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

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

REPLY BRIEF IN SUPPORT OF
UNITED STATES' MOTION TO ALTER OR AMEND JUDGMENT

In its Response to the United States' Motion to Alter or Amend Judgment [Doc. 84] ("Response"), the Cleveland School District ("Cleveland" or "District") misstates the controlling Supreme Court and Fifth Circuit case law that compels this Court to set aside the "freedom of choice" plan for students in grades 6-12 that the Court ordered on January 24, 2013. The District also misconstrues its continuing obligations to desegregate the all-black East Side High School ("East Side") and D.M. Smith Middle School ("D.M. Smith"), suggesting that this Court could find these schools "desegregated" even if they remain one-race black schools. Consolidation is a workable approach that would promptly eliminate the continuing racial identifiability of these two schools, and, given that option, neither the Constitution nor this Court can tolerate "freedom of choice" or any other remedy that would serve to maintain the status quo.

The District, as it has done repeatedly throughout this litigation, points to its record in desegregating some of its schools to argue that it need not do anything more for East Side or D.M. Smith other than continue to grant white students the choice to enroll in those schools. *See* Resp. at 4-5. This is a choice every white student in the District had before the Court's decision in January through the majority-to-minority transfer system, yet no white student has ever pursued that option as a full-time student. *See* United States' Mem. of Law in Support of Motion to Alter or Amend Judgment [Doc. 81] ("Opening Brief"). Regardless, the issue now before the Court is not whether some schools in the District are desegregated. The sole question is what remedy will be effective in eradicating the remaining vestiges of segregation in the District's formerly *de jure* black middle school and high school—namely, the continuing racial identifiability of East Side and D.M. Smith as "black" schools.

"Freedom of choice" is not the answer. "Freedom of choice" cannot reasonably be expected to alter the racial composition of East Side or D.M. Smith, and this Court should amend its order to replace "freedom of choice" with a consolidation plan that will work now. The United States therefore reiterates its proposal that the Court order the parties to engage in negotiations to devise an acceptable consolidation plan to be implemented by the 2013-14 school year, or to simply order such a plan.[1]

[1] Contrary to the District's assertion that the United States has not proposed an alternative plan, Resp. at 1, the United States has urged this Court order the District to develop and adopt a consolidation plan. *See* Opening Br. at 3-4; Hr'g Tr. 112-13, Dec. 11, 2012. The United States' position is that any consolidation plan resulting in a single-grade structure for the middle and high school grades would address the District's desegregation obligations related to student assignment, and that the District is in the best position to devise a consolidation plan meeting local needs (either on its own or in consultation with the United States). Opening Br. at 23. The United States is prepared to submit a formal plan for the Court's consideration if the Court so directed.

I. "Freedom of choice" is unconstitutional in this case.

A. Race-neutral admissions policies are insufficient to eliminate the vestiges of segregation "root and branch."

The District posits that the "freedom of choice" plan "cuts to the heart of *Brown II* where the Supreme Court found a school district's constitutional obligation is 'to achieve a system of determining admission to public schools on a non-racial basis," because "[a]n open enrollment process is non-racial." Resp. at 3-4 (quoting *Brown v. Board of Educ. of Topeka*, 349 U.S. 294, 300-01 (1955)). This narrow interpretation of *Brown*'s mandate was foreclosed by the Supreme Court's holding in *Green v. County School Board of New Kent County*, in which the Court found that "the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system." 391 U.S. 430, 437 (1968). The Fifth Circuit has repeatedly held that race-neutral admission policies are insufficient to eradicate the vestiges of *de jure* segregation. *See, e.g., United States v. Board of Educ. of Baldwin Cnty.*, 417 F.2d 848, 850 (5th Cir. 1969) ("The schools from which the Negroes come must be desegregated as well as the schools to which they go."); *Adams v. Mathews*, 403 F.2d 181, 187 (5th Cir. 1968) (quoting *Green*, 391 U.S. at 437); *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 845 (5th Cir. 1966) ("The *Brown* case is misread and misapplied when it is construed simply to confer upon Negro pupils the right to be considered for admission to a white school.") (internal quotation marks omitted).

B. Factual differences are not sufficient to distinguish relevant Fifth Circuit cases holding "freedom of choice" plans unconstitutional.

