would be *more* effective than the magnet plan the Court has already rejected as constitutionally deficient.

C. Generations of segregation at East Side and D.M. Smith have created a stigma against attending those schools that will be a barrier to meaningful desegregation at these schools.

For decades, East Side and D.M. Smith have been stigmatized as racially identifiable "black schools," which has discouraged enrollment among white students and many black students, and suggested that the students attending those schools are somehow inferior. As Reverend Edward Duvall, a parent who testified at the December 11, 2012 hearing, stated:

> Well, for the past 50 years, the kids always been taught that East Side was a bad school and they have been looked down upon. And most of the black kids that go there, Cleveland High, they have a condescending attitude toward the kids that go to East Side. They think they are better, think they are smarter and they kind of look down upon the kids. . . . Well, I think the kids on the west side of town have no desire to cross those railroad tracks. And I don't care what kind of program you bring to East Side; they don't want to come, period.

Hr'g Tr. 89-90, Dec. 11, 2012. Parents have a perception that the east side schools do not have reputations as "good" schools, Hr'g Tr. 57-58 (testimony of Tonya Short); that the District "tend[s] to put a little more in integrated schools," Hr'g Tr. 73-74 (testimony of Lenden Sanders); and that Cleveland's business community provides more support to students on the west side of town, Hr'g Tr. 93-94 (testimony of Rev. Edward Duvall). This stigma is a real and lasting vestige of segregation—and is attributable, at least in part, to the east side schools' continuing racial identifiability as black schools. As long as this stigma persists, white families' reluctance to send their children to East Side and D.M. Smith will continue, further rendering a "freedom of choice" plan, without more, constitutionally insufficient in practice.

The weight of the evidence before the Court strongly indicates that the "freedom of choice" plan will result in little or no additional desegregation of East Side and D.M. Smith.

IV. Either as a result of negotiation by the parties or Order of the Court, consolidation can quickly remedy segregation at the middle school and high school levels.

Green and its progeny command that "freedom of choice" be rejected when other alternatives more likely to result in immediate desegregation are available. *See supra* at 7-9. Consolidation is one such alternative. Consolidation of the middle school and high school grades is a workable remedy to achieve desegregation of Cleveland's schools. *See* United States' Objections at 12; Hr'g Tr. 112-13 (closing statement of Joseph J. Wardenski). As such, and in the absence of any other feasible plans, "freedom of choice" must be rejected and the Court must order a consolidation plan forthwith. The United States proposes three options for consolidation that the Court, together with the parties, may consider in developing a workable plan to desegregate D.M. Smith and East Side.

A. Existing schools could easily be utilized in a single-grade structure serving all students in the middle and high school grade levels.

The District could, of course, close some or all of its existing facilities and construct a new middle school and/or high school to serve all of Cleveland's students. The United States recognizes that the costs associated with such a plan may be prohibitive, as the Board chairman suggested at hearing, Hr'g Tr. 40-41, and that a less costly route, at least in the short term, would be to use existing facilities in a single-grade structure.[5] Current facilities have the capacity to serve all middle school and high school students. As the Court observed, the four middle school and high school facilities are in close proximity to each other and are all in good condition, Op.

[5] As suggested by one witness at the hearing, however, the operational expenses associated with maintaining four schools serving the middle and high school levels, could be higher over time than those associated with operating two new or upgraded facilities. *See* Hr'g Tr. 95 (testimony of Rev. Edward Duvall).

at 3-5, such that it would be possible immediately to change the grade levels served at these facilities in order to implement a single-grade structure. Based on the 2011-2012 enrollment figures[6] for these schools, three possible single-grade configurations for grades six through twelve are set forth below. These examples are not exhaustive, and the United States seeks to engage with the parties and the Court to develop a consolidation plan that meets local needs and constitutional requirements.

