No. 16-60490

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DIANE COWAN, minor, by her mother and next friend, Mrs. Alberta Johnson, et al; FLOYD COWAN, JR., minor, by his mother and next friend, Mrs. Alberta Johnson, et al; LENDEN SANDERS; MACK SANDERS; CRYSTAL WILLIAMS; AMELIA WESLEY; DASHANDA FRAZIER; ANGINETTE TERRELL PAYNE; ANTONIO LEWIS; BRENDA LEWIS,

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellee

v.

CLEVELAND SCHOOL DISTRICT,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

(See inside cover for continuation of caption)

(Continuation of caption)

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that the issues presented on appeal can be resolved without oral argument. If the Court would prefer to hear argument, however, the United States respectfully requests that this case be placed on the first available oral argument calendar.

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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v.

CLEVELAND SCHOOL DISTRICT,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

Private plaintiffs filed this lawsuit pursuant to 42 U.S.C. 1983 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, seeking to desegregate public schools in Bolivar County, Mississippi. The district court had jurisdiction under 28 U.S.C. 1343(a)(3). The United States subsequently intervened in the case as of right pursuant to, *inter alia*,

Federal Rule of Civil Procedure 24(a) and 42 U.S.C. 2000h-2. The district court had jurisdiction over the United States' claims under 28 U.S.C. 1345. In the present appeal, the Cleveland School District (District) challenges the district court's adoption of the United States' desegregation plan, which requires consolidation of two high schools and of two middle schools. See ROA.3223-3318.[1] The District filed a timely notice of appeal on July 11, 2016. ROA.3398. This Court has jurisdiction pursuant to 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion by adopting the United States' consolidation plan over the District's proposal to maintain the status quo freedom-of-choice plan with minor modifications to remedy ongoing segregation at the District's racially identifiable African-American middle and high schools.

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[1] "ROA. __" refers to consecutively numbered pages of the Record on Appeal. "Opening Br. __" refers to the pages in the District's opening brief. "RE Tab __ at __" refers to specific pages of the documents enclosed at the identified tab within the Record Excerpts. Due to the age of this case, the documents enclosed at RE Tabs 1-2 are not electronically available on the district court's docket sheet and were not included in the electronic Record on Appeal. These documents are identified on the district court's original docket sheet and are part of the Record on Appeal. ROA.30-32; Letter from Lyle W. Cayce, Fifth Circuit, Office of the Clerk, to United States Dep't of Justice (Sept. 16, 2013) (available on docket of *Cowan* v. *Cleveland Sch. Dist.*, No. 13-60464 (5th Cir.)) (noting that these documents "are still part of the record on appeal" even though they are "unavailable electronically").

STATEMENT OF THE CASE

Cleveland is a small city of approximately 12,000 people, located in Bolivar County in the Mississippi River Delta. ROA.3245. Railroad tracks run north-south through Cleveland and have historically served as the dividing line for school attendance. ROA.3246-3247. When this case was filed in 1965, Bolivar County schools were racially segregated by operation of state law, policy, custom, and practice. ROA.3224-3225; ROA.81. The de jure white schools were on the west side of the tracks, and the de jure African-American schools were on the east side. ROA.81.

Since 1965, student enrollment at the formerly de jure African-American middle and high schools has remained between 97.8% and 100% African-American—with zero white enrollment in the vast majority of years—even though African-American students have comprised only 55.7% to 67.8% of the District's total student enrollment during this period. Addendum to U.S. Opening Br. at 1-4, *Cowan* v. *Cleveland Sch. Dist.* (*Cowan III*), 748 F.3d 233 (5th Cir. 2014) (No. 13-60464). At no time during the course of this litigation has the District petitioned for declaration of unitary status.

In 2012, the district court held that the District had failed to desegregate two racially identifiable African-American schools: East Side High School (East Side) and D.M. Smith Middle School (D.M. Smith). See *Cowan ex rel. Johnson* v.

Bolivar Cnty. Bd. of Educ. (*Cowan I*), 914 F. Supp. 2d 801 (N.D. Miss. 2012); ROA.948-988. This holding, which the District did not appeal, is unchallenged. The two formerly de jure white schools, Cleveland High School and Margaret Green Junior High School (Margaret Green) have been desegregated. *Cowan I*, 914 F. Supp. 2d at 816-818; ROA.971-973. Accordingly, the only issue presented in this appeal is whether the district court abused its discretion when choosing a remedy for the District's failure to desegregate East Side and D.M. Smith.

1. Private Plaintiffs' Original Lawsuit And Early Proceedings

On July 24, 1965, African-American students and their parents sued multiple school districts in Bolivar County to desegregate the county's public school system. ROA.915-932. Only the Cleveland School District—known as Bolivar County School District No. 4 when the case was filed—is at issue in this appeal.

In their original complaint, plaintiffs alleged that the District had six white schools, including Margaret Green and Cleveland High School, which were staffed by white teachers, principals, and professional personnel and which only white students could attend. ROA.926. Plaintiffs further alleged that the District had four African-American schools, including East Side, which were staffed by African-American teachers, principals, and professional personnel and which only African-American students could attend. ROA.927. At the time, African-

American students in grades 7 to 12 attended East Side; there was no separate junior high school for African-American students.[2] RE Tab 1 at 5.

Over the course of this litigation, the district court has ordered a number of desegregation plans. The first, in 1967, eliminated de jure segregation and set out a freedom-of-choice plan for Bolivar County schools under which students could choose which schools to attend. RE Tab 1 at 6-8; ROA.28.

In 1969, the district court issued findings of fact and conclusions of law about, among other things, the District's schools and student enrollment. RE Tab 1. The court found that the District operated three formerly all white schools, each of which had later enrolled a small number of African-American students, and four schools with student enrollments that were entirely African-American. RE Tab 1 at 4-5. The district court further found that, although the District had been operating under a freedom-of-choice desegregation plan, the vast majority of African-American students continued to attend wholly African-American schools. RE Tab 1 at 6. Moreover, not a single white student had chosen to attend a formerly de jure African-American school. RE Tab 1 at 5. The district court concluded that "[d]espite the fact that freedom of choice has been

[2] The District constructed D.M. Smith (previously known as Eastwood Junior High School) after this litigation commenced. While it was never de jure segregated, it has always been racially identifiable and was a successor to the middle school portions of the formerly de jure segregated East Side.

honestly and fairly carried out by each of these districts, that method has failed to produce genuine desegregation." RE Tab 1 at 6-7. The district court noted that this failure ran afoul of this Court's admonition that school districts have "an obligation to see that the schools in these districts 'remain no longer all Negro schools or all white schools enrolling only an infinitesimal fraction of Negro students.'" RE Tab 1 at 7 (quoting *United States* v. *Indianola Mun. Separate Sch. Dist.*, 410 F.2d 626, 629 (5th Cir. 1969), cert. denied, 396 U.S. 1011 (1970)). Based on these findings, the district court rescinded the freedom-of-choice desegregation plan and ordered the District to submit a new plan. RE Tab 1 at 8-11.

In response, the District submitted a desegregation plan that nevertheless continued to rely on freedom of choice. RE Tab 2 at 2. The district court rejected this plan as to student attendance and ordered the District to submit a revised plan. RE Tab 2 at 6-7. The court specifically instructed the District that "no longer may the effectiveness of any plan depend upon the wishes or choice of students or their parents." RE Tab 2 at 2; see also RE Tab 2 at 6-7. The court noted that the District's plan was problematic because "whether or not these schools will lose their identity as white schools or Negro schools will depend, either altogether or entirely too much, upon the wish of individual students and not as the result of a plan of student assignment promulgated by the school district." RE Tab 2 at 2.

After the District submitted an amended plan, the district court entered a new desegregation order on July 22, 1969. That order permanently enjoined the District from discriminating on the basis of race or color in the operation of its public schools and required the District to take affirmative steps to eliminate segregation and the effects of the dual school system. ROA.812-819. To that end, the order established attendance zones for each of the District's schools. ROA.812-813. Under this plan, Cleveland High School, which had been consolidated with Margaret Green (both formerly de jure white), covered all of the District's territory to the west of the railroad tracks, and East Side (formerly de jure African-American) covered all of the territory to the east of the railroad tracks. ROA.813. At that time, approximately 1400 white residents lived in the East Side attendance zone. ROA.1380.

The order also established a majority-to-minority transfer program, whereby "any student [could] transfer from a school where students of his race [were] a majority to any other school within the system where students of his race [were] a minority," as long as there was no school overcrowding. ROA.815. This effectively permitted the vast majority of the District's students to choose their preferred school.

Despite the fact that white students in majority white schools could have transferred to formerly de jure African-American schools, virtually no white

students opted to do so. From 1969 to 1984, the student enrollment at the District's formerly de jure African-American schools on the east side of the tracks was between 97.8% and 100% African-American—with zero white enrollment most years. During the same timeframe, all of the schools on the west side of the tracks, except one, remained predominantly white.[3]

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

In 1983, the United States Department of Justice investigated complaints from parents alleging that the District had violated the district court's 1969 order by engaging in practices designed to maintain racially identifiable schools.

