

Exhibit C

Memorandum in Support of Petition to Amend Minn. Rule 3535

MEMORANDUM

From: Myron Orfield
To: Interested Parties
Re: Memorandum in Support of Petition to Amend Minn.Rule 3535
Date: May 30, 2014

In 1999, the Minnesota Department of Education issued its current Rule 3535, which addresses school segregation and integration.¹ It doing so it relied upon a 1998 Statement of Need and Reasonableness (“1998 SONAR”) which inaccurately advised that the State Board of Education’s earlier proposed rule was unconstitutional.² The 1998 SONAR incorrectly declared that the state of Minnesota, absent proof of intentional discrimination, did not have a compelling governmental interest in integrating its K-12 schools.³ Based on this inaccurate legal advice, the Department replaced an effective proposed rule that was fully authorized by the legislature, and consistent with the clear state policy of racial integration in schools, with a rule that has itself increased school segregation and is in direct conflict with clear state legislative policy that supports integration in schools.

I. New law and social science evidence has arisen since the rule’s promulgation that demonstrates that the existing Rule 3535 is no longer reasonable.

First, the United States Supreme Court has clarified beyond doubt that the 1998 SONAR’s legal conclusion – that diversity was no longer a compelling governmental interest in

¹ MINN R. 3535.0100-.0180 (2013).

² STATE OF MINN. DEP’T OF CHILDREN, FAMILIES, & LEARNING, STATEMENT OF NEED AND REASONABLENESS IN THE MATTER OF PROPOSED RULES RELATING TO DESEGREGATION: MINNESOTA RULES CHAPTER 3535 (3535.0100 TO 3535.0180) (1998) [hereinafter 1998 SONAR].

³ See *infra* Section I(a).

K-12 education – was completely incorrect. This inaccurate legal judgment was used to improperly gut the Board of Education proposed desegregation rule. Second, the United States Department of Education’s Office for Civil Rights has issued guidance which makes clear that the rule illegally exempts certain institutions and activities, such as charter school and open enrollment programs, from desegregation requirements. Third, new social science evidence demonstrates that the rule itself, particularly through its illegal exemption of charter schools and open enrollment, has led to a significant increase in school segregation in Minnesota.

The 1998 SONAR sharply restricted the earlier proposed desegregation rule on the basis of its conclusion that “recent cases . . . call[] into serious question whether it is permissible to have a rule which requires or even encourages race-based student assignments . . . absent a finding of intentional discrimination.”⁴ The SONAR predicted that the desegregation techniques used in the proposed rule were unconstitutional and would be struck down in federal court. The SONAR’s predictions have not proven correct. Instead, the United States Supreme Court in *Parents Involved in Community Schools v. Seattle School District* clarified beyond any doubt the legal inaccuracy of the 1998 SONAR, and confirmed that the State of Minnesota has always had a compelling interest in avoiding racial isolation and encouraging diversity even absent intentional discrimination.⁵

The current state rule exempts charter schools and the open enrollment system from the desegregation requirements. Since its promulgation, these programs have changed dramatically in scope and character, growing from small experiments into major educational alternatives enrolling one out of every eight Minnesota students. In May of 2014, the United States Department of Education Office for Civil Rights released an official guidance document stating

⁴ 1998 SONAR at 14.

⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

that desegregation policies must be applied to charter schools located within the geographic jurisdiction of a school district subject to a desegregation rule. Minnesota is currently the only state to explicitly exempt its schools from these requirements.

Finally, recent evidence shows that the unreasonable rule has caused a dramatic increase in school segregation in the metropolitan area, catalyzed by charter schools and transfers through open enrollment, but affecting schools throughout the region. Statistical measures of segregation have increased throughout the last decade and the process shows no sign of abating.

- a. The 1998 SONAR's legal conclusions were speculative and erroneous.

The 1998 SONAR relied upon an inaccurate statement of the existing law and an erroneous prediction of future legal developments. The SONAR concluded that diversity was not a compelling governmental interest in K-12 education absent proof of discrimination.⁶ In doing so it ignored clear controlling Supreme Court and Eighth Circuit precedent, a previous 1978 SONAR, and dozens of other federal and state cases. It also ignored two United States Supreme Court cases and many lower federal court precedents that had upheld the use racial ratios like those used by Minnesota. In support of its assertion, the SONAR inappropriately cited a number of cases which dealt with the higher education and employment context, and extrapolated from those cases to predict that Minnesota's existing policy of relying on flexible racial ratios would soon be disallowed. In *Parents Involved in Community School v. Seattle School District*, the United States Supreme Court directly addressed the issues raised in the SONAR.⁷ Instead of barring all consideration of race as predicted, it confirmed that the State of Minnesota still has a

⁶ See, e.g., 1998 SONAR at 17 ("Legal commentary suggest that the need for diversity in higher education classrooms is not likely to be found a compelling interest which would justify race-based assignments; it is also not likely in the K-12 setting.")