Scenario A: 6th Grade Academy, Middle School, 9th Grade Academy, and High School

Facility	**Current Use**	**2011-2012 Enrollment**	**Possible Use**	**Estimated Enrollment**
Margaret Green	Middle School (Grades 6-8)	Grade 6: 126 Grade 7: 188 Grade 8: 171 *Total: 497*	Middle School (Grades 7-8)	Total grades 7-8: 558
Cleveland High	High School (Grades 9-12)	Grade 9: 199 Grade 10: 124 Grade 11: 138 Grade 12: 86 *Total: 571*	High School (Grades 10-12)	Total grades 10-12: 581
D.M. Smith	Middle School (Grades 6-8)	Grade 6: 93 Grade 7: 102 Grade 8: 97 *Total: 293*	6th Grade Academy (Grade 6)	Total grade 6: 219
East Side High	High School (Grades 9-12)	Grade 9: 112 Grade 10: 96 Grade 11: 76 Grade 12: 61 *Total: 346*	9th Grade Academy (Grade 9)	Total grade 9: 311

[6] *See* Mississippi Department of Education ("MDE"), Public Reports, Enrollment, Year 2011-2012, at http://orshome.mde.k12.ms.us/Accountability_Information/Home.aspx ("MDE 2011-2012 Enrollment Data") (school-level and grade-level data retrieved for each school district on February 13, 2013 by selecting "(0614)-CLEVELAND SCH DIST" under pull-down menu labeled "District" and selecting individual schools under pull-down menu labeled "School").

Scenario B: 6th Grade Academy, Middle School, 9-10 High School, 11-12 High School

Facility	**Current Use**	**2011-2012 Enrollment**	**Possible Use**	**Estimated Enrollment**
Margaret Green	Middle School (Grades 6-8)	Grade 6: 126 Grade 7: 188 Grade 8: 171 *Total: 497*	9-10 High School (Grades 9-10)	Total grades 9-10: 531
Cleveland High	High School (Grades 9-12)	Grade 9: 199 Grade 10: 124 Grade 11: 138 Grade 12: 86 *Total: 571*	Middle School (Grades 7-8)	Total grades 7-8: 558
D.M. Smith	Middle School (Grades 6-8)	Grade 6: 93 Grade 7: 102 Grade 8: 97 *Total: 293*	6th Grade Academy (Grade 6)	Total grade 6: 219
East Side High	High School (Grades 9-12)	Grade 9: 112 Grade 10: 96 Grade 11: 76 Grade 12: 61 *Total: 346*	11-12 High School (Grades 11-12)	Total grades 11-12: 361

Scenario C: Middle School, High School

Facility	**Current Use**	**2011-2012 Enrollment**	**Possible Use**	**Estimated Enrollment**
Margaret Green	Middle School (Grades 6-8)	Grade 6: 126 Grade 7: 188 Grade 8: 171 *Total: 497*	High School (Combined Campus) (Grades 9-12)	Total grades 9-12: 892
Cleveland High	High School (Grades 9-12)	Grade 9: 199 Grade 10: 124 Grade 11: 138 Grade 12: 86 *Total: 571*		
Total for both schools: 1068				
D.M. Smith	Middle School (Grades 6-8)	Grade 6: 93 Grade 7: 102 Grade 8: 97 *Total: 293*	Middle School (Combined Campus) (Grades 6-8)	Total grades 6-8: 777
East Side High	High School (Grades 9-12)	Grade 9: 112 Grade 10: 96 Grade 11: 76 Grade 12: 61 *Total: 346*		
Total for both schools: 639				

These, or other configurations using the four existing middle and high schools, or other facilities in the District (e.g., Cypress Park Elementary School, which is adjacent to D.M. Smith), present options that would permit consolidation immediately.

B. Given the existing schools' physical capacity and the need for predictable year-to-year enrollment for budgeting, staffing, and other operational planning, consolidation is a superior option to "freedom of choice."

