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

REPLY BRIEF IN SUPPORT OF
THE UNITED STATES' MOTION FOR FURTHER RELIEF

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INTRODUCTION

Cleveland is a tale of two school districts. On the west side of the railroad tracks are formerly all-white schools that maintain a disproportionately white enrollment. On the east side of the railroad tracks are four all-black or virtually all-black schools that were black schools by law prior to Brown v. Board of Education and have never been racially integrated. To obscure the reality that Cleveland continues to operate a version of its former dual school system, the Cleveland Board of Education ("Cleveland" or "District") mischaracterizes the controlling law and relies heavily on immaterial facts and statistical indices in its Response in Opposition to the United States' Motion for Further Relief and supporting memorandum ("Response"). Stripped to its core, the District's argument is that it has satisfied its desegregation obligations by sole virtue of the fact that its formerly all-white west side schools have become more integrated and it has achieved limited success with two magnet schools at the elementary school level.[1] This argument disavows any obligation to desegregate the remaining all-black east side schools and to eliminate the persistent racial identity of nearly every school in Cleveland—nurtured over time by discrepant student assignment patterns and reinforced by the District's assignment of disproportionately black faculty and staff to the east side schools and disproportionately white faculty and staff to the west side schools.

Under a wealth of controlling authority, there is no legal justification for a school district to preserve a system of segregated schools directly traceable to the district's former dual school system. Cleveland nonetheless attempts to ignore its legal obligation to desegregate, and to excuse its failure to dismantle the District's single-race schools, using a series of fanciful legal theories that have no basis in precedent or are simply irrelevant. While each theory espoused by

[1] One of these schools, Bell Academy for Math, Science, Health and Wellness, has only been operating for one academic year, replacing the former Bell Elementary School. See Response at 16.

the District is distinctly flawed, each shares a common fallacy: they prove too much. If the law cannot hold Cleveland accountable for its ongoing failure to take even the first step toward unitary status by dismantling its former dual school system, it is difficult to conceive of desegregation measures that can be legally required.

ARGUMENT

I. CLEVELAND DRAMATICALLY UNDERSTATES ITS FAILURE TO DISMANTLE THE DISTRICT'S FORMER DUAL SYSTEM BY MISCHARACTERIZING THE RELIEF SOUGHT BY THE UNITED STATES AS "RACIAL BALANCING FOR ITS OWN SAKE."

Cleveland complains in its Response that the United States improperly seeks to compel the District to "racially balance" its schools. See Response at 9 ("[T]he Government's apparent standard for measuring constitutional compliance defies the longstanding mandate against racial balancing."). It is unclear from Cleveland's brief how the District defines "racial balancing," or whether and how it would distinguish improper racial balancing from an appropriate desegregation remedy. At one point Cleveland goes so far as to suggest that any desegregation remedy that relies on quantified benchmarks for student enrollment is unconstitutional. See id. at 9-10 ("[T]he government . . . suggest[s] that a district's 'racial identifiability' is determined by its achievement of a ± 15 - ± 20% ratio of each race compared to the overall racial makeup of the district. If this standard were used to judge the constitutionality of the District's integrative efforts, it is precisely the type of racial quota case law prohibits.").

This argument is a red herring. It is manifest from the United States' Motion for Further Relief and supporting memorandum ("Memorandum") that the issue in this case not whether the racial enrollment of Cleveland's schools is properly "balanced." The issue is whether the segregated, single-race schools in Cleveland's unlawful dual school system have ever been

dismantled and integrated—and they have not been. In any case, once a school district is found liable for failing to dismantle de jure segregated schools, numerical ranges for student enrollment may be a necessary remedial tool for establishing integrated enrollment patterns at schools that are artifacts of the dual system particularly where, as here, voluntary efforts have failed. See Freeman v. Pitts, 503 U.S. 467, 497 (1992) ("Racial balancing in elementary and secondary school student assignments may be a legitimate remedial device to correct other fundamental inequities that were themselves caused by the constitutional violation."). Indeed, had courts ever credited the argument that calibrated adjustments in student enrollment are constitutionally prohibited, most if not all of the desegregation ordered after Brown would have been foreclosed.

