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

UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO STAY AND CROSS-MOTION TO EXPEDITE APPEAL

(See inside cover for continuation of caption)

(Continuation of caption)

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This Court should deny the Cleveland School District's (District) Motion For Stay. In more than 50 years of litigation, the District has failed to desegregate its racially identifiable African-American secondary schools: East Side High School (East Side) and D.M. Smith Middle School (D.M. Smith). In a May 13, 2016, order (May 2016 Order), the district court adopted the United States' desegregation plan (U.S. Plan), which will desegregate these schools by the 2017-2018 school year. The District, having appealed the May 2016 Order, now seeks to stay it pending (1) the district court's consideration of a new desegregation plan the District belatedly proposed on November 18, 2016, and (2) this appeal. Mot.10-20.[1] The Court should deny both requests and expedite its decision on the merits of this fully briefed appeal.

BACKGROUND

Before this case, the District was segregated as a matter of law and policy, with African-American students attending schools on the east side of town and white students attending schools on the west side. District court orders over the years eliminated these laws and policies and desegregated the formerly white secondary schools. However, the District failed to desegregate the formerly

[1] "Mot.__" refers to the pages of the District's December 21, 2016, Motion For Stay. "U.S. Br. __" refers to pages of the United States' December 6, 2016, merits brief on appeal. "ROA. __" refers to pages of the Record on Appeal. "Ex. __" refers to exhibits to this response. "Doc.__" refers to documents on the district court's docket.

African-American secondary schools, the enrollments of which have always been 97% or more African-American.

Because of this racial identifiability, the district court on March 28, 2012, found that new measures were needed to remedy segregation at East Side and D.M. Smith. *Cowan ex rel. Johnson* v. *Bolivar Cnty. Bd. of Educ.* (*Cowan I*), 914 F. Supp. 2d 801, 816-818 (N.D. Miss. 2012). Over the United States' objection, the district court adopted a plan giving students freedom of choice to attend either of the District's two high schools and two junior high schools notwithstanding the ineffectiveness of past freedom-of-choice plans in the District. *Cowan ex rel. Johnson* v. *Bolivar Cnty. Bd. of Educ.* (*Cowan II*), 923 F. Supp. 2d 876, 881-882 (N.D. Miss. 2013); ROA.1331-1359; see U.S. Br. 4-15 (history of failed freedom-of-choice policies).

The United States appealed the freedom-of-choice plan, and this Court reversed on April 1, 2014. *Cowan* v. *Cleveland Sch. Dist.* (*Cowan III*), 748 F.3d 233 (5th Cir. 2014) (Ex.A). In doing so, this Court noted that, "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." *Id.* at 239. Because "no evidence or explanation indicat[ed] that the freedom of choice plan was likely to work, and all the available empirical evidence indicate[d] that the plan is not likely to contribute to meaningful

desegregation," this Court remanded for entry of a plan most likely to achieve desegregation. *Ibid.*

The District and the United States submitted competing plans to the district court on January 23, 2015. The District offered three plans: (1) the 2012 freedom-of-choice plan; (2) Plan A, which added minor modifications to the freedom-of-choice plan that are immaterial here; and (3) Plan B, which the District has since abandoned.[2] ROA.1675; ROA.1677-1683; Mot.5 n.6. In contrast, the United States proposed consolidation of the District's two middle schools (D.M. Smith and the formerly white Margaret Green Junior High) at the East Side facility and consolidation of the District's two high schools (East Side and the formerly white Cleveland High School) at the adjoining Cleveland High/Margaret Green facilities on the west side. ROA.1694-1724.

After discovery, the district court held a five-day evidentiary hearing.[3] On May 13, 2016, the district court issued a 96-page order rejecting the freedom-of-choice plans, which the court found had not worked and would not work. ROA.3282. The court adopted the U.S. Plan and ordered the parties to submit

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[2] The District's motion elides the differences between the freedom-of-choice plan and Plan A—the two plans it presses on appeal—and therefore we do too. See U.S. Br. 44-50 (discussion of differences).

[3] On the eve of the evidentiary hearing, the District submitted a new plan—Plan C—which was found untimely and which the District is not pursuing. ROA.3008-3012; U.S. Br. 18 n.6.

implementation timelines. ROA.3316-3318. On July 11, 2016, the District noticed this appeal. ROA.3398.

A month later, the District requested that the district court modify its May 2016 Order by adopting a new plan—Plan D. Doc.222. Under Plan D, the District proposed moving all middle and high school students to the Cleveland High/Margaret Green campus while closing the secondary schools on the historically African-American east side of town. Doc.228 at 2. The District simultaneously filed a motion to stay the May 2016 Order pending consideration of Plan D, or in the alternative, pending this appeal. Doc.223.

On September 29, 2016, the district court denied the District's motion to stay. Doc.235. The court found that the District lacked a substantial appellate case and that the harm of subjecting students to segregated schools outweighed any harm to the District. Doc.235 at 6-9. The court noted that denial of the stay was appropriate notwithstanding the District's new plan, because the U.S. Plan was the only plan that it had found constitutional. Doc.235 at 9 n.4.

In the stay order, the district court also scheduled briefing and discovery on Plan D. Doc.235 at 10. On October 21, 2016, the United States responded to Plan D, explaining that East Side's closure was impermissibly motivated by race, that Plan D placed desegregation burdens exclusively on African-American students,

and that Plan D would delay desegregation. Doc.242. The United States subsequently served discovery requests regarding Plan D. Ex.B.

Instead of responding to these requests, the District withdrew Plan D and filed another desegregation plan—Plan E—on November 18, 2016. Doc.252. Plan E proposes sending all sixth through eighth graders to Margaret Green (on the west side), all ninth and tenth graders to East Side, and all eleventh and twelfth graders to Cleveland High School (on the west side). See Doc.252. The court denied as moot the District's motion for reconsideration related to Plan D and ordered expedited discovery and briefing on Plan E to be completed this month. Doc.253.

Even as the District filed new proposals, the district court entered an order on September 22, 2016, setting forth an implementation timeline for the U.S. Plan. Doc.233. The order requires the District to undertake planning efforts in 2016 and 2017, with rebranded, consolidated schools opening in August 2017. Doc.233 at 5-6. Importantly, in each of its orders on the District's new proposals, the district court has reiterated its commitment to its timeline order and to ending segregation by August 2017. See Doc.239 at 4; Doc.244 at 2; Doc.253 at 3.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO CONSIDER THE REQUEST FOR A STAY PENDING RECONSIDERATION AND SHOULD DENY THE REQUEST FOR A STAY PENDING APPEAL ON THE MERITS

A. This Court Lacks Jurisdiction To Stay The District Court's Order Pending Further District Court Proceedings, And The Request Is Substantively Meritless

1. The District first asks this Court to stay the district court's May 2016 Order pending district court proceedings on its latest desegregation proposal. Mot.10-12. This extraordinary request has nothing to do with this appeal or this Court's appellate jurisdiction. The District does not in this request seek to stay the May 2016 Order pending this appeal or to stay this appeal pending the reconsideration proceedings. Rather, the District asks this Court to stay *the district court's order* pending further *district court* proceedings. Such a stay does not implicate this Court's jurisdiction and is thus beyond its authority, as evidenced by the District's failure to cite any rule, statute, or precedent in support of its unusual request.[4]

[4] The District cites only *Itel Corp.* v. *M/S Victoria U* (*Ex Pishtaz Iran*), 710 F.2d 199, 202-203 (5th Cir. 1983), which is inapposite. There, this Court vacated a district court's order staying a case pending resolution of a case before another tribunal. It provides no support for the proposition that this Court has the authority to stay a district court order pending further district court proceedings when the district court has chosen not to do so.