⁷ *Parents Involved*, 551 U.S. at 701.

compelling interest in avoiding racial isolation and encouraging diversity. The Court also made clear that Minnesota's proposed use of racial ratios as a flexible starting point has always been constitutionally appropriate. Thus, it is now apparent that the 1998 SONAR arbitrarily and unreasonably undermined the clear goals of the Board of Education and the legislature.

1. The previous desegregation rule was grounded in valid law.

By 1994, Minnesota had used racial ratios in its existing desegregation rule for two decades, which had been judged to be legal and appropriate in a 1978 SONAR and by a local federal district court and the Eighth Circuit.⁸ These rules were based in part on the Supreme Court's 1971 decision in *Swann v. Charlotte-Mecklenburg Board of Education*.⁹ In *Swann*, the United States Supreme Court validated the use of race in student assignments by educational authorities, even absent a showing of intentional segregation, when the goal was integration rather than segregation.¹⁰ The Court stated that state and local school authorities could use quotas to prescribe precise racial balancing in local schools, even though a court could not undertake such precise racial balancing.¹¹

Specifically, *Swann* stated:

Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary....School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to White students reflecting the proportions for the district as a whole. To do this as an educational policy is within the broad discretionary power of school authorities;

⁸ STATE OF MINN. DEP'T OF EDUC., STATEMENT OF NEED AND REASONABLENESS IN THE MATTER OF: THE PROPOSED AMENDMENTS TO RULES OF THE STATE BOARD OF EDUCATION GOVERNING EQUALITY OF EDUCATIONAL OPPORTUNITY AND SCHOOL DESEGREGATION (1978) [hereinafter 1978 SONAR]; see also *Booker v. Special Sch. Dist. No. 1*, 451 F.Supp 659 (D. Minn. 1978), *aff'd*, 585 F.2d 347 (8th Cir. 1978).

⁹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 401 U.S. 1 (1971).

¹⁰ *E.g., id.* at 16.

¹¹ *Id.*

absent a finding of a constitutional violation, however, that would not be within the power of a federal court.¹²

Swann also held that a court could use a rough target of a 71-29 racial ratio (the percentage of white students to black students in individual schools) as a “flexible starting point” to integrate schools.¹³ *Swann* specifically held that a 71-29 racial ratio was neither prohibited racial balancing nor a prohibited racial quota.¹⁴ The unanimous *Swann* court stated: “We see therefore the use of mathematical ratios as no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement.”¹⁵ *Swann* specifically distinguished the use of such “a mathematical ratio” from requiring “that every school in every community must always reflect the racial composition of the school system as a whole.”¹⁶ It found that these flexible ratios were reasonable means to prevent the creation of single race schools and racial isolation.

In *McDaniel v. Barresi*, decided on the same day as *Swann*, the Court overturned the Georgia Supreme Court, which had previously declared a racial ratio plan to be prohibited racial balancing.¹⁷ In doing so, the Court upheld a voluntary desegregation plan that used racial ratios as a starting point in a district that had never been found to be de jure segregated.¹⁸

In *North Carolina State Board of Education v. Swann*, also decided the same day, the Supreme Court struck down a North Carolina statute which prohibited the use of racial ratios in

¹² *Id.*

¹³ *Id.* at 23-25.

¹⁴ *Id.*

¹⁵ *Id.* at 25.

¹⁶ *Id.* at 24.

¹⁷ *McDaniel v. Barresi*, 402 U.S. 39 (1971).

¹⁸ *Id.* at 40-41, *see also* *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 821-22 (2007) (Breyer, J., dissenting) (citing *McDaniel* to demonstrate that “a number of school districts . . . that the Government or private plaintiffs challenged as segregated *by law* voluntarily desegregated their schools *without a court order*” and that the Supreme Court has “permitt[ed] a race-conscious remedy without any kind of court decree.” (emphasis original)).

student assignments.¹⁹ The Court found the statute was unconstitutional whether or not the racial ratios were designed to combat de jure or de facto segregation.²⁰

The Court held:

We observed today in *Swann* that school authorities have wide discretion in formulating school policy, and that *as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable, quite apart from any constitutional requirements*. However, if a state imposed limitation on a school authority's discretion operates *to inhibit or obstruct the operation of a unitary school system* or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder the vindication of federal constitutional guarantees.