To support its untenable assertion that any efforts to achieve racial balancing are proscribed, Cleveland, ironically, relies on the Supreme Court's decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). See Response at 10. In Swann, the Supreme Court upheld—in a unanimous decision—a desegregation order by the federal district court directing "that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others." 402 U.S. at 23-25. Noting that the use of numerical ratios was "a starting point . . . rather than an inflexible requirement," and that the district court had anticipated that "some variation from that norm may be unavoidable," the Court observed that "[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." Id. at 23-25. The Court concluded that the order "was within the equitable remedial discretion of the District Court." Id. at 25. If anything, the desegregation remedy endorsed by the Supreme Court in Swann is more exacting and onerous than the student assignment requirements proposed here by the United States, which would permit the racial

enrollment of each school to deviate by as much as 15 percentage points from the district-wide average.

Moreover, numerical ratios are not only a permissible tool for dismantling a dual school system, but a key indicator of whether a school district has eliminated the vestiges of its segregated system and acted in good faith to comply with its court-ordered and Constitutional obligations. The Supreme Court observed in Freeman that:

> as in most cases where the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole. This inquiry is fundamental, for under the former de jure regimes racial exclusion was both the means and the end of a policy motivated by disparagement of, or hostility towards, the disfavored race.

503 U.S. at 474. Though Cleveland strains to argue that the deeply skewed racial demographics of its schools have no bearing on whether the District has complied with its desegregation obligations, see Response at 12, as courts have repeatedly and consistently held, these enrollment patterns are in fact strong prima facie evidence that Cleveland has violated the extant desegregation orders and federal law. See Memorandum at 25-27.

As Freeman and Swann illustrate, the Supreme Court has never proscribed the use of numerical enrollment targets, either as a desegregation remedy or as a barometer to assess a school district's compliance with its desegregation obligations. Both the Supreme Court and the Fifth Circuit have, however, distinguished between the appropriate consideration of racial composition to eliminate the vestiges of a dual school system, and improper "racial balancing for its own sake." See Freeman, 503 U.S. at 494; Cavalier v. Caddo Parish Sch. Bd., 403 F.3d 246, 260 (5th Cir. 2005). As these cases illustrate, courts disapprove of "racial balancing" when two criteria—neither one of which exists here—are both satisfied: (1) the school district has already

dismantled its dual school system and desegregated its schools, and (2) the district nonetheless continues efforts to fine-tune the racial demographics of particular schools on a periodic basis to preserve an ideal mix of black and white students in the school. Id. The nature of such inappropriate "racial balancing" is clearly articulated in Pasadena City Board of Education v. Spangler:

> In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished that objective. That being the case, the District Court was not entitled to require the [school district] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity.

427 U.S. 424, 436 (1976).

Similarly, in 2005, while the Fifth Circuit struck down an admissions policy codified in a 1981 Consent Decree in Caddo Parish requiring a magnet school ("CMMS") to maintain a student enrollment that was 50% white and 50% black, plus or minus fifteen percentage points, see 403 F.3d at 260, a previous 1990 order entered by the trial court had made clear that the school district had eliminated any vestiges of segregation at CMMS. As the Court observed:

> While the 1990 Order did not wholly terminate the entire Consent Decree, none of the remaining issues regarding its successful compliance and full implementation involved CMMS. . . . According to the 1990 Order, the School Board had complied with all student assignment and projected enrollment provisions of the Consent Decree.

Id. at 255. Importantly, the Fifth Circuit noted that "[t]here is no evidence in the record of current segregation within the school system or at CMMS or vestiges of past discrimination." Id. at 258. Under these circumstances, the Court concluded that "[t]he 1981 Consent Decree no longer applies to CMMS, and racial balancing by itself is not a constitutionally proper reason for employing racial classifications." Id. at 260 (citing Freeman, 503 U.S. at 494 ("Racial balance is not to be achieved for its own sake. . . . Once the racial imbalance due to the de jure violation has

been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.")) (underlined emphasis added).