Federal Rule of Appellate Procedure 8—the rule ordinarily invoked when an appellant is seeking a stay—is inapplicable here. Rule 8(a)(1)(A) permits only "a stay of the judgment or order of a district court *pending appeal*." (emphasis added). It does not permit this Court to grant a stay pending district court reconsideration proceedings.[5] See *Eli Lilly & Co.* v. *Generix Drug Sales, Inc.*, 460 F.2d 1096, 1105 (5th Cir. 1972) ("An appellate court will not interfere with the trial court's exercise of its discretion to control its docket and dispatch its business.").

This request is also barred because it was not presented to the district court. Rule 8(a)(1)-(2) provides that "[a] party must ordinarily move first in the district court" for stays of district court orders or suspensions of injunctions, unless doing so would be impracticable. Here, the District requested the district court for a stay pending appeal or pending consideration of *Plan D* (*i.e.*, "Modified Plan"). Doc.224; Doc.252. The district court denied that request. Doc.235 at 5-9. After that denial, the District withdrew Plan D and proposed a new plan with material differences, Plan E (*i.e.*, "Unified High School Plan"). Doc.252. The District never sought a stay in the district court of the May 2016 Order pending resolution of the proceedings on *Plan E*—the request that the District makes to this Court.

[5] Mandamus under Rule 21 is the sole mechanism to seek the relief the District pursues here. The District has not sought mandamus relief or contended that it can meet the standards for such relief.

See Mot.10. Because the District has neither presented this argument to the district court nor demonstrated the impracticability of doing so, Rule 8(a) bars it. See *Ruiz* v. *Estelle*, 650 F.2d 555, 566 (5th Cir. 1981); *In re Montes*, 677 F.2d 415, 416 (5th Cir. 1982).

2. In any event, the District's arguments for staying the May 2016 Order pending the district court's consideration of Plan E are baseless.

First, the District contends that preparation of East Side for U.S. Plan implementation results in "substantial financial and logistical cost" that will be avoided if the district court adopts Plan E. Mot.11. This is contrary to the District's trial court filings. The District was required to identify any potential facilities renovations by December 4, 2016 (Doc.233 at 3), but it identified no renovations to East Side related to U.S. Plan implementation. See Doc.254 at 3 ("The District does not contemplate any major repairs or renovations other than the ADA issues identified in this case."). Moreover, when it filed Plan E, the District stated that "[a]ll efforts the District is now undertaking for the Court-ordered consolidation plan [*i.e.*, the U.S. Plan] are applicable to the Unified High School Plan [*i.e.*, Plan E]." Doc.252 at 9-10.

Second, the District contends that a stay is needed pending consideration of Plan E because the U.S. Plan "will result in a greater loss of white enrollment than the District's proposed plan." Mot.11. This assertion is baseless. No reliable

record evidence suggests that Plan E will lead to less white flight than the U.S. Plan, and the District cites nothing for this proposition. Moreover, as discussed below (pp.15-16), the District has not established the premise to this argument: that U.S. Plan implementation is causing white flight.

Third, the District asserts that Plan E is "obviously constitutional." Mot.12. This is *ipse dixit*. Discovery on the constitutionality of Plan E is underway, and plaintiffs have until January 31, 2017, to file objections. Doc.253. There is no basis for the District to assert—again without citation—that its plan is constitutional, particularly when the district court has not considered the issue and the District's last six plans have been found unconstitutional, been withdrawn, or both.

B. This Court Should Deny A Stay Pending Appeal Because The District Has Not Established Likelihood Of Success On The Merits Or Irreparable Injury, And A Stay Would Harm Students

This Court has jurisdiction to consider the District's belated second request—for a stay pending appeal—which the district court denied three months ago. Doc.235. This Court reviews that denial for abuse of discretion. *Moore* v. *Tangipahoa Parish Sch. Bd.*, 507 F. App'x 389, 392 (5th Cir. 2013). In making that assessment, this Court is required to consider four factors: (1) whether the movant has made a "strong showing" that it will succeed on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether issuance of the

stay will substantially injure the other parties; and (4) where the public interest lies. *Nken* v. *Holder*, 556 U.S. 418, 425-426, 434 (2009). The movant "bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Id.* at 433-434. Applying these standards, the Supreme Court has "consistently denied stays and reversed stays granted by courts of appeals from relief ordered in school desegregation cases." *United States* v. *Texas*, 523 F. Supp. 703, 729 (E.D. Tex. 1981).

1. The District's Merits Arguments Are Unlikely To Succeed Because They Rely On A Plan That Is "Ineffective" According To This Court And All Available Data

The movant must make a "strong showing" of likelihood of success; "more than a mere possibility of relief is required."[6] *Nken*, 556 U.S. at 434-435. Under the applicable standard of review, the District cannot satisfy this burden. This Court reviews "implementation of desegregation remedies for abuse of discretion." *Cowan III*, 748 F.3d 233, 238 (5th Cir. 2014). The district court's remedial powers in desegregation cases are "broad, for breadth and flexibility are

[6] The District improperly relies on a lower legal standard. Under this Court's case law, a movant needs to present only a "substantial case on the merits" where "there is a serious legal question involved *and* the balance of equities heavily favors a stay." *Weingarten Realty Investors* v. *Miller*, 661 F.3d 904, 910 (5th Cir. 2011) (emphasis added). This test is inapplicable because, as discussed below, the District cannot establish that the equities *heavily* favor a stay. Moreover, even if this standard applies, the district court correctly found that the District lacks a substantial appellate case.

inherent in equitable remedies." *Milliken* v. *Bradley*, 433 U.S. 267, 281 (1977) (citation omitted). The 96-page order adopting the U.S. Plan rests on factual determinations that are entitled to deference and thus unlikely to be reversed. ROA.3223-3318. The District's merits arguments, which advocate for freedom-of-choice plans and rely on white-flight concerns, are contrary to the law and the record, and thus the district court reasonably concluded that the District lacked a substantial case on appeal. Doc.235 at 6-7.

a. In 2012, the district court held that East Side and D.M. Smith had been segregated and remained racially identifiable, and that thus, a new plan was needed to desegregate the schools. *Cowan I*, 914 F. Supp. 2d 801, 817-818, 824 (N.D. Miss. 2012). This holding has never been challenged. See *Cowan III*, 748 F.3d at 238. The only question on appeal is whether the district court abused its discretion in its choice of remedy for this ongoing segregation.

The District contends that it is likely to prevail because the district court abused its discretion by choosing the U.S. Plan over the District's freedom-of-choice plans. Mot.13-14. Freedom of choice, however, has been in effect since 2013 and has not desegregated East Side and D.M. Smith. In the four years before this freedom-of-choice plan, only three white students enrolled in the two racially identifiable African-American schools; in the three years since, only one white

student has enrolled in these schools. See ROA.531-534; ROA.667-668; ROA.1045; ROA.1542; ROA.1615; ROA.3042-3043; ROA.3326-3327.

In fact, there have been plans in place for decades that allowed students to choose which schools to attend, but none of these plans increased white enrollment at East Side or D.M. Smith. See U.S. Br. 4-10; Ex.C (enrollment data). In light of these data, this Court concluded that "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." See *Cowan III*, 748 F.3d at 239. Considering this, the district court reasonably held in the May 2016 Order that "freedom of choice has not worked to achieve desegregation in the District." ROA.3282; see also *Hall* v. *Saint Helena Parish Sch. Bd.*, 417 F.2d 801, 807 (5th Cir. 1969) ("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.").

Not only do the District's merits arguments ignore these data, they are also contrary to longstanding precedent from this Court, including in this case, reflecting skepticism about the efficacy of choice. As this Court noted in this case's prior appeal, choice "has historically proven to be an ineffective desegregation tool." *Cowan III*, 748 F.3d at 238. Indeed, this Court has "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).

b. The District's second argument on appeal (and in its motion) is that the U.S. Plan will cause white flight. Mot.15-16. However, the U.S. Plan is the only plan presented at the evidentiary hearing that would lead to desegregation; where, as here, the district court had no alternative constitutionally permissible plan to consider, concerns about white flight are irrelevant. See *United States* v. *Pittman*, 808 F.2d 385, 391 (5th Cir. 1987) (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.").