The Department determined that the District had perpetuated the vestiges of segregation and, in 1985, moved to intervene. ROA.1593-1594. The United States alleged that the District instituted an informal dual-residency policy that permitted white students who lived in attendance zones of African-American schools to establish a second residence during the school week in the attendance zone of a white school. ROA.1604-1605. The United States also concluded that the District had constructed new schools so that African-American students would continue to attend schools with 100% African-American enrollment. ROA.1606. The United States further asserted that as a result of these policies, African-American students

[3] Addendum to U.S. Opening Br. at 3-4, *Cowan III*, 748 F.3d 233 (5th Cir. 2014) (No.13-60464) (collecting data).

remained heavily concentrated in the formerly de jure African-American schools: six of these schools were 99% African-American, and 83% of African-American students in the District attended these schools. ROA.1606.

The district court granted the United States' motion to intervene. ROA.38. The United States and the District engaged in discovery and settlement negotiations for the next several years. In 1989, 1992, and 1995, the district court entered desegregation consent decrees between the United States and the District.[4] ROA.506-529.

These decrees provided more detail regarding the District's desegregation obligations but, as relevant here, reaffirmed the 1969 order's creation of "east and west attendance zones, bounded by the railroad tracks in the center of town: all students living west of the tracks attended Margaret Green Junior High and Cleveland High School, while all students living east of the tracks attended D.M. Smith Middle School and East Side High School." *Cowan III*, 748 F.3d at 235; ROA.1558. Moreover, the orders required "the District to encourage and permit students in the racial majority at one school to transfer if they would be in the racial minority at the other school." *Cowan III*, 748 F.3d at 235; ROA.1558.

[4] These orders are described in further detail in *Cowan I*, 914 F. Supp. 2d at 807-809; ROA.953-958.

3. The United States' Motion For Further Relief And 2006-2013 Proceedings

a. In 2006, the United States' periodic review of the District's desegregation efforts revealed that nearly every school in the District remained racially identifiable as an African-American or white school and that the District had failed to eliminate the vestiges of its former dual school system. Therefore, on May 2, 2011, the United States moved for further relief, arguing that the District had violated the existing desegregation orders and federal law.

The United States argued that the schools on the east side remained virtually all African-American and that the schools on the west side had an enrolled student body that was at least 20% "more white than the student population for the District as a whole." ROA.93-94. The United States argued that the racial segregation of the District's junior high and high schools was particularly pronounced. During the 2009-2010 school year, the student body at D.M. Smith was 100% African-American, despite the fact that it was 1.2 miles from Margaret Green, the formerly de jure white junior high school. ROA.82. Similarly, during the same year, the student body at East Side was 99.7% African-American, even though it was only 1.3 miles away from Cleveland High School, the formerly de jure white high school. ROA.82.

The United States argued that the school board's proposed plan to reorganize several schools for the 2010-2011 school year was further evidence of the

District's failure to desegregate. ROA.100-101. This plan called for, among other things, the closure of D.M. Smith. ROA.101. Instead of consolidating the District's two junior high schools, so that all students, regardless of race, would attend the same school, the District's plan proposed consolidating D.M. Smith and East Side, which would have recreated a virtually all African-American school for grades 7 to 12 (ROA.101)—returning the District to the scheme it had in place in the days of de jure segregation. Due to community opposition, this plan was not carried out.

b. On March 28, 2012, the district court—with Judge Glen H. Davidson presiding—granted in part the United States' motion for further relief and ordered the District to submit a plan to desegregate D.M. Smith and East Side. See *Cowan I*, 914 F. Supp. 2d at 801; ROA.948-988. The district court found that, although the District's formerly de jure white junior high and high schools were racially mixed, the District had never desegregated its formerly de jure African-American high school and related middle school: both had a student enrollment that was 99.7% African-American. *Cowan I*, 914 F. Supp. 2d at 816-818; ROA.971-973. The court noted that neither of these schools had attracted significant white enrollment, despite the fact that, in the 1960s and 1970s, white residents made up between 17% and 26% of the population within the schools' attendance zones. *Cowan I*, 914 F. Supp. 2d at 822; ROA.980. A "likely" reason for the lack of

white enrollment in the formerly de jure African-American schools, the district court found, was the District's policy that allowed white families to establish a "fictitious 'weekday residence' on the west side of the railroad tracks so that their children could attend predominantly white west side schools." *Cowan I*, 914 F. Supp. 2d at 822; ROA.981 (citation omitted).

The district court concluded that East Side and D.M. Smith remained racially identifiable as African-American schools, despite the District's efforts to attract white students to the two schools through magnet programs, arts and International Baccalaureate (IB) programs, and the majority-to-minority transfer program. *Cowan I*, 914 F. Supp. 2d at 817-818, 820; ROA.971-973; ROA.978. The district court found it "troubling" that the District's junior high and high schools had such a "distinct racial composition" even though the schools were only 1.2 and 1.3 miles away, respectively, from their integrated counterparts on the west side. *Cowan I*, 914 F. Supp. 2d at 817-818; ROA.971-973. The court also noted that the District's proposed merger of D.M. Smith and East Side was "peculiar," given that the merger would have "resulted in a revival of a one-race school for grades 7 through 12," akin to what existed in "the days of *de jure* segregation." *Cowan I*, 914 F. Supp. 2d at 821; ROA.979.

Based on these findings, the district court ordered the District to submit a plan to desegregate D.M. Smith and East Side. *Cowan I*, 914 F. Supp. 2d at 826;

ROA.987. The district court noted that "[o]ne obvious remedy would be consolidation of the two high schools * * * and consolidation of the two junior high schools." *Cowan I,* 914 F. Supp. 2d at 826 n.9; ROA.987.

c. Rather than propose a consolidation plan, the District proposed creating new magnet programs and revitalizing the IB programs at D.M. Smith and East Side to attract white students. ROA.989-992. The District also proposed making courses offered exclusively at these two schools (*e.g.*, remedial courses, choral music) available to students at Cleveland High School and Margaret Green and busing these students to the racially identifiable African-American schools to participate in these programs. ROA.990.

The United States objected to the District's plan because it continued to rely on the majority-to-minority transfer program, which had been ineffective in bringing white students to the racially identifiable African-American schools. ROA.1064-1065. The United States suggested that consolidation of the two junior high schools and the two high schools or rezoning existing attendance boundaries would be more effective and efficient. ROA.1063.

The district court held that the District's proposed desegregation plan did not meet constitutional requirements. See *Cowan ex rel. Johnson* v. *Bolivar Cnty. Bd. of Educ.* (*Cowan II*), 923 F. Supp. 2d 876, 881-882 (N.D. Miss. 2013); ROA.1326. Instead, the court ordered the District to implement a plan that neither party had

proposed. Specifically, the district court abolished the attendance zones and majority-to-minority transfer program, and ordered the District to establish "an open-enrollment procedure," so that junior high and high school students would have "true freedom of choice to attend either high school and either junior high school." *Cowan II*, 923 F. Supp. 2d at 882; ROA.1326.

The United States moved to alter or amend the district court's order because the court's freedom-of-choice plan was constitutionally inadequate. ROA.1331-1359. The United States argued that the court should reject the freedom-of-choice plan because it had not worked and there was no evidence that it would work. ROA.1342-1353. The United States further argued that the vast majority of District students effectively had freedom of choice under the majority-to-minority transfer program. ROA.1349-1350. Yet, not a single white student had chosen to enroll in D.M. Smith or East Side since at least the 2007-2008 school year, and there was no evidence that white students would do so in the future. ROA.1349-1351. The schools' failure to attract white students, the United States contended, was due to the stigma attached to these two schools as racially identifiable African-American schools, which was a lasting vestige of segregation. ROA.1352-1353. Therefore, the United States urged the court to order consolidation of the schools. ROA.1353-1357.

While the United States' motion was pending, the District submitted data regarding pre-enrollment at the District's junior high and high schools for the 2013-2014 school year. ROA.1510. Although incomplete, the data revealed that no white students had pre-enrolled to attend D.M. Smith or East Side, just as no white students had enrolled at these schools during the prior school year. ROA.1510. The record thus showed that no white student had ever chosen to transfer to the District's racially identifiable African-American middle or high school, whether it was under the original freedom-of-choice plan, the majority-to-minority transfer program, or the district court's most recent freedom-of-choice plan.

The district court denied the United States' motion to amend without significant discussion and found that the pre-enrollment data did not warrant consolidation of the District's junior high and high schools. ROA.1531-1533.

4. This Court's 2014 Decision

The United States appealed the district court's freedom-of-choice plan and the denial of the motion to amend. On April 1, 2014, this Court reversed and remanded "for further consideration of the desegregation remedy." *Cowan III*, 748 F.3d at 235; ROA.1556. This Court noted that the district court's March 28, 2012 decision—*Cowan I*—which found continuing segregation at East Side and D.M.

Smith, had not been appealed, and thus that the only issue was the remedy for that ongoing segregation. *Cowan III*, 748 F.3d at 237-238; ROA.1561-1562.