In a pattern repeated throughout its Response, the District attempts to gain the benefit of case law addressing school districts in a considerably more advanced stage of desegregation at the time of the dispute. Cleveland bears little resemblance, however, to the school districts in Spangler and Caddo Parish, which had successfully desegregated the schools governed by the "racial balancing" requirements at issue. By contrast, at no time throughout the forty-six year history of this case has this Court stated or even hinted that Cleveland has dismantled its dual school system or made good faith efforts to comply with its desegregation obligations. Nor could any such finding be supported on the record today.

Given that many of Cleveland's schools are as deeply segregated today as they were before Brown, the obvious purpose of the flexible enrollment targets sought by the United States is to compel the District to dismantle its segregated schools, not to engage in an exercise of "racial balancing for its own sake." See Freeman, 503 U.S. at 494. Put differently, the United States' objection to four of the five schools on the east side of Cleveland (including Eastside High School (99% black, 0.6% white); D.M. Smith Middle School (100% black, 0% white); Cypress Park Elementary School (99.6% black, 0% white); and Nailor Elementary School (97% black, 2% white)) is not that the racial enrollment of these schools needs "fine-tuning." Its objection is that these schools are wholly racially segregated, and always have been. In this regard, Cleveland is much more comparable to defendants like the school districts in Hattiesburg, Mississippi and West Carroll Parish, Louisiana, both of which were found to have violated their constitutional obligations and ordered to implement remedies similar to what the United States requests here. See Memorandum at 27 (citing United States v. Pittman, 808 F.2d

385, 386 (5th Cir. 1987); United States v. West Carroll Parish Sch. Dist., 477 F. Supp. 2d 759, 760 (W.D. La. 2007)); Consent Order, West Carroll Parish Sch. Dist., No. 14428 (W.D. La. Mar. 21, 2007) (setting forth the desegregation remedy in West Carroll Parish) (attached as Ex. A). Cleveland conspicuously fails in its Response to reconcile its "racial balancing" theory with these relatively recent decisions that reiterate Supreme Court mandates regarding how to dismantle previously de jure systems, or to distinguish the stark historical pattern of segregation in the District with the records underlying the decisions in these cases.

II. THERE IS NO LEGAL OR FACTUAL EXCUSE FOR CLEVELAND'S PATENT VIOLATIONS OF THE GOVERNING DESEGREGATION ORDERS AND FEDERAL LAW.

a. Cleveland cannot evade its Constitutional obligations by arguing that it has technically complied with the requirements of the operative desegregation orders.

At several junctures in its Response, Cleveland asserts that it has strictly adhered to the requirements of the operative desegregation orders, and is not compelled to do more. See, e.g., Response at 2, 7, 8, 24. As a threshold matter, the District's assertion that it has consistently complied with the 1969 Order and 1989 Consent Order is directly contradicted by the facts. See supra at 2; Response at 4-11, 20-21. Even if Cleveland had adhered to the requirements of the operative orders, strict compliance with these orders does not ipso facto satisfy a school district's constitutional obligations:

> A school system is not, of course, automatically desegregated when a constitutionally acceptable plan is adopted and implemented, for the remnants of discrimination are not readily eradicated. Public school officials have a continuing duty to eliminate the system-wide effects of earlier discrimination and to create a unitary school system untainted by the past. . . . We have several times refused to find unitary a school system whose operation continues to reflect official failure to eradicate, root and branch, the weeds of discrimination.

Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 225 (5th Cir. 1983) (emphasis added); see also West Carroll Parish, 477 F. Supp. 2d at 763 ("Contrary to West Carroll's argument, the mere facts that it has technically complied with the 1969 Plan and that its students have admirable test scores are not sufficient to discharge its desegregation duties.").

As these cases indicate, a desegregation order is a blueprint for transforming a dual school system into a unitary school system, not a conglomeration of action items that can be satisfied independent of their larger purpose. Where, as here, the District's proclaimed compliance with the desegregation orders manifestly fails to eradicate "root and branch" the vestiges of the former dual system, the appropriate remedy is to create a blueprint that puts the school district on a path to unitary status, not to reflexively declare the school district unitary.

b. Cleveland cannot evade its Constitutional and Court-ordered obligations by arguing that the general relief sought by the United States would "destabilize" the District.