The legislation before us flatly forbids assignment of any student on account of race for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. *But more important, the statute exploits an apparently neutral form to control school assignment plans by requiring they be "color blind"; that requirement against the background of segregation would render illusory the promise of Brown v. Board of Education*. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.²¹

In response, the Minnesota Department of Education adopted a conservative course and decided to use *Swann's* flexible ratios as a starting point in its desegregation plan.²² In its 1978 SONAR, the state cited *Swann* and concluded that "the Department of Education is not constitutionally prohibited from regulating de facto segregation."²³

¹⁹ N.C. Bd. of Educ. v. *Swann*, 402 U.S. 43, 45 (1971).

²⁰ *Id.*

²¹ *Id.* at 45-46 (internal citations omitted).

²² See, e.g., 1978 SONAR at 3 ("It is the State Board's position that it is necessary and reasonable to have an educational policy favoring the requirement that students attend integrated schools with each school having a prescribed ratio of minority to white students reflecting the proportion for the district as a whole as set forth in the *Swann* decision.").

²³ *Id.*

Since *Swann*, the use of racial ratios in cases without evidence of intentional discrimination had been uniformly upheld in the lower federal courts. In *Martin v. Charlotte-Mecklenburg*, school authorities on their own initiative adjusted the racial balance of desegregation plan to prevent racial isolation in certain schools.²⁴ Even though it was clear that a federal court could not make such an adjustment after a final desegregation order, the Fourth Circuit found the school board action legal, holding that “[t]he School Board is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students.”²⁵

2. The 1998 SONAR cited inapplicable law and relied on speculation about future developments.

In 1994, the Minnesota State Board of Education proposed a metropolitan-wide desegregation rule using suggested racial ratios for local public school as a flexible starting point to achieve Minnesota’s compelling governmental interests of avoiding racial isolation and encouraging diversity.²⁶ The Board sent the draft rule to the Minnesota Legislature, which passed legislation that specifically authorized the Board to adopt the rules as proposed.²⁷ The legislature and the State Board clearly indicated they believed that racial integration was an important public policy that helped all children, particularly non-white children. Their intention to adopt a mandatory metropolitan desegregation rule that would keep Twin Cities schools from becoming segregated was unambiguous.

²⁴ *Martin v. Charlotte-Mecklenburg*, 626 F.2d 1165,1166 (4th Cir. 1980).

²⁵ *Id.* at 1167.

²⁶ MINN. STATE BD. OF EDUC., DESEGREGATION/INTEGRATION AND INCLUSIVE EDUCATION FINAL REPORT (1994).

²⁷ Act of Apr. 10, 1998, ch. 398, 1998 Minn. Laws HF 2874.

The 1998 SONAR then gutted the proposed rule, concluding that “recent cases in the federal district courts and at the United States Supreme Court calls into serious question whether it is permissible to have a rule which requires or even encourages race-based student assignments, such as quotas and mandatory busing, absent a finding of intentional discrimination.”²⁸ In declaring that diversity in K-12 was no longer a compelling governmental interest absent discrimination, the SONAR failed to note -- or even mention -- the overwhelming number of courts which had specifically held that diversity in K-12 education was a compelling government interest absent proof of intentional discrimination.²⁹ Nor did it address the precedent cited by the 1978 SONAR, which had listed ten of these cases in addition to Swann.

Instead, the 1998 SONAR marshalled support from a number of cases that are either unrelated to public school education or not binding in the Eighth Circuit. In doing so, it inappropriately analogized rules across a variety of contexts, and ignored the unique sensitivity with which the modern Supreme Court has always approached school segregation. As a result, the SONAR did not so much follow school desegregation law as it existed but instead attempted to extrapolate the future course of the law – and in retrospect, it guessed incorrectly.

²⁸ 1998 SONAR at 14.