Moreover, the District ignores the trial court's factual findings on white flight. Mot.15-16. The district court concluded that the District overstated white-flight concerns, which the U.S. Plan appropriately addressed with "creativity." ROA.3312-3313 (citing *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1438 (5th Cir. 1983), and discussing rebranding and other "reasonable and appropriate" measures in U.S. Plan to address white-flight concerns). The District relies on the testimony of its expert Christine Rossell to contend that a dramatic drop in white enrollment at District schools is likely. Mot.15-16. But this ignores the district court's rejection of Rossell's testimony because of her reliance "on twenty-five year old survey data and case studies that failed to differentiate

between consolidation and other forms of mandatory reassignment." ROA.3312. The district court's weighing of this evidence is entitled to deference and is unlikely to be reversed. U.S. Br. 52-56.

c. The District's remaining likelihood-of-success-on-the-merits arguments also disregard the record. Relying on Rossell's testimony, the District contends that it is on the pathway to maximum integration due to increasing "interracial exposure." Mot.15. The interracial exposure theory—which looks at the number of white students in the average African-American student's school—is flawed, because there is no *average* African-American student in the District. U.S. Br. 43. Students either attend integrated schools on the west side of town or segregated schools on the east side of town. ROA.3661-3662. Moreover, as the district court found, this theory is unrelated to the reason for its rejection of freedom-of-choice plans: those plans "would fail to eliminate the one-race schools in the District." Doc.235 at 7.

In addition, contrary to the District's argument (Mot.16), the United States has never advocated for a "racial quota." See U.S. Br. 56-58; see also *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992) (courts can remedy "racial imbalance [that] has been caused by a constitutional violation"). Rather, we argued—and the district court held—that "the District could not maintain one-race schools which were vestiges of past segregation." Doc.235 at 7; ROA.3275-3278.

2. The District Has Not Demonstrated Irreparable Injury Resulting From The U.S. Plan's Adoption, And Any Harm It Has Suffered Is Caused By Its Own Delay

"[S]imply showing some possibility of irreparable injury fails to satisfy the second factor." *Nken*, 556 U.S. at 434-435. The District has not shown any injury, let alone met the irreparable-injury standard.

a. The District's harm argument relies on the notion that white students are not enrolling in the District's schools because of the district court's adoption of the U.S. Plan. See Mot.16-19. As the District admits (see Mot.17 n.8) and as noted above, white flight is irrelevant in a desegregation case where only one constitutional plan has been presented. Accordingly, the District's principal harm is not cognizable under this Court's case law.

In any event, the District's evidence that adoption of the U.S. Plan has caused white flight is weak. The District relies on affidavits of its employees—principals at two schools—who state that 11 of the 15 families that have chosen not to enroll their children in District schools told the principals that this was due to the U.S. Plan's adoption. See Mot., Ex. D. This evidence is hearsay of declarants who are unidentified, provided by witnesses who have an interest in the case. Neither this Court nor the United States can determine who these families are, whether the principals' statements of their motives are accurate, or whether

their concerns regarding the U.S. Plan are constitutionally cognizable.[7] Moreover, there is no data indicating whether this amount of non-enrollment is unusual. Accordingly, the Court should discount these conclusory hearsay statements. Eleven anonymous students cannot veto 600 students' right to a desegregated education.

This evidence also does not establish that staying implementation of the U.S. Plan would *prevent* white families from leaving the District. Even accepting the affidavits, the non-enrollment of white students results not from any particular step in the *implementation* of the U.S. Plan, but because the district court *adopted* the plan. Staying implementation will not undo that adoption.[8] Accordingly, the District has not established any connection between its alleged harm and its stay request.

Besides the hearsay affidavits, the District also relies on Rossell's testimony based on decades-old data that white flight was likely in the first few years of the U.S. Plan's implementation. Mot.17-18. As noted above (pp.13-14), however, the

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[7] The District did not respond to November 4, 2016, discovery requests regarding these families. Ex.B.

[8] The District seeks to stay the May 2016 Order adopting the U.S. Plan—which creates no obligations. Mot.20. Staying that order would have no real effect. Only the September 22, 2016, implementation order confers obligations, none of which the District contends causes irreparable harm. Indeed, the District's motion to stay the May 2016 Order in the district court was filed on August 15, 2016—*before* the district court's implementation order was issued.

district court rejected Rossell's white-flight testimony, a factual finding that is entitled to deference.

Finally, the District points to the funding loss that it contends will occur due to white flight—a theory that suffers numerous flaws. Mot.18. First, it is derivative of the District's white-flight arguments, which as discussed above are irrelevant where only one constitutional plan is before the Court. Second, the District's contention that the drop in student enrollment in its 2016 reporting period *resulted from* implementation of the U.S. Plan defies common sense. The court adopted the U.S. Plan less than three weeks before the 2016 report was filed, and no implementation had occurred during that time. The notion that dozens of white families decided to leave the District's schools in that three-week window due to the adoption of the U.S. Plan strains credulity, and the District has resisted attempts to verify its validity. See note 7, *supra*. Third, contrary to the District's contention, there is no precipitous drop in white enrollment. Rather, white enrollment has ebbed and flowed over the years. There has been no decrease in actual white enrollment since 2011, and overall District enrollment has *increased* by 200 students. See ROA.534; ROA.3322. Fourth, as the district court found, funding loss is not irreparable injury; rather, the District must show some reduction of services resulting from the supposedly reduced funding, which the "District has failed to show." Doc.235 at 8-9.

The District's silence regarding the implementation deadlines demonstrates the lack of harm. The District has never challenged any part of the order setting forth a timeline for U.S. Plan implementation—before the district court or this Court—by seeking extensions or contending that specific deadlines were infeasible. Rather, the District seeks this Court's permission to do *nothing* to address ongoing segregation while this Court considers the appeal.

b. To the extent that the May 2016 Order is harming the District pending appeal, the District's diligence could have prevented such harm. Ordinarily, where an appellant seeks to stay an injunction pending appeal, a motion is filed shortly after the injunction issues and before appellate briefing—not, as here, more than seven months after the district court's adoption of the U.S. Plan, nearly three months after the district court's refusal to stay that order, and after full appellate briefing. The District's delay in filing this motion belies its claim of urgency now.

If, as the District contends, the U.S. Plan's adoption were causing ongoing irreparable harm, it could have mitigated or eliminated that harm by appealing quickly and seeking expedited briefing. Instead, the District waited nearly two months before noticing this appeal and then sought a month-long briefing schedule extension. Had the District been diligent, this appeal could have been resolved by now, ameliorating or eliminating any harm the District is allegedly suffering. The

District's delay suggests that the goal of this motion is to further delay implementation of the U.S. Plan—not to prevent irreparable harm.

Nothing has changed in the almost *five years* since the district court's unchallenged 2012 decision finding the racial identifiability of East Side and D.M. Smith unconstitutional. This is due in part to the District's efforts to delay implementation of the U.S. Plan. This Court should not countenance the District's dilatory tactics at this late stage by staying the only remedy that will indisputably and immediately desegregate the two schools.[9]

3. Delaying Implementation Of The U.S. Plan Harms Plaintiffs And The Public

"The 'injury to the other parties' and 'public interest' factors 'merge when the Government is the opposing party.'" *United States* v. *Transocean Deepwater Drilling,* Inc., 537 F. App'x 358, 364 (5th Cir. 2013) (quoting *Nken*, 556 U.S. at 435). The district court reasonably concluded that the significant harm a stay would cause students outweighs any harm to the District. Doc.235 at 9. The District is currently implementing the U.S. Plan, with consolidated schools opening August 2017. The district court has remained steadfast in maintaining this timeline notwithstanding the District's changing proposals because the U.S. Plan remains

[9] The District also delayed before the district court by filing its most recent proposal nearly two years after the deadline for desegregation plans. The District provided no reason for this delay, choosing instead to continually propose new plans to thwart finality of the U.S. Plan's implementation.