In its Memorandum, the United States established the uncontroversial principle that fear of white flight cannot justify the preservation of segregated schools traceable to a school district's former dual system. See Memorandum at 32-33. Cleveland nonetheless argues in its Response that the prospect of white flight—without more—should deter this Court from ordering the District to meet its legal obligation to desegregate its schools. See Response at 18-21.

The infirmity of Cleveland's position is aptly illustrated by the two cases it relies upon, and selectively quotes from, for support. See Flax v. Potts, 864 F.2d 1157 (5th Cir. 1989); Stout v. Jefferson County Bd. of Educ., 537 F.2d 800 (5th Cir. 1976). In both cases, the Fifth Circuit affirmed district court decisions permitting school districts to discontinue mandatory busing of school children for desegregation purposes. See Flax, 864 F.2d at 1162; Stout, 537 F.2d at 803. In each case, the court relied upon three factors demonstrably absent here: (1) the district had

previously dismantled its dual schools and effectively desegregated its school system; (2) formidable geographic barriers imposed heavy burdens on the students being bused; and (3) there was uncontroverted evidence that mandatory busing had induced significant numbers of students to temporarily or permanently leave the school system. See Flax, 864 F.2d at 1158-62; Stout, 537 F.2d at 801-03.[2]

The facts of Stout are particularly illustrative. The underlying dispute arose from efforts by the Jefferson County Board of Education to integrate two all-black schools in the Wenonah attendance zone. 535 F.3d at 801. Though the all-white Berry attendance zone lay directly to the east of the Wenonah zone, the trial court determined that busing white students from the Berry zone to the Wenonah zone was infeasible. Id. In addition to mountainous bus routes approximately eleven miles long, the Fifth Circuit noted on appeal that parents had resisted prior efforts to assign white students to Wenonah schools, and further observed that the lower court had deemed Jefferson County to be a desegregated, unitary school system. Id. at 801-03. Notwithstanding the confluence of these factors, the Fifth Circuit acknowledged that "the issue is close and troubling," and expressed "reservations" about agreeing to allow Jefferson County to implement an alternative plan that achieved less integration. Id. at 802.

The language and tone of the Fifth Circuit's decision leave little doubt that the Stout Court, if confronted with the facts of this case, would find for the United States and order Cleveland to devise and implement a desegregation plan to dismantle its one-race schools. No mountains, treacherous roads, or other geographic barriers separate the east side and west side

[2] Significantly, the decisions in Flax and Stout reflect the Fifth Circuit's intention in each case to continue mandatory desegregation measures other than forced busing. See Flax, 864 F.2d at 1162 ("The termination of busing was only a small part of the desegregation plan which will still be in effect . . . . More viable desegregation techniques, [including] gerrymandered boundaries . . . have been continuingly successful."); Stout, 537 F.2d at 801 ("We have approved a trial-court order modifying two attendance zones and directing retention of jurisdiction by that court.").

schools in Cleveland, and every zoned school in the District is in close proximity to every other zoned school. See Memorandum at 15. Furthermore the District is not unitary, nor has it "effectively desegregated" the vast majority of its schools.[3] Finally, the District presents no evidence, nor could it, that white students will flee the Cleveland school system en masse if this Court grants the requested relief. The reason for this dearth of evidence is that the District has never in its history attempted to implement a mandatory desegregation measure. Its strident objection to any mandatory requirements now is at best premature; particularly since evidence Cleveland has added to the record suggests that mandatory measures to increase the integration of Cleveland's schools might have little if any impact on white flight. See Response at 13, 15 (observing that black and white students in Cleveland currently tolerate a high degree of "interracial exposure" and lauding the "valuable academic training and programs" available at the east side magnet schools white students might be required to attend under a new desegregation plan).

c. Cleveland cannot evade its Constitutional obligations by laying blame for the District's segregated schools on "demographic change."

Cleveland erroneously asserts in its Response that the Fifth Circuit "has refused to hold school districts responsible for racial imbalances resulting from demographic changes within the community." Response at 21. Once again, this argument badly mischaracterizes the controlling law. Demographic change over time does not, by itself, excuse a school district's failure to desegregate its schools. As the Fifth Circuit has clarified, demographic change in school districts that have not achieved unitary status is significant only to the extent that it renders additional desegregation impractical:

[3] While Cleveland's misconduct in the areas of student assignment and faculty and staff assignment is particularly egregious, it is by no means the only violation of the operative desegregation orders. See, e.g., Memorandum at 12.