This Court concluded that the district court's explanation for adopting the freedom-of-choice plan was inadequate and thus reversed and remanded. *Cowan III*, 748 F.3d at 240; ROA.1566-1567. This Court noted that "[a] freedom of choice plan is not necessarily an unreasonable remedy for eliminating the vestiges of state-sponsored segregation, but it has historically proven to be an ineffective desegregation tool." *Cowan III*, 748 F.3d at 238; ROA.1563. The Court further said that while single-race schools are acceptable in some contexts, "the situation in Cleveland is distinguishable from those where we have found that the retention of some one-race schools did not preclude a declaration of unitary status." *Cowan III*, 748 F.3d at 239; ROA.1563. In reaching this conclusion, this Court pointed to the facts that the schools at issue are a single high school and middle school; that the schools were never meaningfully desegregated; that the schools are located less than 1.5 miles away from the only other junior high and high schools in the District; and that the purpose of the location of the schools was to segregate the races. *Cowan III*, 748 F.3d at 238-239; ROA.1563.

This Court held that, while a freedom-of-choice plan was not necessarily inadequate in this case, the district court had not sufficiently explained why it adopted such a plan in light of potential problems. *Cowan III*, 748 F.3d at 239;

ROA.1564. This Court was particularly troubled because, "in the nearly five decades in which the District has been under federal court supervision, not one white student has ever voluntarily transferred to D.M. Smith Middle School or East Side High School." *Cowan III*, 748 F.3d at 239; ROA.1564-1565. Accordingly, the Court stated that "there was no evidence or explanation indicating that the freedom of choice plan was likely to work, and all the available empirical evidence indicates that the plan is not likely to contribute to meaningful desegregation." *Cowan III*, 748 F.3d at 239; ROA.1564. The Court thus held that on remand, "the district court should sort through the various proposed remedies, exclude those that are inadequate or infeasible and ultimately adopt the one that is most likely to achieve the desired effect: desegregation." *Cowan III*, 748 F.3d at 240; ROA.1566.

5. Proceedings On Remand

a. On remand, the United States and the District filed competing proposed desegregation plans in the district court—with Judge Debra Brown presiding.[5]

[5] Judge Davidson sua sponte recused himself shortly after remand because his name had appeared on the United States' pleadings in this case in 1985 when he was the U.S. Attorney for the Northern District of Mississippi. See ROA.1586-1591.

ROA.1674-1738. The District proposed three plans but has since abandoned one.[6] The District's first plan was to retain the "true freedom of choice" plan that the district court had entered in *Cowan II* before appeal and remand and under which the District had been operating. ROA.1675. The District's second plan—called Plan A—was to continue the freedom-of-choice plan but with certain minor modifications.[7] ROA.1677-1683. The sole modifications to the status quo would be that (1) students who want to participate in East Side's IB program would have to enroll in that school full-time (rather than being bused over from Cleveland High School to attend IB classes for just part of the school day); (2) East Side would house a new early college program under which students could earn college

[6] Under the abandoned plan—Plan B—the middle schools would be consolidated at Margaret Green but the District would maintain two high schools. ROA.1684-1690. The District has abandoned this plan on appeal. See Opening Br. 8 n.7. In addition, four months after the deadline to file proposed plans and four days before the evidentiary hearing on the plans, the District sought an indefinite continuance of the hearing to develop another plan—Plan C; the district court denied the continuance, and the District is not pursuing that plan on appeal. ROA.3008-3012.

[7] Before the district court, the District treated Judge Davidson's plan and Plan A as a single plan. ROA.1675. Before this Court, the District appears to be treating them as two separate plans, both of which it argues are constitutional. See, *e.g.*, Opening Br. 14.

credit; and (3) the District would institute a 550-student cap at each of the two high schools. ROA.1678-1680.[8]

In contrast to the District's plans, the United States proposed consolidating the District's two middle schools into a new middle school at the current East Side facility and consolidating the District's two high schools into a new high school at the current Cleveland High School and Margaret Green facilities (U.S. Plan). ROA.1694-1724. The United States also proposed that the District undertake a year-long implementation period for consolidation, which would include creating a multi-racial community panel that would advise the District as to the consolidated schools' programs and activities, along with rebranding and other initiatives. ROA.1722.

The parties objected to each other's plans. ROA.1741-1760; ROA.1894-1920. The United States argued that there was no evidence that Plan A would desegregate East Side or D.M. Smith because the existing freedom-of-choice plan had not attracted white students to those schools and there was no evidence that the small modifications that Plan A made to the status quo would change that. ROA.1904-1913. The United States pointed to the fact that two years into the latest iteration of the freedom-of-choice plan, no white students had enrolled at

[8] After the evidentiary hearing, the District dropped the proposed 550-student caps because the District's own witnesses testified against those limits. See Opening Br. 9-10.

D.M. Smith and only one white student had enrolled at East Side, leaving both schools with more than 99% African-American students. ROA.1904-1906. The United States further argued that neither the IB program, which had standards that few students could meet, nor the early college program, which also had stringent eligibility criteria that students would not be able to meet until the 11th grade, would attract white 8th graders who were choosing between the two high schools. ROA.1906-1910. Finally, the United States argued that the 550-student cap at Cleveland High School, combined with the first-come, first-served admission process, could push more African-American students from Cleveland High School to East Side, which would further exacerbate segregation. ROA.1910-1911.

The District objected to the U.S. Plan, which it described as a "mandatory reassignment" plan, claiming that it would lead to "white enrollment loss" and consequently increased segregation. ROA.1746-1748. The District contended that other mandatory reassignment plans have not worked in Cleveland or in nearby districts. ROA.1751-1755. The District argued that its "open enrollment" plan was narrowly tailored to remedy the segregation, that it deserved deference, and that no specific ratio of white enrollment in formerly de jure African-American schools was needed.[9] ROA.1748-1751; ROA.1755-1757.

[9] The District also argued that the U.S. Plan was infeasible because the East Side facility was not large enough to hold the combined middle school population. (continued…)

b. After fact and expert discovery, the district court held a five-day evidentiary hearing from May 18, 2015, to May 22, 2015. The court heard testimony from, and actively questioned, multiple expert witnesses, who opined on issues ranging from desegregation to school facilities, and numerous fact witnesses, including school board members, District officials, parents, and other community leaders. The court also considered data regarding demographics and student enrollment that the District has regularly submitted under existing consent decrees. Finally, the court sua sponte decided to tour the District's schools for "informational purposes." ROA.4471.

The District's enrollment data revealed that only one white student had enrolled at East Side and D.M. Smith—the racially identifiable African-American schools—since Judge Davidson's freedom-of-choice plan took effect in 2013, even though these schools enrolled approximately 350 and 250 students per year, respectively. See ROA.3326-3327; see also ROA.1615; ROA.3042-3043. Witnesses at the evidentiary hearing confirmed that there has been no increase of racial diversity in enrollment since the most recent freedom-of-choice plan was put into effect and attributed the lack of white enrollment in East Side and D.M. Smith

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ROA.1758-1759. The district court rejected this argument (see ROA.3307-3308), and the District does not raise the argument in its opening brief. Accordingly, the district court's finding that the U.S. Plan is feasible is not at issue on appeal.

to the stigma associated with the racially identifiable African-American schools. See, *e.g.*, ROA.3933; ROA.4250; ROA.4278; ROA.4336.

The district court also heard from parents, school board members, and community leaders who supported Plan A's preservation of the status quo. ROA.3733-3734; ROA.3749; ROA.4425-4426. None of these witnesses, however, testified that Plan A (or another freedom-of-choice plan) would increase white student enrollment at East Side or D.M. Smith. Notably, the District's superintendent, Jacquelyn Thigpen, testified that she supported consolidation of the middle schools, even though she preferred a choice model for the high schools. ROA.3765-3768. One school board member, Chresteen Seals, testified in favor of consolidation of the two high schools in a new location because the District had an "ideal number of students to attend one school." ROA.3788; ROA.3791; ROA.3796. But, because there were insufficient resources to construct a new high school, she supported Plan A because "what we have now is working." ROA.3791.

The district court also heard nearly two days of testimony from two experts: Christine Rossell, who testified on behalf of the District, and Claire Smrekar, who testified on behalf of the United States. Rossell supported Plan A because it continued the status quo, which she claimed "respect[ed] human dignity, the human dignity of both races." ROA.3647. In Rossell's view, Cleveland was on

the path to as much integration as other school districts that were declared unitary. ROA.3645-3646. In contrast, Smrekar testified that the consolidation plan proposed by the United States would "achieve desegregation realistically and immediately." ROA.3975.