"the only proposed constitutional plan." See Doc.235 at 9 n.4. Staying implementation could derail the timeline and prevent desegregation by the 2017-2018 school year, contravening the Supreme Court's mandate that formerly de jure segregated districts have an obligation to implement "a plan that promises realistically to work, and promises realistically to work now." *Green* v. *County Sch. Bd.*, 391 U.S. 430, 439 (1968); *Texas*, 523 F. Supp. at 734 ("Postponing relief in this case for a year or more will merely perpetuate the proven evils of past discrimination, to the detriment of all Americans.").

The District contends that a stay would cause only "some minor delay in the implementation of a new desegregation plan." Mot.19. However, if a stay prevents implementation of the U.S. Plan by August 2017, there will be at least an additional year of delay, forcing hundreds more students to attend segregated schools, since the plan could not be implemented in the middle of a school year. In desegregation cases, there are no minor delays; there are years-long delays, which cause substantial harm to students who suffer because of the stigma attached to these schools. Indeed, the District does not state that it can implement the U.S. Plan in the 2017-2018 school year if the district court's adoption of the plan is stayed, but then affirmed. There are challenges to doing so, because the U.S. Plan contemplates a months-long implementation to ensure smooth integration. That process is already underway, and a stay could disrupt it by, for example,

dismantling the U.S. Plan's multiracial advisory panel, which has been established and is meeting. Successful desegregation relies on community support and momentum, which a stay would erode, creating even more potential delay.[10]

II

THIS COURT SHOULD EXPEDITE ITS DECISION ON THE MERITS OF THE APPEAL

Rather than staying the May 2016 Order, this Court should expedite its decision on the merits of the appeal and issue a decision by March 5, 2017, the next interim implementation deadline.[11] There is "good cause" for expedited review. 5th Cir. R. 27.5. Both the District and the community need finality. East Side and D.M. Smith have been unconstitutional one-race schools for more than 50 years, and the district court found that these schools remain segregated five years ago. Yet nothing has changed. The district court has required implementation of the U.S. Plan by August 2017 despite the District's evolving proposals. This Court can bolster that commitment to finality by expediting its review.

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[10] The District's suggestion that plaintiffs can *choose* to attend integrated west side schools in the meantime (Mot.20 n.9) is constitutionally inadequate. See *Green*, 391 U.S. at 437 (rejecting argument that free choice discharges district's desegregation obligations).

[11] Private plaintiffs join this request; the District has stated that it will oppose.

Expedited review may also obviate the need for this Court to consider the District's motion. In the usual case, a stay motion is presented *before* merits briefing, necessitating a preliminary assessment of likelihood of success on the merits. Here, the District has waited until *after* merits briefing to file its motion. Therefore, the Court can decide the merits of the case, eliminating the need for preliminary assessment.

If the Court rules on the stay motion, expedited review becomes even more important, regardless of the outcome. If the Court denies the stay, expedited review will mitigate or eliminate any harm the District is purportedly suffering as a result of the uncertainty regarding adoption of the U.S. Plan. While, as discussed above, the Court should view such claims of harm with skepticism, it can eliminate any concern by issuing a decision before the next implementation deadline (*i.e.*, March 5, 2017). Doc.233. If the Court grants the stay, expedited review becomes critical because such review provides the sole mechanism to ensure that a desegregation plan is implemented by August 2017.

CONCLUSION

This Court should deny the District's stay motion and expedite its decision on the merits of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 3, 2017, I electronically filed the foregoing UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO STAY AND CROSS-MOTION TO EXPEDITE APPEAL 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 UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO STAY AND CROSS-MOTION TO EXPEDITE APPEAL:

(1) complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5199 words; 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
VIKRAM SWARUUP
Attorney

Date: January 3, 2017

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60464

United States Court of Appeals
Fifth Circuit
FILED
April 1, 2014
Lyle W. Cayce
Clerk

DIANE COWAN, etc., et al

Plaintiffs

UNITED STATES OF AMERICA,

Intervenor Plaintiff - Appellant

v.

CLEVELAND SCHOOL DISTRICT,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Mississippi

Before KING, SOUTHWICK, and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

In this nearly fifty-year-old desegregation case, the United States appeals the district court's order implementing a freedom of choice plan intended to desegregate the formerly *de jure* African-American middle school and high school in the Cleveland School District ("the District"). We reverse and remand for further consideration of the desegregation remedy.

I. Factual and Procedural Background

The Cleveland School District encompasses the southeast area of Bolivar County in the Mississippi Delta, including the city of Cleveland, the towns of

Boyle, Renova, and Merigold, and outlying areas. Most of the District's schools are located in Cleveland, a city of approximately 12,000 people. The District is one of many school districts in Mississippi that previously practiced race-based *de jure* segregation in education. Under that system, African-American students were required to attend schools on the east side of the railroad tracks that run north to south through Cleveland, while white students attended schools on the west side of town. The original plaintiffs in this case sued in 1965 to enjoin the District from maintaining segregated schools, and the district court ordered the District to submit a desegregation plan to dismantle the dual school system and remedy the continuing effects of segregation. The United States intervened in 1985. Over the ensuing decades, the district court has supervised the desegregation efforts in the District through a series of desegregation orders.[1] The present appeal concerns D.M. Smith Middle School and East Side High School, the formerly *de jure* African-American junior high and high school in the District, which are located near each other on the east side of town.[2] The formerly *de jure* white junior high and high school, Margaret Green Junior High and Cleveland High School, are located adjacent to each other on the west side of town.

The United States filed a motion in May 2011, arguing that the District was not in compliance with the extant desegregation orders and requesting further relief. The desegregation orders contain a number of components, but the United States challenged only the District's non-compliance with the

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[1] The details of these orders are recounted at length in the district court's thorough March 28, 2012 memorandum opinion. *See Cowan ex rel. Johnson v. Bolivar Cnty. Bd. of Educ.* (*Cowan I*), 914 F. Supp. 2d 801 (N.D. Miss. 2012). We discuss only those portions of the orders that are relevant to the instant appeal.

[2] Under the *de jure* system, all African-Americans in grades 7-12 attended a single school, now East Side High School. A second junior high, D.M. Smith Middle School was constructed later, on a site behind East Side High School.

student assignment and faculty assignment components of the desegregation orders. In relevant part, with regard to junior high and high school student assignment, the previous desegregation orders created 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. The orders also included a majority-to-minority transfer policy requiring 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. The faculty assignment component of the desegregation orders provided that the faculty and professional staff at each school should reflect the districtwide ratio of minority and nonminority faculty and professional staff to the extent feasible.

In a thorough, well-reasoned March 28, 2012 memorandum opinion, the district court analyzed whether the District was in compliance with the student assignment and faculty assignment components of the desegregation orders. *Cowan ex rel. Johnson v. Bolivar Cnty. Bd. of Educ.* (*Cowan I*), 914 F. Supp. 2d 801 (N.D. Miss. 2012). It determined that the District had achieved desegregation in many of its schools, particularly within the District's six elementary schools. It noted the District's success in attracting white students to its formerly *de jure* African-American elementary schools through magnet programs and magnet schools. It also found that the District's formerly *de jure* white junior high and high school, Margaret Green Junior High School and Cleveland High School, were desegregated. However, the district court found that a new plan was needed to eliminate segregation at D.M. Smith Middle School and East Side High School, which have never been meaningfully desegregated but have always been and continue to be racially identifiable, almost exclusively black schools. Although white enrollment in the District

has held steady around 29% in recent years, the student population at D.M. Smith and East Side High is now and has always been between 98% and 100% black.