> Until it has achieved the greatest degree of desegregation possible under the circumstances, the Board bears the continuing duty to do all in its power to eradicate the vestiges of the dual system. That duty includes the responsibility to adjust for demographic patterns and changes that predate the advent of a unitary system . . . . Until all reasonable steps have been taken to eliminate remaining one-race schools, [] ethnic housing patters are but an important factor to be considered in determining what further desegregation can reasonably be achieved; they do not work to relieve the Board of its constitutional responsibilities.

Davis v. East Baton Rouge Parish Sch. Bd., 721 F.2d 1425, 1435 (5th Cir. 1983) (internal citations omitted) (emphasis added).

Thus the salient inquiry is largely pragmatic; namely, whether additional desegregation measures can reasonably mitigate existing (and in this case, long-standing) segregation given the effects of demographic change. Assuming arguendo Cleveland's highly questionable assertion that it has in fact experienced significant demographic change, Cleveland's "demography defense" primarily rests on an implicit comparison to the vastly different public school district in Houston, Texas. See Response at 22-23 (relying for support on Ross, 699 F.2d 218)).[4] In Ross, the Court addressed the impact of demographic shifts in the Houston Independent School District ("HISD"), a "large and sprawling school district" that at the time was the fifth largest school district in the nation. 699 F.2d at 220. The trial court concluded that further remedial efforts to desegregate HISD were impracticable: "[T]he district court found that, to accomplish racial integration by pairing schools, it would be necessary to pair schools on the extreme western and eastern ends of HISD. Otherwise, naturally integrated schools would be disturbed . . . . In addition, the court referred to the past inadequacies of busing as a desegregation tool in HISD."

[4] Cleveland additionally cites Horton v. Lawrence County Board of Education, 578 F.2d 147 (5th Cir. 1978), in support of its argument that school districts are not accountable for segregation that can be linked to demographic change. Response at 22. This case is also readily distinguishable. In Horton, the Court held that remaining segregation in the school district was attributable solely to residential patterns, based in part on its finding that "[a]ll of the formerly black schools in the system have been desegregated." 578 F.2d at 150. In Cleveland, however, the formerly black schools have never been desegregated, and remain one-race or virtually one-race black schools.

Id. at 224. The Fifth Circuit affirmed the district court, grounding its ruling in considerations certainly not present here:

> Considering the undisputed fact that HISD is unitary in every aspect but the existence of a homogeneous student population; the intensive efforts that have been made to eliminate one-race schools; and the district court's conclusion that further measures would be both impractical and detrimental to education, we conclude that the district court made no error in declaring the system unitary while retaining supervision of it for three more years.

Id. at 228 (emphasis added).

Here, by contrast, it is not clear how alleged demographic change in Cleveland renders the remedy sought by the United States impractical. Cf. id. at 226 ("In making this determination adequate time-and-distance studies are desirable, if not indispensable.") (citing Tasby v. Estes, 572 F.2d 1010, 1014 (5th Cir. 1975)). Cleveland cites two specific "demographic changes": (1) the steady attrition of white students from the District, and (2) the apparent refusal of white students zoned for east side schools in 1969 to actually attend those schools.[5] See Response at 23-24. Neither "change" suggests that the United States' proposed parameters for a new desegregation plan are impractical or unreasonable. Unlike the public school district of Houston, Texas, the Cleveland school district is sufficiently small and the schools conveniently close to one another such that no matter where black families and white families choose to reside, their children are within a short commute of every zoned school.

[5] Though not relevant per se, Cleveland should not be permitted to distort the record by holding itself blameless for the fact that white students zoned for east side schools in 1969 did not actually attend those schools. As the United States pointed out in its Memorandum, one major reason that white students zoned for east side schools never attended those schools is that, for years, the District violated the 1969 Order by allowing white families residing on the east side to establish a fictitious "weekday residence" on the west side of the railroad tracks so that their children could attend the predominantly white west side schools. See Memorandum at 7-8.

d. Cleveland concedes it has failed to comply with its faculty and staff assignment obligations.