The district court heard competing evidence about the extent to which the potential decrease in enrollment of white students—or white flight—would undermine the efficacy of the U.S. Plan. Rossell testified that the District would likely experience white flight if the U.S. Plan were implemented. ROA.4367. Smrekar, on the other hand, testified that white flight was unlikely due to a "constellation of factors" including the "sociodemographic portrait of Cleveland School District families," the stability of the job market in Cleveland, and the fact that nearby school districts were also majority black. ROA.3988-3989. She also opined that elements of the U.S. Plan designed to address concerns about white flight—such as rebranding the schools and a multi-racial advisory panel to guide the transition—would be effective in the District. ROA.3983-3985.

c. After considering all of this relevant information, the district court on May 13, 2016, issued a 96-page order, adopting the U.S. Plan, rejecting both of the District's proposed plans, and directing the parties to submit proposed timelines for implementation of the U.S. Plan. ROA.3223-3318.

As discussed in greater detail below, see pp. 34-50, *infra*, the district court rejected both Judge Davidson's status quo plan and the District's Plan A, which it found to be, "in essence, a continuation of the District's current open enrollment policy with the addition of an early college program." ROA.3270. The district court found that both of these plans would perpetuate the existence of racially identifiable African-American middle and high schools in the District, as evidenced by the enrollment data from the three years during which the most recent version of freedom of choice had been in effect. ROA.3282. Using the criteria set forth by this Court in prior cases, the district court concluded that a plan that continued to produce racially identifiable middle and high schools could not pass constitutional muster because the single-race nature of the schools was a "vestige of discrimination." ROA.3278. In light of the District's failure to offer a constitutional proposal, the district court dismissed objections to the U.S. Plan that were grounded in concerns about white flight. ROA.3312. While acknowledging that some white flight was inevitable, the court found that no other constitutional alternative had been offered and that white flight concerns could not therefore lead to rejection of the only constitutional plan presented to it. ROA.3313. Moreover, the court found that the U.S. Plan met the challenge of white flight with "creativity" and that the methods described in the U.S. Plan were "reasonable and

appropriate," in accord with this Court's case law. ROA.3312-3313 (citing *United States* v. *Pittman*, 808 F.2d 385, 391 (5th Cir. 1987)).

In light of its findings, the district court adopted "the United States' indisputably constitutional plan of consolidation." ROA.3316. The court directed the parties to submit "a proposed timeline to implement the United States' plan in such a way as to ensure the immediate termination of the District's dual system in its high schools and middle schools." ROA.3318.

d. On June 1, 2016, the District submitted its 2015-2016 Consent Order Report, which reflected that East Side had enrolled no white students (out of 364 students) and D.M. Smith had enrolled one white student (out of 268 students). ROA.3319-3321; ROA.3326-3327. On June 3, 2016, the parties submitted proposed timelines for implementation of the district court's order by the 2017-2018 school year, and on September 22, 2016, the district court entered an order setting forth the timeline for implementation of the U.S. Plan, which is underway. ROA.3339-3353. The District filed a timely notice of appeal on July 11, 2016. ROA.3398.[10]

[10] After the District filed its notice of appeal, it filed a motion to stay the district court's order pending the appeal and pending a contemporaneously filed motion for reconsideration. In the motion for reconsideration—filed three months after the district court order on appeal here—the District proposed a new desegregation plan (Plan D). The district court denied the motion to stay and ordered further briefing and discovery on the motion for reconsideration. On

(continued…)

SUMMARY OF ARGUMENT

The district court in 2012 held that East Side and D.M. Smith—the enrollments of which have always been 97% or more African-American—remain racially identifiable. The District did not appeal that decision then and does not challenge that decision now. The sole issue before this Court is whether the district court's chosen remedy—consolidation of the District's two high schools and of its two middle schools—was an abuse of discretion. The District contends that it was, arguing that the court should have retained the status quo or ordered mere minor modifications to the status quo.

The district court's 96-page decision, which followed extensive discovery, multiple expert reports, a visit to the District's schools, and a five-day evidentiary hearing, was not an abuse of discretion. Since 2012, the District has been operating under the plan for which it is currently advocating. All the available data show that there has been *no* increase in white enrollment (and thus no *decrease* in segregation) at the two schools in question during that time period. This is not surprising. For decades, the District has operated under various plans that allowed

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(…continued)
November 18, 2016, the District withdrew its Plan D and proposed yet another new plan (Plan E). The reconsideration proceedings are not part of the record on appeal and thus should have no effect on this Court's review of whether the district court's adoption of the U.S. Plan was within its discretion. See *Crumbley* v. *Helem*, 485 F. App'x 1, 4 (5th Cir. 2012).

parents and students to choose which schools to attend. These freedom-of-choice plans—including the one currently in effect—have *never* increased white enrollment in the racially identifiable African-American middle and high schools. *Cowan III*, 748 F.3d 233, 239 (5th Cir. 2014); ROA.1564-1565 ("[I]n the nearly five decades in which the District has been under federal court supervision, not one white student has ever voluntarily transferred to D.M. Smith Middle School or East Side High School."). The reason for this, as multiple witnesses testified, is the stigma attached to these schools that is a direct result of historic de jure segregation. None of the District's witnesses rebutted this testimony or provided any evidence that the minor modifications the District was proposing to the status quo would increase white enrollment at the two schools.

Faced with this stubborn reality, the district court adopted the only constitutional plan that any party has presented: the United States' consolidation plan. The U.S. Plan promises to eliminate the vestiges of state-sponsored segregation that remain in the District and promises to do so expeditiously. There is no dispute that the District can implement the U.S. Plan and that this plan will desegregate East Side and D.M. Smith by combining their enrollments with those of Cleveland High School and Margaret Green, respectively.

Instead, the District's arguments on appeal are red herrings. The District contends that implementation of the U.S. Plan is likely to lead to white enrollment

loss. Yet, as the District concedes, consideration of white flight is only appropriate "[w]hen choosing among constitutionally acceptable remedies in desegregation cases." Opening Br. 25. The district court reasonably concluded that the District has not presented a constitutional remedy here because the status quo will not desegregate the two schools, which the Constitution requires. Thus, under these circumstances, white flight is irrelevant as a legal matter. Moreover, as the district court found, "potential white enrollment loss is a problem that must be met with creativity," and the U.S. Plan provides such creative solutions, including a rebranding effort and a multi-racial advisory panel. ROA.3313.

The District also suggests that the United States is advocating for racial quotas or for a particular proportion of white enrollment at East Side or D.M. Smith. But the District cites nothing in the record for this proposition, because there is no support. The United States has not advocated for a particular racial balance at either school; rather, the United States has argued—and the district court found—that some meaningful change is needed because East Side's and D.M. Smith's nearly 100% African-American student enrollment is a vestige of segregation.

In sum, the District argues that the district court abused its discretion by rejecting a plan that even the District's superintendent did not support and which this Court deemed had "historically proven to be an ineffective desegregation

tool." *Cowan III*, 748 F.3d at 238; ROA.1563. However, in light of the record in this case and its factual findings, the district court was well within its discretion to conclude that the U.S. Plan is the only plan that will meaningfully and immediately desegregate East Side and D.M. Smith.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SELECTING THE UNITED STATES' INDISPUTABLY CONSTITUTIONAL PLAN TO END DECADES OF SEGREGATION AT EAST SIDE AND D.M. SMITH

A. Standard Of Review

This Court reviews "implementation of desegregation remedies for abuse of discretion." *Cowan III*, 748 F.3d 233, 238 (5th Cir. 2014); ROA.1562. "Failure on the part of school authorities to implement a constitutionally prescribed unitary school system brings into play the full panoply of the trial court's remedial power." *Valley* v. *Rapides Parish Sch. Bd.* (*Valley II*), 702 F.2d 1221, 1225 (5th Cir.), cert. denied, 464 U.S. 914 (1983). When invoked, the district court's remedial powers are "broad, for breadth and flexibility are inherent in equitable remedies." *Milliken* v. *Bradley*, 433 U.S. 267, 281 (1977) (citation omitted).

In line with this broad authority conferred to the district court, this Court is "limited to ascertaining whether the court abused its discretion." *Valley II*, 702 F.2d at 1225. Abuse of discretion occurs where a district court "bases its decision

on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Esmark Apparel, Inc.* v. *James*, 10 F.3d 1156, 1163 (5th Cir. 1994).

While the district court's conclusions of law are reviewed de novo, its "findings of fact must be accepted unless they are clearly erroneous." *Ross* v. *Houston Indep. Sch. Dist.*, 699 F.2d 218, 225-226 (5th Cir. 1983). This Court defers to the district court's factual findings as long as they are "plausible in light of the record viewed in its entirety"; thus, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). This Court must be "wary" of second guessing the district court's factual findings because the factfinder "has the decided advantage of first hand experience concerning the testimony and evidence presented at trial." *Nichols* v. *Petroleum Helicopters, Inc.*, 17 F.3d 119, 121 (5th Cir. 1994) (citation omitted). This is particularly true in desegregation cases, where "[a] trial judge's insight into local conditions is to be accorded substantial deference." *Valley II*, 702 F.2d at 1226.