The District submitted its proposed desegregation plan for the 2012-2013 academic year in May 2012. The District proposed to create new magnet programs and revitalize existing magnet programs at D.M. Smith and East Side High. The proposed plans consisted of offering specialized or advanced classes only at D.M. Smith Middle School and East Side High School, and recommitting to the International Baccalaureate programs at both schools in order to attract students enrolled at Margaret Green Junior High School and Cleveland High School, and to attract students graduating from the successful magnet programs at the elementary schools. Parts of the District's plan called for white students to attend D.M. Smith or East Side High for certain classes or for part of the day, without enrolling full time at those schools. The United States objected to the District's plan, claiming that the magnet programs did not and would not attract white students in significant numbers and the District's plan would not meaningfully integrate the schools. The United States also argued that consolidation of the schools into one junior high and one high school for the entire District would accomplish the objectives set forth by the district court.

The district court held a hearing on the adequacy of the District's proposed plan in December 2012. Beverly Hardy, an elementary school principal and director of the magnet program, and Maurice Lucas, president of the school board, testified in favor of the District's plan. Hardy explained how the magnet programs at the schools would work, and Lucas explained why the school board chose its plan, claiming that the magnet programs were likely to be successful. He also testified that the school board had not considered consolidation. The United States called Reverend Edward Duval, Lenden

Sanders and Tonya Short, parents of children attending East Side High School and D.M. Smith Middle School. These witnesses opposed the District's plan, generally testifying that the schools on the east side of town were not academically challenging for their children, that there was a continuing stigma associated with attending those schools, and that the public consensus was in favor of consolidation.

The district court issued its memorandum opinion regarding the desegregation remedy on January 24, 2013. *Cowan ex rel. Johnson v. Bolivar Cnty. Bd. of Educ.* (*Cowan II*), 923 F. Supp. 2d 876 (N.D. Miss. 2013). The district court detailed observations from its site visit to the Cleveland schools, noting that D.M. Smith and East Side High had equal or better facilities compared to Margaret Green Junior High and Cleveland High School. The district court then rejected both the District's proposed desegregation plan and the United States's proposed alternative of consolidation, and adopted a new plan not previously suggested. Finding that "the attendance zones, as defined by the former railroad tracks in Cleveland, perpetuate vestiges of racial segregation," the district court adopted a plan that abolished the attendance zones and majority-to-minority transfer program and implemented a freedom of choice plan that allows each student in the district to choose to attend any junior high or high school.

Shortly thereafter, the United States filed a Rule 59 motion to alter the judgment. It maintained, as it does on appeal, that the freedom of choice plan was constitutionally inadequate and again argued that the appropriate solution was consolidation. The District responded, as it does on appeal, by defending the freedom of choice plan. It argued that the plan was constitutionally adequate and that the United States had not offered evidence that the plan would not work. It also argued that a mandatory consolidation plan would ultimately result in decreased integration due to "white flight" from

the District, as mandatory consolidation would lead to white parents leaving the District or placing their children into private schools. While the Rule 59 motion was pending, the District submitted pre-enrollment data for the 2013-14 school year. As of April 1, 2013, approximately three-quarters of the District's eligible junior high and high school students had pre-enrolled. Of those that had pre-enrolled, not one white student chose to pre-enroll at East Side High School, but 216 African-American students pre-enrolled at that school. Similarly, not a single white student pre-enrolled at D.M. Smith Middle School, but 134 African-American students pre-enrolled there. In addition to noting the obvious racial imbalance suggested by this data, the United States pointed out that, depending upon where the undecided African-American students chose to pre-enroll, there was a real possibility that Margaret Green Junior High School and Cleveland High School might be oversubscribed and D.M. Smith Middle School and East Side High School would not have enough students to operate economically. The district court denied the Rule 59 motion. It stated that it had considered the pre-enrollment data and the response of the United States but that it would not alter its judgment. In reaching this conclusion, the district court stated that it "gives credence to the testimony of the African-American president of the District's school board, Maurice Lucas." Mr. Lucas had testified that he did not support consolidation, because it was not his intention to eliminate East Side High School and that he believed the identity of the two high schools was important to the community.

The United States appeals the district court's order instituting the freedom of choice plan as a desegregation remedy. Neither the United States nor the District appealed the district court's March 28, 2012 memorandum opinion, which found that the District had achieved integration at many of its

schools but found continuing segregation at East Side High School and D.M. Smith Middle School. [3]

II. Analysis

"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.*, 702 F.2d 1221, 1225 (5th Cir. 1983) (citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)). We review the district court's implementation of desegregation remedies for abuse of discretion. *Id.* We review conclusions of law *de novo*, and findings of fact for clear error. *Id.* Here, neither 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, and that further remedies were not necessary in the District's elementary schools. On appeal, the United States asks us to remand so that the district court can consider alternative plans to desegregate D.M. Smith and East Side High, including consolidation, while the District requests that we affirm the implementation of the freedom of choice plan.

In desegregation cases, the objective is "to eliminate from the public schools all vestiges of state-imposed segregation." *Swann*, 402 U.S. at 15. "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about. . . ." *Green v. Cnty. Sch. Bd. of New Kent*

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[3] The district court also determined that, despite its good faith effort, the District was not in compliance with the faculty assignment component of the extant desegregation orders. The district court ordered the District to submit a plan with "real prospects for achieving a ratio of African-American to Caucasian teachers and administration in each school to approximate the race ratio throughout the districtwide school system." However, the subsequent order regarding the desegregation remedy failed to address faculty assignment, an issue the parties only briefly mention on appeal. On remand, the district court should clarify the status of this issue, particularly whether there is a continuing violation, and if so, the remedy to be implemented.

Cnty., Va., 391 U.S. 430, 436 (1968). The duty is not simply to eliminate express racial segregation: where *de jure* segregation existed, the school district's duty is to eliminate its effects "root and branch." *Id.* at 437-38. Now, six decades after *Brown v. Topeka Board of Education*, 347 U.S. 483 (1954), "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." *Green*, 391 U.S. at 439; *see Davis v. E. Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1437 (5th Cir. 1983).

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. *See Green*, 391 U.S. at 439-40. Likewise, some racially homogeneous schools within a school system do not necessarily violate the federal Constitution. *See Swann*, 402 U.S. at 25-26; *Valley*, 702 F.2d at 1226; *see also Flax v. Potts*, 915 F.2d 155, 160-62 (5th Cir. 1990). However, "[t]he retention of all-black or virtually all-black schools within a dual system is nonetheless unacceptable where reasonable alternatives may be implemented." *Valley*, 702 F.2d at 1226. 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. *See Flax*, 915

F.2d at 161 (finding that fourteen schools that were over 80% black did not preclude declaration of unitary status in large urban district with 98 total schools, where it was "essentially uncontroverted" that the district had succeeded in "removing the vestiges of the dual system"); *Ross v. Houston Independent School District*, 699 F.2d 218, 226-28 (5th Cir. 1983) (finding that thirty-three schools that were 90% black did not preclude declaration of unitary status in large urban district with 226 schools facing "unusual, perhaps unique, problems," including rapidly changing demographics and housing patterns).

We acknowledge that confecting a remedy in these types of cases can be especially difficult. No matter how noble the effort, the effect can be less than adequate. Unlike the district court's earlier opinion finding that further remedies were necessary, the remedial order adopting the freedom of choice plan lacks explanation. While we are "mindful that the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies," *Valley*, 702 F.2d at 1225 (internal quotation marks omitted) (quoting *Swann*, 402 U.S. at 15), we are unable to evaluate the soundness or reasoning of the decision, where it is not discussed in the opinion. Although we do not hold that the freedom of choice plan is necessarily inadequate, there are apparent deficiencies in the plan that were not addressed by the district court. First, 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 at D.M. Smith Middle School or East Side High School. African-American students residing in the eastern attendance zone have availed themselves of the now abolished majority-to-minority transfer policy over the years, but 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. The pre-enrollment data for the 2012-13 school year, submitted while the Rule 59 motion was pending, indicated that the order had no effect on the status quo: no white student pre-enrolled at D.M. Smith or East Side High. Albeit not part of the record before the district court, the District at oral argument acknowledged that the plan has now been in effect for over a year, and no white student has enrolled at D.M. Smith or East Side High. In defending the freedom of choice plan on appeal, the District does not even forcefully argue that the plan is likely to work at D.M. Smith Middle School and East Side High School, instead focusing on its successes at other schools in the district. Lastly, the district court did not explain its reasoning for rejecting the District's proposed desegregation plan of revitalizing and expanding magnet programs at the black schools, or the United States's proposed remedy of consolidation, and instead adopted a freedom of choice plan that neither party had suggested. The district court encouraged the District to continue to strengthen its magnet programs but did not order the magnet program plan to be implemented.