Confronted with the overwhelming body of Fifth Circuit case law in which "freedom of choice" plans were found to be constitutionally inadequate, the District incorrectly argues that

these cases are factually distinguishable. Resp. at 4-7. The District asserts that the constitutional principle that "freedom of choice" must be rejected where better alternatives exist is inapplicable here because, among other things, some of Cleveland's schools are desegregated and because "there is no evidence of violence or intimidation toward black children" preventing their enrollment in the formerly white Cleveland High School ("Cleveland High") and Margaret Green Junior High School ("Margaret Green"). *See id.* at 6-7.

The District misstates the controlling case law by suggesting that the Fifth Circuit only struck down "freedom of choice" plans in school districts with "racially polarized factual scenarios" in which all of a district's schools remained one-race schools. Resp. at 4. The Fifth Circuit struck down "freedom of choice" plans in many cases in which both formerly *de jure* black and formerly *de jure* white schools had failed to integrate, including those cited by the District. *See* Resp. at 5. Yet the Fifth Circuit never required such racial polarization to find "freedom of choice" plans ineffective in eliminating all vestiges of segregation. Moreover, the Fifth Circuit has consistently and expressly held that a "freedom of choice" plan in which one-race schools of either race remained was ineffective and thus constitutionally inadequate. *See Hall v. St. 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, *or* only a small percentage of Negroes enrolled in formerly all-white schools, then the plan, as a matter of law, is not working.") (emphasis added); *Adams v. Mathews*, 403 F.2d 181, 188 (5th Cir. 1968) ("If in a school district there are still all-Negro schools *or* only a small fraction of Negroes enrolled in white schools . . . then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green*.") (emphasis added).

The District incorrectly states that "[t]he racial composition of the District's schools is markedly different from the district in *Green* and every other district where courts rejected 'freedom of choice' plans." Resp. at 5. Although the District cites several cases in which formerly *de jure* white schools failed to attract many black students, Resp. at 5-6, it ignores the numerous cases cited by the United States in which the Fifth Circuit struck down "freedom of choice" plans where formerly *de jure* black schools remain racially identifiable, or as here, 100% black. *See* Opening Br. at 8-11. In each of these cases, the formerly *de jure* black schools enrolled no or very few white students under a "freedom of choice" plan. *See id*. As the District concedes, the current enrollment in the middle schools and high schools in the District is no different: not a single white student is enrolled at the formerly black East Side or D.M. Smith. Resp. at 2.

The Fifth Circuit has consistently rejected "freedom of choice" plans in cases where, as here, formerly white schools had significant black enrollment but one-race black schools still remained. In *Lee v. Marengo County Board of Education*, the Fifth Circuit summarily reversed the district court-ordered "freedom of choice" plan where black enrollment at the two formerly white K-12 schools in the 1978-79 school year was 41 and 61 percent black at the K-6 level and 11 and 46 percent at the 7-12 level, while three formerly black schools remained 100 percent black. 588 F.2d 1134, 1135-36 (5th Cir. 1979). In *Beaumont Independent School District v. Department of Health, Education & Welfare*, the Fifth Circuit rejected a "freedom of choice" plan and directed the district court to "require the School District to institute an effective plan which is constitutionally sound." 804 F.2d 855, 856 (5th Cir. 1974). In *Beaumont*, all seven formerly black schools remained 100 percent black in the 1973-74 school year, and the black enrollment at the 14 formerly white schools ranged from 5.5 to 88.9 percent (exceeding 30

percent in seven of those schools). *Id.* In *Hall*, the Fifth Circuit rejected "freedom of choice" plans in 38 districts in which the percentage of black students in formerly white schools ranged from 0.96 to 45.9 percent in the 1969-70 school year, and, like Cleveland, virtually no white students were enrolled in any formerly black schools. 417 F.2d at 813-19. In *Baldwin County*, the Fifth Circuit struck down a "freedom of choice" plan where two of the district's 11 schools remained all-black. 417 F.2d at 850. Substantial enrollment of black students in formerly white schools is no bar to a finding that "freedom of choice" is ineffective and constitutionally inadequate in desegregating remaining formerly all-black schools.