B. The District Court Did Not Abuse Its Discretion In Selecting The Indisputably Constitutional U.S. Plan Over the District's Proposals Because Freedom-Of-Choice Plans Have Been In Effect For Decades And Have Failed To Desegregate East Side And D.M. Smith

The district court, in its 96-page order, reasonably concluded (1) that the status quo was not leading to desegregation of East Side or D.M. Smith because the enrollment of these schools remained almost entirely African-American

(ROA.3275-3278; ROA.3282); (2) that the District's freedom-of-choice plans continued the unconstitutional status quo (ROA.3279-3282); (3) that consolidation would desegregate the District's middle and high schools (ROA.3311; ROA.3316-3317); and (4) that, presented with only one plan that will meaningfully desegregate the schools, concerns about white flight—which the District overstated—were irrelevant and properly addressed through creative solutions, as the U.S. Plan proposes (ROA.3312-3313). None of these findings was an abuse of discretion.

1. The District Court Reasonably Concluded That The District's Proposed Plans Would Perpetuate The Current Unconstitutional Segregation At East Side And D.M. Smith

a. The District Court's Conclusion That The Racial Identifiability Of East Side And D.M. Smith Required Some Remedy Followed From This Court's Decision In Cowan III *And Is Not At Issue On Appeal*

In 2012, the district court held that East Side and D.M. Smith had been segregated and remained racially identifiable. *Cowan I*, 914 F. Supp. 2d 801, 817-818 (N.D. Miss. 2012); ROA.971-973. Specifically, the court concluded that "Eastside High has never been anything other than a racially identifiable African–American school" and that "no data before the Court shows that D.M. Middle School was ever meaningfully desegregated." *Cowan I*, 914 F. Supp. 2d at 817-818; ROA.971-973. The court based its conclusion on the fact that both schools' enrollment was 99.7% African-American. *Cowan I*, 914 F. Supp. 2d at 817-818;

ROA.971-973. The district court therefore concluded that a new plan was necessary to redress this ongoing segregation. *Cowan I*, 914 F. Supp. 2d at 824; ROA.987.

The District did not challenge this conclusion either before the district court in 2012, on appeal,[11] or before the district court on remand, and it does not explicitly challenge this conclusion now. Nevertheless, and notwithstanding its failure to dispute these findings by the district court in a timely or appropriate manner, the District now tries to relitigate this issue by suggesting that it is no less integrated than other school districts that have been declared unitary, and thus there is no reason to disturb the status quo. See Opening Br. 21.

First and foremost, this Court should refuse to entertain this argument because the District forfeited it by failing to raise it in the earlier appeal to this Court. See *United States* v. *Griffith*, 522 F.3d 607, 610 (5th Cir.), cert. denied, 555 U.S. 890 (2008). But even if examined on the merits, the district court correctly found that, in light of this Court's holding in *Cowan III* and the relevant factors set forth in the case law, the District could not carry its burden of demonstrating that its one-race schools are

[11] See *Cowan III*, 748 F.3d at 238; ROA.1562 ("[N]either party challenged the district court's determinations that a new plan should be administered to desegregate D.M. Smith Middle School and East Side High School.").

constitutional.[12] See *Valley* v. *Rapides Parish Sch. Bd.*, 646 F.2d 925, 937 (5th Cir. 1981) (holding that "[w]e cannot ignore the continued existence of one-race schools in this system" and that "the maintenance of the all-black schools * * * clearly requires further relief"). The district court correctly concluded that "the continued operation of East Side High and D.M. Smith as single-race schools is a vestige of discrimination," and therefore, any plan that simply perpetuated the status quo as it exists at these schools "must be rejected." ROA.3278. Accordingly, there is no legitimate dispute that *some* remedy is needed to meaningfully change the enrollment numbers at East

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[12] The relevant factors are, as the district court noted:

> (1) the size of the district, (2) the number of schools at issue, (3) the distance between the relevant schools, (4) whether the relevant schools had ever been desegregated, (5) whether the schools were originally intended to be single race schools, (6) whether the district had previously been declared unitary, (7) the extent to which housing patterns influence the enrollment at the schools, (8) whether the housing patterns occurred during the life of the proposed plan, (9) other evidence of vestiges of discrimination, and (10) whether the district has made intensive efforts to eliminate one-race schools.

ROA.3277. The district court reasonably found that this Court's decision in *Cowan III* compelled a finding that "the first six factors weigh against the continued maintenance of one-race schools at East Side High and D.M. Smith." ROA.3277 (citing *Cowan III*, 748 F.3d at 238-239). The court further found that there were no vestiges of discrimination other than student assignment, but that the other three factors were neutral or unimportant. ROA.3277-3278.

Side and D.M. Smith, *i.e.*, to increase the number of white students so that the schools are less than 99.7% African-American.

b. The District Court Reasonably Concluded That Neither Of The District's Freedom-Of-Choice Plans Would Change The Status Quo In Light Of Enrollment Data And Other Record Evidence

Without any basis for disturbing the prior conclusion that *some* remedy was necessary, the only question facing the district court was *what* remedy would be appropriate. There is no pattern solution to the complex task of desegregation, but there is one consistent refrain easily discerned from precedent: "[t]he only school desegregation plan that meets constitutional standards is one that works." *United States* v. *Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967). The remedy must "dismantle dual school systems," *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971), at "the earliest practicable date," *Brown* v. *Board of Educ.*, 349 U.S. 294, 300 (1955).

The remedy for ongoing segregation must do more than merely make school enrollment available to all students, regardless of race. *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437 (1968). A school district has an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-438. This duty exists "to ensure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present."

Freeman v. *Pitts*, 503 U.S. 467, 485 (1992). The racial identifiability of schools is one of the vestiges of a racially discriminatory dual school system that a school district must eliminate. *United States* v. *Lawrence Cnty. Sch. Dist.*, 799 F.2d 1031, 1043 (5th Cir. 1986); *Valley II*, 702 F.2d at 1226. A school district remains in violation of the Constitution when it fails to adequately discharge its duty to desegregate and eliminate the vestiges of racial discrimination, including racially identifiable schools. *United States* v. *Fordice*, 505 U.S. 717, 727-728 (1992).

The only question before this Court in this appeal is whether, in light of these authorities, it was within the district court's considerable discretion to reject the District's freedom-of-choice proposals and to adopt the U.S. Plan.

i. Judge Davidson's Freedom-Of-Choice Plan

Consistent with this Court's instructions, the district court on remand first examined whether a freedom-of-choice plan would be adequate in this case. Because Judge Davidson's freedom-of-choice plan has been in effect since 2013, the district court did not need to extrapolate to determine the effect of the District's proposals (and this Court need not do so either). In this case, there are three years of concrete data regarding the efficacy of the freedom-of-choice plan that the District espouses. These data show that Judge Davidson's freedom-of-choice plan has not worked. Indeed, all the available enrollment data show that freedom of

choice has resulted in no meaningful increase in white enrollment (*i.e.*, no decrease in desegregation) at East Side or D.M. Smith since it was put in place in 2013:

Number of White Students By Year[13]

	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016
East Side High School	1/354	2/330	0/341	0/355	0/349	0/344	0/364
D.M. Smith Middle School	0/195	0/280	0/299	0/300	0/258	0/248	1/268

In the four years before the current freedom-of-choice plan, three white students enrolled in the two racially identifiable African-American schools; in the three years after the plan, one white student enrolled in these schools. ROA.3933 (testimony that there was no "increase of racial diversity enrollment of white students at East Side" since the effective date of Judge Davidson's plan). As these data show, the District cannot bear its burden of proving that freedom of choice "does result in more integration." See *Monteilh* v. *St. Landry Parish Sch. Bd.*, 848 F.2d 625, 632 (5th Cir. 1988); see also *Hall* v. *St. Helena Parish Sch. Bd.*, 417 F.2d 801, 807 (5th Cir.) ("If under an existent plan there are no whites, or only a small percentage of whites, attending formerly all-Negro schools, * * * then the plan, as a matter of law, is not working."), cert. denied, 396 U.S. 904 (1969). Faced with these data, the district court reasonably concluded that "[b]ased on enrollment

[13] See ROA.531-534; ROA.667-668; ROA.1045; ROA.1542; ROA.1615; ROA.3042-3043; ROA.3326-3327.

numbers, freedom of choice has not worked to achieve desegregation in the District." ROA.3282.

It is not surprising that the latest version of freedom of choice has not worked. There have been various freedom-of-choice plans in place in the District for decades, and at no point have these plans led to a meaningful increase in white enrollment at East Side or D.M. Smith. See *Cowan III*, 748 F.3d at 239; ROA.1564-1565 ("[I]n the nearly five decades in which the District has been under federal court supervision, not one white student has ever voluntarily transferred to D.M. Smith Middle School or East Side High School."). For example, the decades-long majority-to-minority transfer program was effectively a freedom-of-choice plan for the vast majority of students in the District because most white students went to majority white schools and most African-American students went to majority African-American schools. Nevertheless from 1969 to 1984—when the majority-to-minority transfer program was in place—student enrollment at the District's racially identifiable African-American schools on the east side of the tracks was between 97.8% and 100% African-American. Addendum to U.S. Opening Br. at 3-4, *Cowan III*, 748 F.3d 233 (5th Cir. 2014) (No.13-60464) (collecting data); see also *Cowan III*, 748 F.3d at 239; ROA.1564 ("[T]here was no evidence or explanation indicating that the freedom of choice plan was likely to work, and all the available empirical evidence indicates that the plan is not likely to

contribute to meaningful desegregation at D.M. Smith Middle School or East Side High School."). And more recent data show that between 2005 and 2009, zero to two white students enrolled at either D.M. Smith or East Side each year notwithstanding the majority-to-minority transfer program. See ROA.190; ROA.206-207; see also Addendum to U.S. Opening Br. at 3-4, *Cowan III*, 748 F.3d 233 (5th Cir. 2014) (No.13-60464).