²⁹ See *Citizens for a Better Education v. Goose Creek Consol. Ind. School Dist.* 719 S.W.2d 350, 352-52 (Tex. App. 1986), *appeal dismissed for want of sub. fed. quest.*, 484 U.S. 804 (1987); *Zaslowsky v. Board of Educ. Of Los Angeles*, 610 F.2d 661 (9th Cir. 1979); *Darville v. Dade County School Board*, 497 F.2d 1002 (5th Cir. 1974); *State ex. rel. Citizens against Mandatory Busing v. Brooks*, 80 Wash.2d 121 (1972) *overruled on other grounds*, *Cole v. Webster*, 103 Wash.2d 280 (1984); *School Comm. of Springfield v. Board of Education*, 362 Mass. 417, 428-29 (1972). Before Swann, many courts had made similar findings, see *Tometz v. Board of Education of Waukegan School District No. 61*, 39 Ill.2d 593, 597-598 (1968); *Offerman v. Nitkowski*, 378 F.2d 22, 24 (9th Cir. 1967); *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 61 (6th Cir. 1966) *cert. denied*, 389 U.S. 847 (1967); *Pennsylvania Human Relations Comm. v. Chester School Distr.* 427 Pa. 157 (1967); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (1st Cir. 1965). The SONAR justified this omission by noting that, while *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), had established that diversity was a compelling state interest, this decision had occurred twenty years previous and, “[s]ince *Bakke*, the Supreme Court has found that diversity is a compelling interest in only one case . . . not in the education context.” 1998 SONAR at 14. Effectively, the SONAR assumed that the Court’s partial silence negated its earlier holding, an unusual and unsupportable constitutional theory.

The SONAR cited *Tito v. Arlington County School Board*, *Wessmann v. Gittens*, and *Ho v. San Francisco Unified School District*, to support its assertion that diversity in K-12 education was no longer a compelling governmental interest absent intentional discrimination and that the proposed rule's racial ratios were prohibited racial balancing.³⁰ These cases stood for neither proposition.

In *Tito v. Arlington County School Board* a federal district court, in an unpublished opinion, struck down a rigid racial quota for a selective magnet school and in so doing declared there was no compelling governmental interest in diversity in K-12 education absent proof of discrimination.³¹ However, after the publication of the 1998 SONAR, *Tito* was reversed on appeal by the Fourth Circuit, which assumed that diversity in K-12 education remained a compelling governmental interest in the absence of discrimination.³² The SONAR also did not report that the *Tito* court acknowledged that the Fourth Circuit had upheld the use of a flexible racial ratio which it distinguished from the allegedly impermissible magnet school quota in the case it was deciding.³³

In *Wessmann v. Gittens*, the court struck down a rigid racial quota for a highly selective magnet school.³⁴ *Wessmann* had nothing to do with a flexible racial ratio. *Wessmann* also held, after discussing the issue at length, that racial diversity in K-12 education was a compelling

³⁰ 1998 SONAR at 18-19; *Tito v. Arlington Cnty. Sch. Bd.*, No. CIV.A.97-540-A, 1997 WL 2337372 (E.D. Va. May 13, 1997); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Ho by Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998).

³¹ *Tito*, 1997 WL 2337372 at *4.

³² *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 701 (1999) ("Since the Supreme Court has not resolved the question of whether diversity is a compelling governmental interest, we assume without deciding that diversity may be a compelling interest . . .").

³³ *Tito*, 1997 WL 2337372 at *3. ("The Fourth Circuit concluded . . . that reassignments made to achieve a particular racial ratio were a valid exercise of the school board's powers and did not violate the Equal Protection Clause.").

³⁴ *See, e.g., Wessmann*, 160 F.3d at 793 ("Consequently, the Policy required school officials to allocate the final 45 seats to 13 blacks, 18 whites, 9 Asians, and 5 Hispanics.").

governmental interest even absent discrimination.³⁵ It explicitly declined to follow the single court which had found no such compelling interest in higher education.³⁶

In *Ho v. San Francisco Unified School District*, the Ninth Circuit sent a court-ordered racial magnet school quota, established in a consent decree, back to the trial court for further fact finding.³⁷ *Ho* was a case in which a constitutional violation had already been found and the court was questioning whether the consent decree was sufficiently narrowly tailored.³⁸ The issue of whether race could be used absent intentional discrimination was not before the court, nor was the use of flexible racial ratios.

Nor did other cases cited in the 1998 SONAR apply to the Minnesota rule. *Equal Open Enrollment Association v. Board of Education of Akron* struck down an absolute prohibition on whites using a local open enrollment statute as not sufficiently narrowly tailored.³⁹ In *People Who Care v. Rockford Board of Education*, the court struck down rigid racial quotas limiting the number of black students who were subject to disciplinary programs, and determining the racial balance of the cheerleading squad and in classes for remedial and gifted students.⁴⁰ Neither *Equal Open Enrollment* nor *People Who Care* held that racial diversity is no longer a compelling

³⁵ *Id.* at 795-96 (It may be that . . . were the Court to address the question today, it would hold that diversity is not a sufficiently compelling interest It has not done so yet, however, and we are not prepared to make such a declaration in the absence of a clear signal that we should. This seems especially prudent because the Court and various individual justices from time to time have written approvingly of ethnic diversity in comparable settings.” (internal citations omitted)).