This Court has already held that East Side and D.M. Smith were never desegregated, Mem. Op., Mar.28, 2012 [Doc. 43] ("2012 Opinion"), at 25-26 —and there is no factual dispute that these two schools are one-race black schools. *See* Resp. at 2. Thus, this District is squarely in line with the school districts whose "freedom of choice" plans were consistently rejected by the Fifth Circuit because they failed to integrate racially identifiable black schools.[2]

C. The Court must remove obstacles to white enrollment in the formerly black schools.

This Court should reject the District's legally unsupportable claim that "freedom of choice" plans are only unconstitutional where there are major obstacles to black students' enrollment in formerly *de jure* white schools, such as violence and intimidation. *See* Resp. at 6-7. The issue currently at bar in this case is not whether Cleveland's formerly *de jure* white schools have or will be successful in attracting black students. Instead, the issue is whether white students will enroll at East Side and D.M. Smith. The intimidation of *black* students, even if it were present in Cleveland, is not a barrier to *white* students' voluntary enrollment in

[2] Currently, 203 of the District's 509 black middle school students (39.9%) attend Margaret Green. Resp., Ex. E [Doc. 84-5]. 278 of the District's 643 black high school students (43.2%) attend Cleveland High. *Id.* The majority of black middle and high school students—671 of 1152 (58.2%) attend D.M. Smith and East Side. *Id.*

formerly *de jure* black schools. The real obstacles to white enrollment—the vestigial racial identifiability of East Side and D.M. Smith as "black" schools and the related stigma against attending those schools—have prevented and will continue to stymie white enrollment in those schools as long as white enrollment remains non-existent there. These are the obstacles that must be addressed in an effective remedial plan.

II. Cleveland's failure to desegregate East Side and D.M. Smith is not a consequence of factors beyond the District's control.

In its Response, the District once again repeats the arguments it made two years ago in opposition to the United States' Motion for Further Relief, including that "demographic factors" excuse it from liability for desegregating East Side and D.M. Smith and that one-race schools are acceptable because of the overall "interracial exposure" in the District. Resp. at 8-10. For the reasons summarized below and explained at length in the United States' October 26, 2011 Reply Brief in Support of its Motion for Further Relief [Doc. 31], this Court should once again reject these arguments and order a consolidation plan resulting in meaningful desegregation.

A. This Court has already held that the racial identifiability of East Side and D.M. Smith is traceable to the prior constitutional violation, and that effective steps must be taken to meaningfully desegregate these schools.

The District suggests that the Court may disregard the fact that East Side and D.M. Smith are one-race "black" schools, asserting that "the failure of white students to enroll [at East Side and D.M. Smith] is not the responsibility of the District" and that "demographic factors and private choices have impacted the racial enrollment of East Side and D.M. Smith." Resp. at 10. That is contrary to this Court's earlier holding that "no data before the Court shows that Eastside High was at any point desegregated and demographics intervened . . . [or] that D.M. Smith Middle School was ever meaningfully desegregated." 2012 Op. at 25-26. This Court should

reject the District's overt attempt to challenge the Court's order that the District must take steps to desegregate East Side and D.M. Smith. *See* 2012 Op. at 24-26, 36.

B. The District's arguments in favor of one-race schools should be rejected.

Although the District is correct that the Fifth Circuit has, in some circumstances, tolerated the continued existence of one-race schools, *see* Resp. at 9, none of those circumstances is present in this case. First, the one-race schools here are not the product of intervening changes that slowed or reversed past desegregation. *See Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 224 (5th Cir. 1983). As this Court already found, demographics did not intervene to reverse previous desegregation; rather, no desegregation of East Side or D.M. Smith ever occurred. 2012 Op. at 24-26. Moreover, Cleveland is not a large urban district with insurmountable logistical or geographical obstacles to further desegregation through consolidation. *Ross*, a case cited by the District in its Response, involved the desegregation of the Houston school district, "the fifth largest school district in the nation," which then had "201,960 students enrolled in its 226 schools." 699 F.2d 218, 220 (5th Cir. 1983). Given the district's large number of schools and the sizeable geographic area, the court found that school pairing would be impracticable, as it would involve one-race schools at distant geographic extremes of the district, and that the one-race schools resulted from intervening demographic changes and were not vestiges of past segregation. *Id.* at 224. Here, consolidation would involve two high schools and two middle schools, together enrolling just 1,762 students, in a geographically small district.