The district court's rejection of the freedom-of-choice plan was eminently reasonable in light of not only these data but also the Supreme Court's skepticism as to the efficacy of freedom-of-choice desegregation plans. See *Green*, 391 U.S. at 439-441 (freedom-of-choice plans are permissible but only when they are proven to actually result in desegregation). Indeed, this Court has also "time and again disapproved the use of freedom of choice where it has failed effectively to desegregate public schools." *Beaumont Indep. Sch. Dist.* v. *Department of Health, Educ. & Welfare*, 504 F.2d 855, 857 (5th Cir. 1974) (collecting cases); see also *United States* v. *Texas Educ. Agency*, 467 F.2d 848, 868 (5th Cir. 1972). A long record of failing to integrate through freedom-of-choice plans—as is the case here—is strong evidence that freedom of choice will not lead to future integration. See, *e.g.*, *United States* v. *Pittman*, 808 F.2d 385, 389 (5th Cir. 1987).[14] Where

[14] During some periods, including now, students, including white students, have been transported from Cleveland High School to East Side to attend specific

(continued…)

"there are reasonably available other ways * * * promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable." *Green*, 391 U.S. at 441.

This case demonstrates why courts have shown such skepticism over the efficacy of freedom-of-choice plans in whatever iteration they may appear. The evidence presented in this case demonstrates that the reason no white student has utilized the majority-to-minority transfer program or the current freedom-of-choice plan to enroll in East Side and D.M. Smith is the stigma that is attached to these racially identifiable African-American schools, which is a vestige of de jure segregation. Unrebutted testimony demonstrates this stigma. For example, Leroy Byars—a former football coach—testified that students at the two schools felt "they were inferior or they [were] treated inferior to the whites on the west side of town." ROA.4336. Edward Duvall, a parent of two East Side students, testified that people "looked down upon East Side as being a bad school." ROA.4250.

(…continued)
classes. This is not a workable desegregation plan. As a factual matter, the district court correctly found that "commuting students are often late for class." ROA.3249; see also ROA.4173-4174 (testimony of former Cleveland High School principal that students were constantly late for class as a result of this busing program, which led to missed instructional time and delayed start times for classes). As a legal matter, this type of part-time enrollment alone cannot desegregate an otherwise one-race school. See *United States* v. *Board of Educ. of Webster Cnty.*, 431 F.2d 59, 61 (5th Cir. 1970) ("Disestablishment of an otherwise segregated student assignment system is not achieved by the sole device of minimal part-time desegregation under a course-exchange program.").

Keith White, an African-American parent of two East Side students, testified that East Side families felt "outcast" from the District because they were "on this side of the track." ROA.4278. Claire Smrekar, the United States' expert, stated that D.M. Smith "has a historic legacy, an identity associated with [the] predominantly black neighborhood or section of town" that makes it impossible to attract white students. ROA.3941.

In addition to the testimony at the most recent hearing, multiple witnesses at a 2012 evidentiary hearing also testified to the stigma that resulted from the perception that the east side schools were not "good" and lacked resources or support from local businesses. ROA.1352. For example, Duvall testified that students had "been taught that East Side was a bad school and they have been looked down upon," and that therefore no matter "what kind of program you bring to East Side[, white students] don't want to come, period." ROA.3491-3492; see also ROA.3489. Indeed, this Court specifically noted the "continuing stigma associated with attending those schools" on the east side when it previously reversed Judge Davidson's freedom-of-choice plan. *Cowan III*, 748 F.3d at 236; ROA.1560. Accordingly, even the District admits that "[d]espite its efforts, the District has not been able to attract white students to enroll at East Side High School." Opening Br. 13.

Having failed to convince the district court (and this Court on the prior appeal), the District argues again that this case is distinguishable from others in which this Court has rejected freedom-of-choice plans. Opening Br. 17-18. The District's argument is flawed because in this case, just as in several of the cases where this Court rejected freedom-of-choice plans, there is indisputable empirical evidence that freedom of choice has failed to increase white enrollment in racially identifiable African-American schools.[15] See, *e.g.*, *Anthony* v. *Marshall Cnty. Bd. of Educ.*, 409 F.2d 1287, 1289 (5th Cir. 1969) (rejecting freedom-of-choice plans because they "have not been effective in eliminating the dual systems nor do they show any promise or prospect of doing so in the future"); *United States* v. *Greenwood Mun. Separate Sch. Dist.*, 406 F.2d 1086, 1092 (5th Cir.) ("Looking at these enrollment figures for the two previous school years, we cannot escape the conclusion that freedom of choice has not been successful in bringing about a transition to a unitary nondiscriminatory school system."), cert. denied, 395 U.S. 907 (1969); *United States* v. *Hinds Cnty. Sch. Bd.*, 417 F.2d 852, 855 (5th Cir. 1969) (rejecting freedom-of-choice plan because "[n]o white students have ever

[15] We do not contend, nor did the district court hold, that "freedom of choice plans are *per se* unconstitutional." Opening Br. 18. Our contention (and the district court's conclusion) was that a freedom-of-choice plan is unconstitutional under the facts of this case because such a plan has been in effect for years and has not meaningfully altered the racial makeup of schools that the district court found were segregated. ROA.3282 ("Based on enrollment numbers, freedom of choice has not worked to achieve desegregation in the District.").

attended any traditionally Negro school in any of the school districts"), cert. denied, 396 U.S. 1032 (1970). The District's speculation that white students could theoretically enroll in racially identifiable African-American schools is of no import where, as here, white enrollment has not in fact increased while the plan has been in effect.

Moreover, the District's emphasis on the fact that many African-American students have chosen to attend the formerly de jure white Cleveland High School and Margaret Green is misplaced. See Opening Br. 18 n.9. It is irrelevant that African-American students choose to attend formerly white schools because this case concerns the continued segregation of formerly African-American schools, which nearly no white students choose to attend. See *Cowan III*, 748 F.3d at 240; ROA.1566 ("[T]he available statistics show[] that not a single white student chose to enroll at D.M Smith or East Side High after the district court's order, and that historically, over the course of multiple decades, no white student has ever chosen to enroll at D.M. Smith or East Side High.").[16]

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[16] The District's reliance on a lack of any roadblocks for African-American parents to enroll their children in a school of their choice is similarly misplaced. Opening Br. 14-17. The Supreme Court has expressly rejected the argument that merely eliminating roadblocks to choice can discharge a school district's desegregation obligations. See *Green*, 391 U.S. at 437 (rejecting a school district'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"). And this Court—which has consistently rejected freedom-of-choice plans—has

(continued…)

The District appears to contend that it is irrelevant that white enrollment in East Side and D.M. Smith has not changed because increasing "interracial exposure" will automatically lead to "maximum integration." Opening Br. 18. The District relies on the testimony of its expert Christine Rossell, who opined that there was a rise in "interracial exposure," by which Rossell meant the number of white students in the *average* African-American student's school. ROA.3638-3639. The district court, however, properly discounted this analysis and concluded that East Side and D.M. Smith are unconstitutional one-race schools that require intervention. At the high school and middle school levels, there is no "average" African-American student. African-American students in the District either attend schools on the west side, which are integrated, or schools on the east side, which are not. ROA.3661-3662. Rossell's interracial exposure theory is deficient because it averages increasing integration (at the west side schools) with stagnant, ongoing segregation (at the east side schools) and calls it increasing integration. Whatever validity this theory might have in a large, complex school district with many schools, it does not capture the reality of a district with two high schools and

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(…continued)
done so not because of roadblocks to full choice but due to the lack of actual integration resulting from such a plan. See, *e.g.*, *Lee* v. *Marengo Cnty. Bd. of Educ.*, 588 F.2d 1134, 1136 (5th Cir.) (rejecting a freedom-of-choice plan because "the student enrollment figures for the present school year furnished us by the Board amply demonstrate" that the plan has not resulted in reducing segregation), cert. denied, 444 U.S. 830 (1979).

two middle schools. See ROA.3683 (Rossell's testimony that "not every black student goes to a racially diverse school"). In any event, Rossell—who did not meet with any parents in Cleveland or study any socioeconomic data regarding Cleveland—did not testify that the status quo will transform East Side and D.M. Smith "from one-race schools to just schools" (ROA.3282)—only that the supposed "average" African-American student will have increasing exposure to white students. The district court was within its discretion not to adopt the District's argument that Rossell's interracial exposure theory permits the status quo of racially identifiable, one-race African-American schools.