"The findings and conclusions we review must be expressed with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." *Davis v. E. Baton Rouge Parish Sch. Bd.*, 570 F.2d 1260, 1263-64 (5th Cir. 1978). The district court did not make clear its conclusion that the problem of the continuing racial isolation and racial identifiability of D.M. Smith Middle School and East Side High School would be resolved by the implementation of a freedom of choice plan. We do not hold that the freedom of choice plan is constitutionally inadequate or could form no part of a desegregation plan. But the district court should consider, review and explain why it is discarding some remedies in favor of others. If the district court concluded that the freedom of choice plan was likely to be successful, it

must explain why and consider the contradictory evidence in the record. On appeal, the District strongly implies that, essentially, there is no more that it can do to desegregate D.M. Smith and East Side High. The district court, however, concluded that the District should remain under federal supervision and ordered the District to propose a new desegregation plan for those two schools. Further, the District has not moved for unitary status. However, if the district court's remedy is premised on a conclusion that, aside from the freedom of choice plan, there is nothing more that the District can or should do to desegregate D.M. Smith and East Side High, that conclusion should be justified. If the district court's order is premised on avoiding "white flight" that may occur as a result of other proposed remedies such as consolidation, it must grapple with the complexities of that issue. *See United States v. Pittman by Pittman*, 808 F.2d 385, 391 (5th Cir. 1987) (noting that white flight may be one legitimate concern "when choosing among constitutionally permissible plans" but "cannot be accepted as a reason for achieving less than complete uprooting of the dual public school system"). While we do not require the district court to provide us a granular report regarding every option considered, 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.

Given the available statistics showing 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, the district court's conclusion that a freedom of choice plan was the most appropriate desegregation remedy at those schools certainly needed to be expressed with sufficient particularity to enable us to review it. *See Davis*, 570 F.2d at 1263-64. We therefore reverse and remand for a more explicit explanation of the

reasons for adopting the freedom of choice plan, and/or for consideration of the alternative desegregation plans proposed by the parties, as appropriate.

III. Conclusion

For the foregoing reasons, we REVERSE and REMAND to the district court for further proceedings consistent with this opinion.

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

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

PLAINTIFF-INTERVENOR UNITED STATES' DISCOVERY REQUESTS FOR DEFENDANT CLEVELAND SCHOOL DISTRICT

Pursuant to Rules 26, 33, and 34 of the Federal Rules of Civil Procedure ("FRCP") and Local Uniform Civil Rule 5(d)(3) of the Northern District of Mississippi, and as directed by the Court's October 25, 2016 Order, Plaintiff-Intervenor United States of America ("United States") propounds the following requests for production of documents and interrogatories on the Cleveland School District ("CSD" or "District"). Consistent with the Court's Order, responses to these requests are due within fourteen (14) days of service of these requests, (*i.e.*, on or before November 18, 2016).

I. INSTRUCTIONS

These discovery requests seek information in the possession, custody, control, or knowledge of CSD and/or its employees, including information contained in documents as defined below or in any other source of data known or available to CSD, its attorneys, agents,

employees, representatives, officers, board members, and/or any other person acting with or on CSD's behalf. All responses will be deemed to reflect the knowledge of CSD, and all responses should indicate the person principally responsible for providing the information contained in the responses.

Pursuant to FRCP 26(e)(1), CSD is under a duty to supplement or amend responses to these discovery requests and to update its responses in a timely manner on a regular basis.

Additionally, pursuant to FRCP 33(b)(3) and (b)(5), CSD's responses to Interrogatories must be made under oath and be signed by the person making the response.

Whenever the information requested in these discovery requests is not readily available in the form requested but is available, or can more easily be made available, in a different form, CSD may make the information available in such different form so long as the information requested is intelligible and does not result in the degradation in quality of the information contained therein.

If CSD refuses to respond to any interrogatory or document request, or any subpart thereof, on the ground of privilege, identify:

a) the nature of the privilege, including work product;

b) if the privilege is being asserted in connection with a claim or defense governed by state law, the state's privilege rule being invoked;

c) with respect to each document:
   i. the type of document,
   ii. the general subject matter of the document,
   iii. the date of the document,
   iv. the author(s) and addressee(s) of the document and the relationship of the author(s) and the addressee(s) to each other, and
   v. all recipients of the document; and

d) with respect to each oral communication:
   i. the name of the person(s) making the communication,
   ii. the names of all persons present while the communication was made,

iii. the relationship of the person present to the person making the communication,
iv. the date and place of the communication, and
v. the general subject matter of the communication.

Provide all hard copy documents scanned and saved to a CD, DVD, or USB drive in PDF or TIFF format, or emailed to counsel for the United States if the attachments are less than 10 MB in size. Please provide all electronic files maintained in widely used software packages (*e.g.* Microsoft Word, Microsoft Excel, Word Perfect) in native electronic format also saved to a CD, DVD, or USB drive.

Email all responses under 10 MB to aziz.ahmad@crt.usdoj.gov and send other responses via FedEx, UPS, or another courier service to Aziz Ahmad, at the following address:

U.S. Department of Justice, Civil Rights Division
Educational Opportunities Section
601 D Street, NW, Suite 4300
Washington, DC 20004

If CSD has any questions regarding these instructions, please contact counsel for the United States.

II. DEFINITIONS

Unless the context of each request clearly indicates otherwise, the following words shall be deemed to mean the following:

1. The present tense includes the past and future tenses. Words in the singular and plural tenses are interchangeable; the masculine and feminine forms are interchangeable.

2. "Administrator" means any person who is responsible for or has authority over any area of CSD's operations, such as student assignment and discipline or faculty recruitment and assignment, including but not limited to principals, assistant principals, and the directors of all departments, such as accounting, elementary curriculum and instruction, gifted/talented programs, guidance and counseling, and human resources.

3. “All” means “any and all;” “any” means “any and all.”

4. “And” as well as “or” shall be construed conjunctively or disjunctively as necessary to make the discovery request inclusive rather than exclusive.

5. “CSD” or “District” means the Cleveland School District, including its agents, employees, representatives, officers, board members, or any person acting or purporting to act on its behalf.

6. “Communication(s)” means any oral or written statement of any nature, including but not limited to correspondence, memoranda, electronic mail, conversations, meetings, conferences, dialogues, discussions, interviews, consultations, agreements, and other interactions between two or more persons. When describing “communication(s),” whether written or oral, indicate the date and place it occurred; the method of communication; the identity of each person who participated in or was present during any part of the communication; the substance of what was stated by each person participating in the communication; and all documents that record, summarize, or reference the communication.

7. “Describe”, “description”, “explain”, and “explanation” mean provide, in detail, all available information about the requested topic, including any relevant dates and identity of all individuals involved.

8. “Document(s)” means any written or otherwise recorded graphic matter of any type and any electronically stored information as defined in FRCP 34(a).

9. “Modified Plan” means the proposed desegregation plan filed by the District with the Court on October 14, 2016.

10. “Including” means “including but not limited to.”

11. “Regarding,” “reflecting,” “concerning,” “pertaining to,” and “relating to” mean constituting, about, with regard to, with respect to, relating, concerning, discussing, describing, reflecting, dealing with, in any way pertinent to, or referring in any way to the referenced subject matter.

12. “School Board” means the Board of Trustees of the Cleveland School District, including its agents, employees, representatives, officers, board members, or any person acting or purporting to act on its behalf.