In its Response, the District acknowledges that 40 percent of its schools are out of compliance with the 1989 Consent Order, using a standard of 20 percent variance from district-wide averages. Response at 25. Indeed, data provided by Dr. Christine Rossell, the District's own expert, indicates that as recently as the 2008-2009 school year, only half of the schools were in compliance. Doc. 26-4 ("Report") at 61. Tellingly, neither the District nor its expert lists the schools at which the faculty ratios are out of compliance. As the United States established in its Memorandum, the schools out of compliance with the faculty requirements in the 2009-2010 school year were all east side schools that are identifiably black both in terms of their student population and faculty/staff demographics. See Memorandum at 21-22 & Ex. 20.[6] The 1989 Order and applicable federal law prohibits Cleveland from reinforcing the racial identifiability of predominantly black schools by maintaining predominantly black faculties at those schools, yet as its own data demonstrates, the District continues to do just that.

III. THE OPINIONS EXPRESSED BY DR. CHRISTINE ROSSELL ARE FACTUALLY AND LEGALLY IRRELEVANT TO THE COURT'S ANALYSIS

Attached to Cleveland's Response is an unsworn expert report prepared by Dr. Christine Rossell.[7] The Report states three conclusions: (1) the Cleveland School District has complied with the student assignment portion of the 1969 Order and the other governing desegregation

[6] After the United States filed its Motion, the District filed a compliance report on June 1, 2011 containing updated data for the 2010-2011 school year. See Doc. 16-6. The 2010-2011 faculty data indicates that three of the five east side schools (Cypress Park, D.M. Smith, and East Side High School) have black faculty ratios that substantially exceed a deviation of 15 percentage points from the District-wide average of 36 percent. Id. Additionally, two west side schools (Parks and Cleveland High School) have black faculty ratios that fall more than 15 percentage points beneath the District-wide average. Id. These statistics are consistent with those reported in previous years, as set forth in the United States' motion papers. See Memorandum at 21-23 & Ex. 20.

[7] Courts generally treat unsworn expert reports as inadmissible. See Provident Life & Accident Ins. Co. v. Goel, 274 F.3d 984, 1000 (5th Cir. 2001).

orders in their entirety; (2) the student assignment proposals suggested by the United States would reduce integration in the District, and (3) the United States' allegations about the "uniqueness" and inadequacy of the District's student assignment plan are not grounded in law or research. Report at 1. As a preliminary matter, Conclusion 1 and Conclusion 3 (to the extent it addresses the legality of the District's current student assignment plan) are legal conclusions that range far beyond the purview of a non-lawyer expert. Cf. Snap-Drape, Inc. v. C.I.R., 98 F.3d 194, 198 (5th Cir. 1996); Jones v. Reynolds, No. 2:06cv57, 2008 WL 2095679, at *12 (N.D. Miss. May 16, 2008) (striking portions of expert report that "assert[ed] legal conclusions and conclusions as to the ultimate fact"); Dean v. Walker, No. 5:08cv157-DCB-JMR, 2009 WL 4855985, at *5-6 (S.D. Miss. Dec. 15, 2009) (striking conclusions of law from expert affidavit).

The portion of the Report that might, if sworn, be admissible is immaterial. It urges this Court to supplant established constitutional standards with two "comprehensive scientific tools" that purportedly quantify the cumulative amount of desegregation in the District. Response at 12-14. According to Dr. Rossell, the first of these tools, the "index of interracial exposure," measures "the degree to which the average black student is exposed to white students" within a school district. Id. at 13. Dr. Rossell describes the second tool, the "index of dissimilarity," as a measure of the "actual distribution of white and black students throughout the school system." Id. Neither tool provides insight into the liability question at issue in this case, namely whether the District has complied with the operative desegregation orders and federal law, given its deliberate maintenance of single-race schools and abject failure to integrate schools proximate to one another. See Brown v. Board of Educ. of Topeka, Shawnee Cnty., Kan., 892 F.2d 851, 870 n.55 (10th Cir. 1989) ("Defendants' expert Dr. Armour agreed . . . that the [dissimilarity and exposure] indices are only summary measures . . . and conceded that it is possible to have a

school system with a good exposure index that nonetheless contains an all-black school."), vacated on other grounds, 503 U.S. 978 (1992); Jenkins v. Missouri, 959 F. Supp. 1151, 1165 (W.D. Mo. 1997) (noting that the two indices "compare only averages, not the success or failure of desegregation at individual schools. An aggregate often presents a different picture from its parts."), aff'd, 122 F.3d 588 (8th Cir. 1997).