In sum, the District did not meet its burden of showing that Judge Davidson's freedom-of-choice plan will desegregate East Side and D.M. Smith because the plan has been in place for nearly four years and has not been effective. Therefore, as the district court reasonably concluded, some change from the status quo is necessary for the District to meet its constitutional obligations. ROA.3278.

ii. Plan A: Freedom Of Choice With Minor Modifications

As an alternative to the status quo, the District also proposed Plan A, which consisted of freedom of choice with two modifications: (1) students who want to participate in East Side's IB program would have to enroll in that school (rather than being bused over from Cleveland High School to attend IB classes for part of the school day) and (2) East Side would house a new early college program, under

which qualified students could enroll for free in classes at Delta State University. Both modifications only apply at the high school level. ROA.1678-1679. Plan A proposes no changes to the status quo at the middle school level. Accordingly, as to D.M. Smith, the district court reasonably concluded that Plan A is unconstitutional on its face. ROA.3282 ("[T]he District has offered absolutely no evidence that Plan A would alter the enrollment at D.M. Smith, a burden only it bears. Accordingly, insofar as Plan A would result in a one-race school at D.M. Smith, this fact provides additional grounds for Plan A's rejection.").[17]

Even as to the high schools, however, the district court was within its discretion to conclude that the proposed modifications will not attract white students to East Side and therefore will not desegregate that school. The District's own witnesses were unable to testify that Plan A would increase white enrollment at East Side (which the District bears the burden of proving). For example, Christine Rossell testified that she could not predict that Plan A would "produce a

[17] The District suggests on appeal that it also "proposed consolidating Margaret Green Junior High and D.M. Smith Middle School into one consolidated middle school at the Margaret Green campus" as part of Plan A in its post-hearing proposed findings of fact and conclusions of law. Opening Br. 10. Not true. In its proposed findings and conclusions, the District expressly stated that "[u]nder Plan A, Margaret Green Junior High and D.M. Smith Middle remain, allowing parents of students in grades 6-12 the ability to choose their school." ROA.3069. We do not address this proposed consolidation here because it was not presented to the district court as part of Plan A. Any attempt to amend Plan A on appeal is improper. Moreover, the district court rejected this consolidation proposal as part of its consideration of the District's now-abandoned Plan B. ROA.3295-3298.

large increase in integration" at East Side. ROA.3663-3664. To the contrary, she admitted that Plan A could increase segregation if some black students who currently attend Cleveland High School were required to attend East Side instead due to the now-abandoned enrollment cap. ROA.3659-3660.

No District witness stated that more white students would enroll at East Side as a result of Plan A's changes to the status quo. Importantly, while a number of the District's witnesses—such as Obbie James, Todd Fuller, Beverly Hardy, Gary Gainspoletti, and Chresteen Seals—testified that they preferred Plan A, they did not (and could not) testify that the plan would increase white enrollment at East Side or D.M. Smith. The district court therefore reasonably concluded that "the evidence is weak that either exclusive offering [*i.e.*, the IB program or the early college program] would draw white students to East Side High." ROA.3280.

In its opening brief, the District does not challenge this finding, which is well-supported by the record. The district court heard extensive unrebutted testimony about the flaws of using the IB or early college programs proposed by the District to attract white students to East Side. Specifically, Claire Smrekar, the United States' desegregation expert, testified that Plan A "is unlikely to change the current segregation picture" when it came to the District's high schools for several reasons. ROA.3945. First, she distinguished between a program within a school (PWS)—such as the IB and early college programs at East Side in Plan A—and a

dedicated magnet school; she testified that "decades of policy research indicate a clear trend here, that white parents prefer dedicated magnets when magnets are placed in minority neighborhoods." ROA.3948. Thus, she concluded that a "PWS model is not the best interest if you are trying to pursue desegregation." ROA.3948. Indeed, despite the existing PWS magnet programs at East Side, no white students have enrolled full-time there to take advantage of the programs. ROA.3432-3433; ROA.3464 (testimony from a parent that despite the existing programs at East Side, "you still only have black students" and that thus "I don't think that adding additional classes would entice [white] students to enter East Side High School or D.M. Smith Middle School"). The district court heard no evidence to call this testimony into question and thus reasonably accepted Smrekar's conclusions.

Second, only a handful of white students would even qualify for these programs. Specifically, in the 2014-2015 school year, only 30 white students were enrolled in IB courses at East Side and only 22 white students would have qualified for the early college program. ROA.3280. Because the District is starting from a baseline of zero white student enrollment at East Side, and in recent years has never had more than two white students enrolled there, see p. 35, *supra*, a substantial number of eligible students would have to choose East Side to have any appreciable effect in terms of integration. Yet, the District presented no evidence

about what percentage of eligible students would choose to enroll full-time at East Side (an issue on which it bears the burden). Evidence in the record suggests that it is highly unlikely that a substantial number of white students who qualify for these programs would choose to enroll in East Side, due at least in part to the stigma attached to East Side, as discussed above. Indeed, both the United States and the District presented evidence based on their respective focus groups that white parents stated that they would enroll their children in Cleveland High School full-time without an IB program rather than send their children to East Side even if that meant that their children would have to forego the IB program altogether. ROA.3139; ROA.3614; ROA.2580. And the District's witnesses could not provide insight into whether a significant portion of eligible white students would enroll at East Side under Plan A. Beverly Hardy, the District's magnet coordinator, testified that she anticipated that *some* parents would "consider sending their child to" East Side but provided no specifics either as to how many parents would seriously consider this option or whether their consideration would actually lead to increased enrollment. ROA.3280; see also ROA.3613-3614.

Third, these programs largely do not commence until the 11th or 12th grade levels; thus, 8th graders and their parents who are deciding where to attend high school will not even know if they qualify for these programs at the time of that

decision. ROA.3953; ROA.3960. Parents and students are unlikely to choose a high school based on a program for which they may not qualify.

Fourth, the District already has a dual college credit program akin to the early college program that it is proposing. ROA.3774-3775. The existing program has less restrictive criteria and can be used by students at Cleveland High School. See ROA.3777. Because a similar program already exists at the school that white students prefer, they are unlikely to transfer to East Side for an early college program.

In sum, Smrekar concluded that the two programs are unlikely to pull a sufficient number of students from Cleveland High

> [b]ecause of the restricted enrollment, because of the eligibility cut scores, because of the criteria, which, first of all, narrows that funnel so dramatically; and then because of the historic enrollment patterns that lead one to believe that the preference for white students is clearly over at Cleveland High School; that a PWS doesn't fit, anyway, what we know about attracting and holding white enrollment in a predominantly black neighborhood.

ROA.3960. In line with this testimony—which was not rebutted—the district court reasonably found that "[u]nder these circumstances, the Court cannot conclude that Plan A's freedom of choice concept promises to transform East Side High and D.M. Smith from one-race schools." ROA.3281.

No District witness testified that Plan A's changes to the IB program and introduction of an early college program would increase white enrollment, and all

record evidence is to the contrary. Accordingly, the district court's finding that Plan A would not lead to an increase in desegregation was not clearly erroneous. In light of this finding, the district court appropriately concluded that Plan A is just as unconstitutional as Judge Davidson's freedom-of-choice plan that is in effect now.

2. The District Conceded, And The District Court Correctly Found, That The United States' Consolidation Plan Is Constitutional And Feasible

In contrast to the status quo or Plan A, the U.S. Plan proposes consolidating the two high schools at the current Cleveland High School and Margaret Green facilities and consolidating the two middle schools at the current East Side facility. The U.S. Plan is constitutional, as the District has conceded. ROA.3311 ("The District concedes that the U.S. Plan is constitutional."). Moreover, the district court found that implementing the U.S. Plan was feasible, a finding that the District does not challenge on appeal. See ROA.3314. Specifically, there was evidence that the existing Cleveland High School and Margaret Green facilities contain sufficient capacity to house a consolidated high school and that the current East Side facility could house a consolidated middle school immediately. ROA.3118; ROA.3130-3132. Thus, no new construction is necessary because the U.S. Plan repurposes existing facilities. ROA.1711; ROA.1718. And the planning process to implement consolidation—which is already underway—would take less than a year. ROA.3982-3983. In light of this evidence, the district court

reasonably concluded that consolidation is a plan—in fact, the only plan before it—that "promises realistically to work, and promises realistically to work now," meeting the test the Supreme Court set forth in *Green*, 391 U.S. at 439.

3. With Only One Constitutional Plan Before It, The District Court Properly Rejected The District's Arguments Regarding White Flight

The District's principal argument against the U.S. Plan is that consolidation "will result in a significant loss of white enrollment." Opening Br. 25. Yet, the District concedes that consideration of white enrollment loss is only appropriate "[w]hen choosing among constitutionally acceptable remedies in desegregation cases." Opening Br. 25; see also *Pittman*, 808 F.2d at 391 (White flight concerns, "legitimate when choosing among constitutionally permissible plans, cannot be accepted as a reason for achieving less than complete uprooting of the dual public school system." (citation and internal quotation marks omitted)). Here, the district court was well within its discretion to conclude that there was only one constitutional plan and that therefore "white flight is an inappropriate objection to the U.S. Plan." ROA.3312.