III. REQUESTS FOR PRODUCTION OF DOCUMENTS

Please produce the following documents and communications:

Student Assignment

1. For the 2015-16 and 2016-17 school years, a spreadsheet in a native electronic format (such as Microsoft Excel or a compatible program) containing the unique student records for all students currently enrolled in the Cleveland School District, including the following fields: student name; student ID; student 911 address (a.k.a. emergency contact address), city, state, and zip code; grade level; school name; school number; and, student race/ethnicity.
2. All documents that describe or track student departure from CSD (*i.e.*, students withdrawing or failing to reenroll) between August 2012 and November 2016, including individual student or parent exit interviews and related notes; communications describing reason(s) for departure; written notices of withdrawal, transfer, intent not to reenroll, and/or requests for provision/transmittal of academic record; and any aggregate tally or analysis.
3. For each student referenced in the affidavits of Hayes Cooper Principal Renee Lamastus and Margaret Green Principal Archie Mitchell (*See* Dkt. #227-2), the name and race of the

student, contact information for a parent/guardian, and the student's current school, if known to the District.

Faculty and Staff

4. All analyses conducted by the District since May 22, 2015 regarding the impact of consolidation under the Court's Plan and the Modified Plan on District employees, including all criteria for any predicted reductions in force or necessary reassignments, re-training, course configuration and curriculum adjustments.

Facilities

5. Consistent with the Court's September 22, 2016 Order (Dkt. #233 at 3), all documents pertaining to all facilities assessments conducted by the District since May 22, 2015, including design plans, construction documents, cost estimates and construction schedules for all completed, projected or desired renovations and repairs.
6. A current floor plan of the Walter Robinson Achievement Center ("WRAC"), including square footage, present usage of spaces, and date(s) and descriptions of all completed renovations, repairs, or additions to the building since its initial construction.
7. All documents related to the 2012 addition and renovation at D.M. Smith, including the architect's submitted designs, project cost estimates, project schedule(s), construction drawings, "as built" drawings if they exist, final costs and actual construction timeline (from conception to completion).
8. All documents related to the 2012 addition and renovation at East Side High School, including the architect's submitted designs, project cost estimates, project schedule(s), construction drawings, "as built" drawings if they exist, final costs and actual construction timeline (from conception to completion).

9. All documents describing CSD's plan to accommodate the projected overflow of high school students in the 2017-2018 school year at Cleveland High School under the Modified Plan.
10. All documents describing CSD's plan for the transition of athletic teams and extracurricular activities to the Cleveland High School/Margaret Green campus under the Modified Plan, including plans for the use of gym facilities, indoor practice/training facilities, playing fields, practice fields, stands and parking.

Finances

11. For the two most recent fiscal years, a copy of the District's annual operating budget, district-wide and by school, and all financial reports or statements showing the District's annual receipts and expenditures, district-wide and for each school in the District.
12. All documents demonstrating and describing all funding disparities between the two high schools and between the two middle schools, including but not limited to per-pupil funding.
13. All documents relating to CSD's outstanding 16th section loans, along with amortizations schedules.
14. All documents describing CSD's annual expendable 16th section interest and all other expendable 16th section revenues.
15. All documents relating to how the issuance of a three-mill note will fund the proposed construction contemplated by the Modified Plan and any alternative sources of funding that have been discussed or considered since May 13, 2016.

School Board and Community

16. All documents related to each alternative desegregation plan considered by the School Board (in addition to the Court's Plan and the Modified Plan) between May 22, 2015 and October 14, 2016.

17. All School Board minutes, agendas, or other Board documents describing plans for East Side and D.M. Smith facilities under the Modified Plan.
18. All video or audio recordings of School Board meetings held since May 13, 2016.
19. All written statements or communications opposing or supporting the District's appeal of the Court's May 13, 2016 Order or the District's Modified Plan received by or in the possession of any and all members of the School Board, the superintendent, any and all School Board employees, jointly or separately, or counsel for the School Board.
20. All written statements or communications opposing or supporting the Modified Plan's dependence upon the issuance of a three-mill note to fund the proposed construction contemplated by the Modified Plan, received by or in the possession of any and all members of the School Board, the superintendent, any and all School Board employees, jointly or separately, or counsel for the School Board.
21. All documents relating to each parent or community survey conducted by the District or on its behalf since May 22, 2015, including all service contracts; statement(s) of purpose; statement(s) of methodology; criteria for sample selection (including how and by whom participants were selected); survey questions; instructions and training documents; scripts; call sheets; written correspondence with survey recipients; collected survey data; summaries of the information, reports or comments made about the survey to or among School Board members jointly or separately; and any other reports or other analysis of results.
22. A list of all persons included in the sample for the survey, indicating the individual's race, school(s) attended by their child(ren), and whether the individual responded to the survey.

IV. INTERROGATORIES

1. Please describe all Cleveland-specific evidence, beyond enrollment data, that the District is relying on to support its argument that white flight is occurring, or will occur, under the Adopted Plan.
2. For each student who has departed from CSD (*i.e.*, students withdrawing or failing to reenroll) between August 2012 and November 2016, please provide the student's name, student ID, race/ethnicity, grade level at departure, school, date of departure, new school or school district if known, and the reason(s) for departure if known.
3. Please describe the parent survey referenced by counsel for the District during the October 25, 2016 status conference with the Court, including the survey's cost, purpose, design, methodology, administration, and planned use.
4. Please identify/describe all individuals or entities that participated in the design, administration, or analysis of the survey and responses, and describe the role of each such individual or entity.
5. Please describe all alternative desegregation plans considered by the School Board between May 22, 2015 and October 14, 2016, including the reasons why those alternatives were not ultimately selected
6. Please describe each community member statement, oral or written, submitted to the School Board, counsel for the School Board, or Administrators supporting the District's Modified Plan.
7. Please describe each community member statement, oral or written, submitted to the School Board, counsel for the School Board, or Administrators opposing the District's Modified Plan.

8. Please provide student capacity numbers for each school facility in the District and an explanation of how those numbers were calculated and by whom.
9. Please describe the current use of the WRAC, including all programming available. Please also explain to which facility, if any, the District intends to transfer the WRAC's operations and programs under the Modified Plan.
10. Please describe the District's immediate and long-term plans for the East Side High facility under the Modified Plan. If it is the District's plan that the East Side High facility will be used as an elementary school for students currently attending Cypress Park Elementary (see statement attributed to CSD counsel in an October 25, 2016 article in *Mississippi Today*), please describe when this plan was adopted, the basis for the District's decision to put the building to this use, and all formal or informal plans CSD has made in furtherance of this use, including plans for renovations, estimated costs, or plans to revise attendance zones.
11. Please describe the District's plans for the Cypress Park facility under the Modified Plan.
12. Please describe the District's plans for the D.M. Smith facility under the Modified Plan.
13. Please describe the District's plans to accommodate the projected overflow of high school students in the 2017-2018 school year at Cleveland High School under the Modified Plan, including structures or buildings to be used, estimated cost, the number of students who will need to use overflow spaces, and the estimated amount of time students will need to use these structures as overflow space.
14. Please describe the District's plans to accommodate athletic teams and extracurricular activities at the Cleveland High School/Margaret Green campus under the Modified Plan, including plans for the use of gym facilities, indoor practice/training facilities, playing fields, practice fields, stands and parking.

15. Please explain any analysis the District has conducted as to the likelihood or consequence of a challenge by 20% of the District's registered voters to a duly published Board-adopted three-mill note resolution of intent.
16. Please explain any analysis the District has produced concerning the likelihood, in the event of an election, of passage of the Board's three-mill note resolution of intent.
17. Please explain the process by which a three-mill note would be sold, either through competitive bid or a negotiated sale, including in what market(s) the note would be made available for purchase.
18. Please describe what, if any, community opposition, oral or written, the District has received in response to the Modified Plan's call for the issuance of a three-mill note.