As courts recognize, the defect of these indices is that they obscure unlawful segregation at individual schools by accounting only for the experience of the "average" black student in the district as a whole. See Keyes v. School Dist. No. 1, Denver, Colo., 609 F. Supp. 1491, 1516 (D. Colo. 1985) ("The expert testimony in this case concerning the use of racial balance and racial contact indices, and the differing conclusions reached by the experts called by the respective parties, demonstrate once again the facility with which numerical data may be manipulated and discriminatory policies may be masked."), aff'd, 895 F.2d 659 (10th Cir. 1990); Brown, 892 F.2d at 870 n.55 ("[E]ven if a *school system* has relatively good rates on these indices, it is still necessary to look at the racial statistics at individual schools to get a true picture.") (emphasis in original). Indeed, it is easy to understand why the District is so enthused about these metrics. See Response at 12-14. On both indices black students attending west side schools with disproportionate white enrollment substantially attenuate the statistical impact of black students enrolled in the all-black east side schools. See Report at Figure 4; Figure 5; Figure 9.

In relying on the Report, the District fails to explain how these indices are consistent with controlling legal standards. Under the Fourteenth Amendment, the constitutional right to attend a desegregated school accrues to each individual student, not to the "average" student. Brown v. Board of Education, 347 U.S. 483, 494-95 (1954). Thus, the mere fact that a black child

attending a west side school is exposed to white students does not cure the constitutional injury suffered by a black student attending an all-black or virtually all-black school on the east side.

In this school district particularly, it is difficult to understand how the indices of dissimilarity and racial exposure can be deployed in a manner that is not facially disingenuous. Four of the District's ten schools have an all-black or virtually all-black student enrollment. A black student who attends Nailor or Cypress Park elementary school, matriculates to D.M. Smith Middle School, and then attends East Side High School stands a strong chance of completing a K-12 education in Cleveland without ever being exposed to white students—who in the meantime are being educated in separate schools a mere 1.2 miles away. See Memorandum at Ex. 9. Dr. Rossell's report attempts to obscure the fact that nearly half of Cleveland's schools have never been racially integrated, and her methods and conclusions are not probative of whether the District has violated the operative desegregation orders or federal law.[8]

Cleveland cannot point to any case within the Fifth Circuit that has even entertained (let alone relied upon) the interracial exposure or dissimilarity indices in determining whether a school district has eradicated the vestiges of segregation within its schools. Nor does it cite to any decision that relies on these indices in lieu of applying established constitutional principles. The District does cite to two non-binding cases outside the Fifth Circuit in which the courts referenced these indices for the limited purpose of reinforcing determinations grounded in a traditional desegregation analysis. See Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d

[8] Dr. Rossell suggests that Cleveland's interracial exposure index, relatively higher than that of several nearby school districts, demonstrates its success in integrating its schools. Report at 16 & Figure 9. To the contrary, the actual distinction between Cleveland and these districts is the overall number of white students who attend school in each district, not whether the schools within each district are meaningfully desegregated. Cleveland, which has a 67 percent black population, differs dramatically from the other districts referenced by Dr. Rossell, which range from 92-99% black enrollment according to 2010-2011 student enrollment data on the Mississippi Department of Education website. See Ex. B. Thus, at least as applied here, the interracial exposure index appears to simply track the percentage of white students in each district, rather than furnish a meaningful basis for comparing the relative merits of each district's desegregation strategies.