In a more factually similar case, the Fifth Circuit found one-race schools unacceptable. *See United States v. DeSoto Parish Sch. Bd.*, 574 F.2d 804 (5th Cir. 1978). In *DeSoto*, the original desegregation plan was projected to result in desegregation at the district's formerly black and formerly white schools, but failed to result in any desegregation at four of the five

formerly black schools, which all remained 100 percent black. *Id.* at 811-12. As in Cleveland, the original plan included geographic attendance zones that were "in several instances . . . drawn around racially homogenous residential areas." *Id.* at 809. The Fifth Circuit found, as this Court did here, that the previously-ordered attendance zones "clearly affect the racial composition of schools," observing that "[v]irtually no white students are zoned to attend formerly black schools, a result achieved by the congruence of zone boundaries with racially homogenous neighborhoods and schools." *Id.* at 814. As in *DeSoto Parish*, "[n]o physical barriers, insuperable distances, or demographic obstacles prevent the assignment of students in ways that would alleviate the segregation still present" in Cleveland. *See id.* Given these circumstances, the Fifth Circuit concluded that a pairing plan was "a feasible and effective remedy" superior to the District's existing system, which included a "free choice" provision, and directed the district court to "implement a comprehensive plan to eliminate the one-race schools." *Id.* at 818-19.

C. An effective remedy must eliminate the continuing racial identifiability of East Side and D.M. Smith that is a vestige of prior segregation.

The District suggests that the United States argues that "a certain 'racial quota' must be met at D.M. Smith and East Side." Resp. at 8. To the contrary, the United States does not seek a specific percentage of black and white students to be enrolled at East Side or D.M. Smith for the District to become eligible for unitary status. However, a failure to overcome the racial identifiability of these schools through actual full-time enrollment of white students will prevent the District from attaining unitary status at some point. Although "[r]acial balance is not to be achieved for its own sake[,] [i]t is to be pursued when racial imbalance has been caused by a constitutional violation," *Freeman v. Pitts*, 503 U.S 467, 494 (1992), as it was here.

As this Court has already found, by any measure, East Side and D.M. Smith are racially identifiable, one-race schools.[3] The evidence before the Court conclusively demonstrates that white students' existing freedom to choose to enroll at East Side and D.M. Smith has resulted in no white enrollment. That cannot be expected to drastically change simply by abolishing zone lines, where, practically speaking, the choice of schools for virtually all of Cleveland's white students remains the same as it has been for many years.[4]

CONCLUSION

The United States respectfully requests that this Court reconsider the "freedom of choice" plan and either direct the parties to negotiate a consolidation plan for the middle and high school grade levels or order the District to implement a consolidation plan by the beginning of the 2013-2014 school year.

[3] At nearly 100% black enrollment, they exceed the District-wide average of 66.3% black by over 30 points. Under one definition, a school is racially identifiable where the proportion of students of one race is at least 75 percent. *See Estes v. Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 442 (1980); *Tasby v. Wright*, 713 F.2d 90, 97 n.10 (5th Cir. 1983). Federal courts have also used a deviation of 15-20 percentage points from District-wide averages as a measure of racial identifiability. *See, e.g.*, *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 319 (4th Cir. 2001) ("[P]lus/minus fifteen percent variance is clearly within accepted standards, and provides a reasonable starting point in the unitary status determination."); *Williams v. Kimbrough*, No. 65-11329, 2010 WL 1790516, at *5 n.4 (W.D. La. 2010) (using 20-point variance). Even with a 20-point variance from the District-wide average (at 86.3 percent black), the schools would still be well above the 75 percent threshold at which courts would consider them to be considered racially identifiable.

[4] There is no reason to expect that the forthcoming April 1 pre-enrollment figures to be submitted by the District will indicate interest by white students in attending East Side or D.M. Smith full-time next year.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2013, I served copies of the foregoing Reply Brief in Support of United States' Motion to Alter or Amend Judgment to the following counsel of record by electronic service through the court's electronic filing system:

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