In its decision, this Court recognized that, depending on the choices actually exercised by students, one or more of the existing facilities may have insufficient capacity for the projected enrollment. Op. at 8-9. As the Board chairman testified at hearing, neither Cleveland High nor East Side has the capacity for all high school students in the District. Hr'g Tr. 39-40. Similarly, neither Margaret Green nor D.M. Smith has the capacity for all middle school students in the district. *Id.* In the event pre-enrollment figures this April indicate that any of these four schools would operate over capacity next year, the Court "will then address the matter with the parties as to an appropriate utilization of existing facilities," Op. at 9, which would presumably include some form of consolidation or reconfiguration of existing facilities before the start of the 2013-2014 school year. However, this exercise will not be limited to this year. Rather, under "freedom of choice," the District will be compelled to assess projected capacity every year, and, if any school becomes oversubscribed in one or more future years, to make additional changes to the usage of these facilities. Future changes may be necessary even if the initial enrollment figures this year do not require changes to the use of existing facilities.

From a budgeting, staffing, and operational planning perspective at the school and District levels, these year-to-year uncertainties may prove complex and disruptive. These uncertainties will be shared by Cleveland's parents and students. Moreover, this process will require closer monitoring by the United States and the Court than would be required under a

consolidation plan, which would not be contingent on an annual choice process and would not result in enrollment fluctuations.

V. Community preferences to maintain existing schools cannot trump legal obligation to desegregate.

As previously stated, the United States recognizes the challenges facing the District and the Court in any plan that would alter the longstanding grade-level configurations of Cleveland's existing schools. As the Court noted and the Board chairman testified, both East Side and Cleveland High are important to the black and white members of the Cleveland community. Op. at 5; Hr'g Tr. 49. Yet, as expressed by two of the parents who testified at the hearing, themselves graduates of East Side who have chosen to send their children there now, many members of the community are seeking a fully desegregated school system and recognize that this might mean changes to the status quo. Hr'g Tr. 83, 93-94 (testimony of Lenden Sanders and Rev. Edward Duvall). Deep loyalties to existing schools, by either the black community or the white community, cannot trump constitutional mandates to desegregate. *See Choctaw County*, 417 F.2d at 842 ("An all-Negro school, even if desired by the students and their parents, is just as wrong constitutionally, as an all-white school desired by white students and their parents.")

A Court may, however, employ creative means while crafting a remedy to ensure the effective implementation of a desegregation plan. *See Davis v. East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1438 (5th Cir. 1983) (addressing fear of white flight, noting "'[w]hite flight' must be met with creativity, not with a delay in desegregation," and commenting that "[f]urther use of special programs designed to make the desegregated schools more attractive to students and parents . . . is entirely appropriate, as long as the cause of desegregation is not frustrated"). If the Court directs further negotiations among the parties, the United States would seek to join with the District in taking creative, affirmative steps to preserve and honor the traditions and

histories each of the schools that are important to the Cleveland community. A thoughtful and effective consolidation plan can result in schools that belong to all students and to which all students, families, and community members can have pride in the years and generations ahead.

CONCLUSION

The Court rightfully observed that the goal of the Court and all parties to any desegregation case must be to end judicial oversight once a school district has eliminated the vestiges of its former segregated system. *See* Op. at 7-8. The Court's findings that D.M. Smith and East Side have never been desegregated, 2012 Order at 25-26, must be met with a plan that promises realistically to establish a clear path to the desegregation of Cleveland schools and dismissal of this case. "Freedom of choice" is simply not that plan. *Green* requires that student assignment, faculty and staff, facilities, extracurricular activities, and transportation all meet constitutional minimums. The "freedom of choice" plan will serve to delay, rather than hasten, the desegregation of D.M. Smith and East Side. In contrast, a carefully constructed plan based on consolidation or another acceptable alternative could put the District on a clear path to unitary status that is attainable within three years.

For these reasons, the United States respectfully requests that the Court amend its January 24, 2013 Order to direct the parties to engage in good faith negotiations to develop a mutually agreeable and constitutionally sound consolidation plan that will promptly resolve the remaining student assignment issues in this case and obviate the need for further litigation or, in the alternative, to order the District to devise a consolidation plan for the middle and high school grade levels to be implemented by the beginning of the 2013-2014 school year.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2013, I served copies of the foregoing Memorandum of Law in Support of Motion to Alter or Amend Judgment to the following counsel of record by electronic service through the court's electronic filing system:

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