Dated November 4, 2016:

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EXHIBIT C

ADDENDUM

District-Wide Student Enrollment					
	African-American	White	Hispanic	Asian	Native-American
1967-1968[1]	55.7%	43.2%	0.3%	0.7%	0.0%
1969[2]	56.1%	42.9%	1.1%		
1970[3]	56.1%	42.7%	0.5%	0.7%	0.0%
1980[4]	59.5%	39.7%	0.4%	0.4%	0.0%
1987[5]	67.4%	32.6%	--	--	--
2005-2006[6]	67.2%	30.8%	1.2%	0.7%	0.1%
2006-2007[7]	70.3%	27.7%	1.2%	0.7%	0.1%
2007-2008[8]	66.1%	31.2%	1.8%	0.9%	0.0%
2008-2009[9]	67.8%	29.4%	2.0%	0.8%	0.0%
2009-2010[10]	67.4%	29.6%	2.1%	0.9%	0.0%

[1] USCA5 165.

[2] RE Tab 5 at 4. The district court identified non-African-American, non-white students as "other races." RE Tab 5 at 4.

[3] USCA5 1492-1493.

[4] USCA5 1512-1513.

[5] USCA5 153-154. This data included only African-American and white students.

[6] USCA5 219.

[7] USCA5 243-244, 559-560.

[8] USCA5 242-244, 558-559.

[9] USCA5 236, 261-262, 585-586.

[10] USCA5 328, 659.

District-Wide Student Enrollment (*continued*)					
	African-American	White	Hispanic	Asian	Native-American
2010-2011[11]	66.4%	30.2%	2.4%	0.9%	0.1%
2011-2012[12]	67.1%	29.0%	2.8%	1.0%	0.1%
2012-2013[13]	66.5%	29.1%	3.1%	1.2%	0.1%

[11] USCA5 531.

[12] USCA5 1034.

[13] USCA5 1649. The percentage of Asian students includes one student identified as Pacific Islander.

D.M. Smith Middle School[14] Student Enrollment					
	African-American	White	Hispanic	Asian	Native-American
1967-1968	--	--	--	--	--
1970	--	--	--	--	--
1980	--	--	--	--	--
1987[15]	99.4%	0.6%	--	--	--
2005-2006[16]	99.1%	0.9%	0.0%	0.0%	0.0%
2006-2007[17]	99.1%	0.9%	0.0%	0.0%	0.0%
2007-2008[18]	100.0%	0.0%	0.0%	0.0%	0.0%
2008-2009[19]	99.5%	0.5%	0.0%	0.0%	0.0%
2009-2010[20]	100.0%	0.0%	0.0%	0.0%	0.0%
2010-2011[21]	100.0%	0.0%	0.0%	0.0%	0.0%
2011-2012[22]	100.0%	0.0%	0.0%	0.0%	0.0%
2012-2013[23]	99.7%	0.0%	0.3%	0.0%	0.0%

[14] At times this school did not exist, was known as Eastwood Junior High School, and was consolidated with East Side High School. See pp. 6, 9, *supra*; USCA5 35, 117, 944, 1493, 1513.

[15] USCA5 153-154. See Addendum note 5, *supra*.

[16] USCA5 219.

[17] USCA5 243, 559.

[18] USCA5 242-243, 558-559.

[19] USCA5 236, 261-262, 585-586.

[20] USCA5 333, 664.

[21] USCA5 531.

[22] USCA5 1034.

[23] USCA5 1649.

East Side High School Student Enrollment					
	African-American	White	Hispanic	Asian	Native-American
1967-1968[24]	100.0%	0.0%	0.0%	0.0%	0.0%
1970[25]	97.8%	2.1%	0.0%	0.1%	0.0%
1980[26]	99.6%	0.4%	0.0%	0.0%	0.0%
1987[27]	100.0%	0.0%	--	--	--
2005-2006[28]	99.8%	0.2%	0.0%	0.0%	0.0%
2006-2007[29]	99.8%	0.2%	0.0%	0.0%	0.0%
2007-2008[30]	99.8%	0.2%	0.0%	0.0%	0.0%
2008-2009[31]	100.0%	0.0%	0.0%	0.0%	0.0%
2009-2010[32]	99.7%	0.3%	0.0%	0.0%	0.0%
2010-2011[33]	99.1%	0.6%	0.0%	0.3%	0.0%
2011-2012[34]	99.7%	0.0%	0.0%	0.3%	0.0%
2012-2013[35]	99.2%	0.0%	0.6%	0.3%	0.0%

[24] USCA5 165.

[25] USCA5 1492-1493.

[26] USCA5 1512-1513.

[27] USCA5 153-154. See Addendum note 5, *supra*.

[28] USCA5 219.

[29] USCA5 243, 559.

[30] USCA5 242-243, 558-559.

[31] USCA5 236, 261-262, 585-586.

[32] USCA5 334, 665.

[33] USCA5 531.

[34] USCA5 1034.

[35] USCA5 1649.

Margaret Green Junior High School[36] Student Enrollment					
	African-American	White	Hispanic	Asian	Native-American
1967-1968[37]	1.6%	96.2%	0.5%	1.7%	0.0%
1970	--	--	--	--	--
1980	--	--	--	--	--
1987[38]	33.5%	66.5%	--	--	--
2005-2006[39]	47.0%	50.8%	1.1%	1.1%	0.0%
2006-2007[40]	42.2%	54.7%	1.2%	1.8%	0.0%
2007-2008[41]	40.4%	55.9%	2.8%	0.9%	0.0%
2008-2009[42]	42.7%	53.6%	2.8%	0.9%	0.0%
2009-2010[43]	46.2%	49.3%	2.6%	2.0%	0.0%
2010-2011[44]	45.7%	48.2%	4.3%	1.6%	0.2%
2011-2012[45]	45.1%	48.9%	4.2%	1.4%	0.4%
2012-2013[46]	43.4%	49.9%	5.2%	1.3%	0.2%

[36] At times this school was consolidated with Cleveland High School. See p. 9, *supra*; USCA5 1493, 1513.

[37] USCA5 165.

[38] USCA5 153-154. See Addendum note 5, *supra*.

[39] USCA5 219.

[40] USCA5 243, 559.

[41] USCA5 242-243, 558-559.

[42] USCA5 236, 261-262, 585-586.

[43] USCA5 336, 667.

[44] USCA5 531.

[45] USCA5 1034.

[46] USCA5 1649.

Cleveland High School Student Enrollment					
	African-American	White	Hispanic	Asian	Native-American
1967-1968[47]	0.8%	96.8%	0.0%	2.4%	0.0%
1970[48]	18.2%	80.1%	0.4%	1.3%	0.0%
1980[49]	23.8%	74.4%	0.9%	1.0%	0.0%
1987[50]	36.8%	63.2%	--	--	--
2005-2006[51]	39.4%	58.4%	1.1%	1.1%	0.0%
2006-2007[52]	39.4%	58.3%	1.6%	0.7%	0.0%
2007-2008[53]	42.0%	54.6%	1.9%	1.4%	0.0%
2008-2009[54]	46.2%	50.5%	1.6%	1.6%	0.0%
2009-2010[55]	45.7%	50.7%	2.1%	1.5%	0.0%
2010-2011[56]	45.2%	50.4%	2.3%	2.1%	0.0%
2011-2012[57]	47.0%	47.1%	3.6%	2.3%	0.0%
2012-2013[58]	45.5%	47.1%	4.4%	3.0%	0.0%

[47] USCA5 165.

[48] USCA5 1492-1493.

[49] USCA5 1512-1513.

[50] USCA5 153-154. See Addendum note 5, *supra*.

[51] USCA5 219.

[52] USCA5 243, 559.

[53] USCA5 242-243, 558-559.

[54] USCA5 236, 261-262, 585-586.

[55] USCA5 331, 662.

[56] USCA5 531.

[57] USCA5 1034.

[58] USCA5 1649.