305, 320-21 (4th Cir. 2001); Coalition to Save Our Children v. State Bd. of Educ., 90 F.3d 752, 762-63 (3d Cir. 1996)). In Belk, a white plaintiff filed a reverse discrimination claim against the public school district in Charlotte-Mecklenburg, North Carolina, alleging harm flowing from desegregation remedies employed by the district. 269 F.3d at 312. The court observed that the desegregation plan implemented by the district in 1971 was "[s]o successful . . . that the district court removed the case from the active docket in 1975, expressing its belief that the once reluctant school board was committed to achieving desegregation and was already well on its way toward a unitary school system." Id. at 311-12. In stark contrast to Cleveland, the trial court found that the school district had "not operated a single-race school since 1970." Id. at 320. The court referenced the dissimilarity and interracial exposure indices in emphasizing Charlotte-Mecklenburg's success in maintaining a desegregated system. Id.

In Coalition to Save Our Children, the district court relied on Dr. Rossell's "index of dissimilarity" analysis to find that the four defendant school districts were "racially balanced." 90 F.3d at 761-62. Significantly, Plaintiffs' own expert testified that three of the four districts had complied with a plus/minus ten percent variance standard—and, like Charlotte-Mecklenburg, had "attained building enrollments that are not racially identifiable and sustained them over a period of time." Id. at 762 n.8 (internal quotations and modifications omitted). In the fourth district, the court noted evidence that the district had adopted measures that "brought all the formerly imbalanced elementary schools within the ±10% district minority percentage, and that the district's middle and high schools were either also within that variance or had been for a prolonged period of time prior to demographic shifts. Id. Not only is Cleveland unable to demonstrate that its schools have ever fallen within a similarly small variance from district-wide ratios, but it strenuously resists any application of the type of numerical standards referenced

with approval in the district court's decision, or, for that matter, the commonly accepted variances of ±15-20 percent.

Before concluding, a brief digression is appropriate. As noted above, Dr. Rossell's report is couched, quite unfortunately, as a thinly-veiled warning to this Court: If you force Cleveland to desegregate its schools, white students will abandon the District and leave de facto segregated schools behind. The false choice she presents between enforcing the law and preserving a population of white students in Cleveland's schools is premised on several deeply flawed assumptions. Chief among these is the unsubstantiated (and unsupportable) presumption that all mandatory desegregation measures have an equal and negative impact on the enrollment of white students in any school district. See Report at 21-25 (distinguishing generically between "mandatory" and "voluntary" plans). It defies common sense, for example, to imply that white parents in Cleveland asked to send their children to a consolidated middle school three miles from their home are as likely to flee a public school system as white parents asked to bus their children to the opposite side of Houston, Texas and back every day.

The United States believes as strongly as Dr. Rossell that the interests of this District are best served by maintaining a strong relationship with both white families and black families. It does not, however, subscribe to her belief that the demands of the law and considerations of sound public policy are mutually exclusive. As evidenced by the United States' proposed order, its objective in filing this motion is not to press for the implementation of a specific desegregation plan developed without Cleveland's input, but to obtain a finding of liability that compels Cleveland to do something it has refused to do for over forty-six years—engage the United States and its own community in good faith to collaboratively develop a plan that will

fully desegregate its schools, while maximizing the probability that all families in the school district will continue to invest in the District's growth and success.

There are good reasons to believe that this goal is achievable. As noted previously, there are no geographic or logistical barriers in Cleveland that would impose undue transportation burdens on students compelled to attend a different school in the District. Moreover, as Cleveland takes pains to point out, even the disproportionately white west-side schools enroll a critical mass of black students, such that white families are unlikely to be cowed by the prospect of having their children attend schools with a moderately higher ratio of black students. Last but not least, there is substantial evidence that fully integrated schools provide benefits to all students. Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("[S]tudent body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.") (internal quotation marks and citations omitted).

CONCLUSION

For the aforementioned reasons as well as the reasons set forth in the United States' motion and Memorandum, the United States respectfully requests that the Court (1) find Cleveland in violation of the extant desegregation orders and federal law, and (2) order Cleveland to devise and implement a desegregation plan that will immediately dismantle its one-race schools and the put the District on a path to unitary status.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2011, I served copies of the United States' Reply Brief to counsel of record by electronic service through the court's electronic filing system, or alternatively via overnight mail, addressed to:

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