Because in this case there is only one constitutional plan, "'[w]hite flight' must be met with creativity, not with a delay in desegregation." *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1438 (5th Cir. 1983); see also *id.* at 1436 ("The Board's legitimate fear that white students would depart the public school system during the difficult period of active desegregation was cause for

'deep concern' and creative solutions but could not justify a retard in the process of dismantling the dual system."). As the district court reasonably found, that is precisely what the U.S. Plan does; it "calls for a rebranding effort, a diverse offering of academic programs, and the formation of a multi-racial advisory panel to ease the transition—all methods this Court finds reasonable and appropriate." ROA.3313. This should end the inquiry on white flight.

In any event, however, the District vastly overstates evidence of white flight and disregards the district court's factual findings. Specifically, the District relies almost exclusively on the testimony of Christine Rossell to contend that the U.S. Plan will lead to white enrollment loss. Opening Br. 31-33. The district court, however, rejected Rossell's testimony that massive white flight is likely because the court found that Rossell relied "in part on twenty-five year old survey data and case studies that failed to differentiate between consolidation and other forms of mandatory reassignment." ROA.3312.[18]

The District does not argue that this finding was clearly erroneous, and it is not. The record fully supports the district court's finding as to both flaws in Rossell's analysis. First, Rossell did not base her opinions on any specific

[18] Every other District witness who testified about the likelihood of white flight relied on Rossell's conclusions, which the district court found unreliable. ROA.3758-3759; ROA.3799-3800; ROA.4427.

information about Cleveland, did not interview or survey any parents in Cleveland, did not study any socioeconomic data related to Cleveland, relied on a quarter-century-old survey data, and based her opinions on analogies to other school districts that are dissimilar to Cleveland and about which important data is unavailable. ROA.3651-3652; ROA.3671-3672; ROA.3677; ROA.3679-3682; ROA.4369-4372.[19] Indeed, Smrekar testified that the 25-year-old parent survey data on which Rossell relied was outdated and did not account for more recent shifts in attitudes toward race and integration. ROA.4442-4444.

Second, Rossell's projections regarding drops in white enrollment are based on mandatory reassignment programs—which include programs where students are bused from their homes to schools that are further away than their neighborhood schools as a result of school officials' decisions—rather than the narrower class of plans akin to that at issue here—where schools are consolidated.

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[19] For example, the District cites the Indianola School District as a comparator. Opening Br. 31. Indianola, however, is distinguishable. Its desegregation plan went into effect 45 years ago when the district was already 90% black. ROA.3682. As Rossell admitted, racial views—which have changed in the intervening decades—and community factors affect the likelihood of white flight. ROA.3685; ROA.3687. As to the remaining districts about which Rossell testified, she did not distinguish between districts that engaged in consolidation of schools and those that engaged in forms of mandatory reassignment, did not address the reason for consolidation (*i.e.*, declining enrollment as opposed to achieving desegregation), and did not consider how many schools were consolidated and how far away those schools were—all of which are relevant to assessing whether Cleveland is comparable. See ROA.4368-4369; ROA.4079-4080.

See ROA.3675-3676. As Smrekar testified, mandatory reassignment occurs only when large school districts transfer students from neighborhood schools to another school that is farther away from their residence. ROA.3985. In light of these issues with Rossell's testimony, it was within the district court's discretion to discount her conclusion about white flight.

This is particularly true because, in addition to hearing about the flaws in Rossell's testimony, the district court also heard affirmative testimony from Smrekar that white flight was unlikely. Smrekar—who, unlike Rossell, actually visited Cleveland, reviewed data regarding the region, assessed housing and transportation, investigated local institutions (such as universities and museums), toured schools, met with school principals and District officials, attended a community meeting, and conducted multiple focus groups—opined that she would not expect white flight based on her study of the private schools near the District, though she could not so conclude with "absolute certainty." ROA.3986-3988. In reaching this opinion, Smrekar looked to "spatial geographical assessments, the quality of housing and schooling, the location of commercial assets, the location and quality and condition of Delta State University," other research, and publicly available documents. ROA.4028-4029. She concluded that white flight was unlikely due to a "constellation of factors" including the "sociodemographic portrait of Cleveland School District families," the stability of the job market in

Cleveland, and the fact that nearby school districts were also majority black. ROA.3988-3989. Smrekar concluded that Rossell's fears of white flight were implausible because the median family income in Cleveland was $37,000 per year and the cost of private school is approximately $5200 per child per year. ROA.4444-4446; see also ROA.3465 (testimony from a parent that "I don't think everyone [*i.e.*, all white families] can afford to leave; so I just feel like they will eventually roll with it, for lack of a better word, because they won't have a choice"); ROA.3492-3493 (testimony from a parent that white flight is unlikely because white parents "can't afford it").

Faced with this competing testimony, it was within the district court's fact-finding authority to conclude that "[t]he District is likely to suffer some white enrollment loss as a result of consolidation," but that this was "insufficient" to reject consolidation.[20] ROA.3313.

In sum, white flight concerns are irrelevant here as a legal matter. And, even to the extent that those concerns have any bearing on this case, the district court's

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[20] The District does not address this finding and instead continues to rely extensively on Rossell's testimony. The District contends that Rossell's statistical predictions were "unrefuted." Opening Br. 26 n.11. Not so. The United States extensively cross-examined Rossell about the flaws in her analysis, and she conceded that none of her analysis was based on circumstances in Cleveland. ROA.3671-3676. Moreover, the United States presented expert testimony from Smrekar, who contradicted Rossell's conclusions as discussed above. ROA.4443-4446.

findings regarding the likely magnitude of white flight and the ability of the U.S. Plan to mitigate white flight are entitled to deference.

4. The District's Suggestion That The United States Insists On A Racial Quota Is Meritless, And The District Court Correctly Rejected It

The District's only other line of attack against the U.S. Plan is to characterize it as requiring "racial quotas." Opening Br. 30 ("The Government's plan advocates that a certain racial quota, the District-wide racial breakdown, be met at D.M. Smith and East Side."). The District cites nothing for this proposition. Nor can it, as the United States has never advocated and does not now advocate for particular racial quotas at the District's schools.

Rather, the United States has contended—and the district court reasonably held—that the District bears the burden of ensuring that East Side and D.M. Smith do not continue as racially identifiable, one-race schools. ROA.3275-3278. While single-race schools are permissible in some contexts, they are not here, because, as the district court held, "the continued operation of East Side High and D.M. Smith as single-race schools is a vestige of discrimination." ROA.3278. Indeed, as this Court previously noted:

> The retention of single-race schools may be particularly unacceptable where, as here, the district is relatively small, the schools at issue are a single junior high school and a single high school, which have never been meaningfully desegregated and which are located less than a mile and a half away from the only other junior high school and high school in the district, and where the original purpose of this configuration of schools was to segregate the races. Apart from the

> fact that Cleveland has not sought a declaration of unitary status and has not challenged the district court's conclusion that further remedies are necessary, on the record now before us, the situation in Cleveland is distinguishable from those where we have found that the retention of some one-race schools did not preclude a declaration of unitary status.

Cowan III, 748 F.3d at 238-239; ROA.1563.

Therefore, this case is not about achieving "racial quotas" or "racial proportionality," as the District contends. Opening Br. 30. Rather, it is about dismantling the racially identifiable nature of the two schools at issue—which, as unrebutted testimony demonstrates, is a vestige of de jure segregation and discrimination. Edward Duvall—an East Side parent—testified that the school remained racially identifiable in part because "for the past 40-something years, East Side has been demonized as being a bad school." ROA.4250. Claire Smrekar testified that based on her review, enrollment maps showed that the students enrolling at D.M. Smith and East Side were African-American and resided in the "historically all-black section of town." ROA.3936-3937. Smrekar further opined that D.M. Smith had not attracted white students and would not attract white students because it "has a historic legacy, an identity associated with [the] predominantly black neighborhood or section of town" (ROA.3941)—vestiges of de jure segregation. See ROA.3945 (noting that "white children do not want to enroll over at East Side fully, full-time").

In light of this testimony, and this Court's analysis of the reasons for lack of white enrollment at East Side and D.M. Smith in *Cowan III*, it was well within the district court's discretion to conclude that the schools remained racially identifiable as a vestige of segregation. ROA.3278. And for the reasons discussed above, it was also within the district court's discretion to conclude that the District's proposals—continuation of the status quo or minor modifications in Plan A—would not eliminate the racial identifiability of the two schools, but that the U.S. Plan will.

CONCLUSION

This Court should affirm the district court's selection of the U.S. Plan.

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CERTIFICATE OF SERVICE

I certify that on December 6, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Vikram Swaruup
VIKRAM SWARUUP
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation in the version of Federal Rule of Appellate Procedure 32(a)(7)(B) in effect before the December 1, 2016 amendments because it contains 13,716 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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

s/ Vikram Swaruup
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Date: December 6, 2016