³⁶ *Id.* (“At first blush, it appears that a negative consensus [on diversity as a compelling interest] is emerging at this point. . . We think that any such consensus is more apparent than real.”).

³⁷ *Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854, 865(9th Cir. 1998).

³⁸ *See, e.g., id.* (“At trial, the School District will bear the burden of proving that Paragraph 13 of the Consent Decree is a narrowly tailored measure that furthers compelling government interests.” (internal quotations omitted)).

³⁹ *Equal Open Enrollment Ass’n v. Bd. of Educ. of Akron City Sch. Dist.*, 937 F.Supp 700, 702 (N.D. Ohio 1996) (striking down law that reads “EXCEPT AS SET FORTH BELOW, NO WHITE STUDENT SHALL BE PERMITTED TO ENROLL IN AN ADJENT DISTRICT, WHETHER OR NOT THE STUDENT’S HOME SCHOOL IN AKRON WOULD THEN BE RACIALLY UNBALANCED”).

⁴⁰ *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 111 F.3d 528, 536-38 (7th Cir. 1997) (holding impermissible a consent decree which, among other things, contains an “indefensible provision . . . [that] prescribes the racial and ethnic composition of the cheerleading squads”).

governmental interest absent racial discrimination nor involved any issue presented by Minnesota's proposed rule.⁴¹

Taxman v. Board of Education of Piscataway, also cited, was an employment case challenging preferential treatment of black teachers in district employment lay off decisions.⁴² The *Taxman* court found that the educational value of exposing students to different races or backgrounds was not a permissible basis for affirmative action under Title VII, an employment discrimination statute.⁴³ The court said nothing about Titles II, IV, and VI (statutes prohibiting education discrimination), nor did it address the question of whether the equal protection clause prohibited the use of race to achieve the compelling governmental interest of diversity in K-12 education absent intentional discrimination.⁴⁴

The 1998 SONAR cited a single Fifth Circuit case, *Hopwood v. Texas*, for the proposition that absent proof of discrimination, diversity in higher education was no longer a compelling governmental interest.⁴⁵ The SONAR failed to note that *Hopwood* was a minority view not shared by any other circuit court.⁴⁶ On the basis of the *Hopwood* opinion alone – a clear outlier not followed by any other court -- the 1998 SONAR predicted that “that need for diversity

⁴¹ The defendant school district in *Equal Open Enrollment* did not even claim diversity as a compelling state interest, instead arguing that its policies were a necessary to ward off intentional segregation, of which the court found no evidence. *Equal Open Enrollment*, 937 F.Supp at 705. *People Who Care* never once mentions state interests, compelling or otherwise. *People Who Care* 111 F.3d at 528.

⁴² *Taxman v. Bd. of Educ. of Twp. Of Piscataway*, 91 F.3d 1547, 1550 (3d Cir. 1996) (“*In this Title VII matter, we must determine whether the Board of Education of the Township of Piscataway violated that statute. . .*” (emphasis added)).

⁴³ *Id.* at 1561-62.

⁴⁴ The court in *Taxman* explicitly distinguished the Title VII context from the question of diversity in other instances, noting, for instance, that “*Bakke’s* factual and legal setting . . . are, in our view, so different from the facts, relevant law and the racial diversity purpose involved in this case that we find little in *Bakke* to guide us.” *Id.* at 1562 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

⁴⁵ *Hopwood v. State of Tex.*, 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁴⁶ *See, e.g., Wessmann v. Gittens*, 160 F.3d 790, 795-96 (1st Cir. 1998) (“In the education context, *Hopwood* is the only appellate court to have rejected diversity as a compelling interest, and it did so only in the face of vigorous dissent from a substantial minority of the actives judges in the Fifth Circuit.”).

in higher education is not likely to be found a compelling governmental interest which would justify race based assignment [and] it is also not likely in the K-12 Context.”⁴⁷ The Supreme Court would soon overrule *Hopwood* in *Grutter v. Bollinger*.⁴⁸

Finally, the 1998 SONAR relied upon three Supreme Court decisions that involved racial quotas in the employment context. In *Wygant v. Jackson Board of Education*, the court struck down provisions in a collective bargaining agreement giving preference to teachers based on their race, finding that having role models for students of color was not a compelling governmental interest.⁴⁹ In *City of Richmond v. Croson*, the court found that the distant effects of remedying past discrimination was insufficient to support racial quota in local government hiring.⁵⁰ In *Adarand Constructors Inc. v. Peña*, it struck down a racial quota for highway contractors and further held that any racial classification that subjected and individuals to unequal treatment and denied them benefits solely on the basis is race was subject to strict scrutiny analysis.⁵¹ As none of these cases even involved student integration, they could have no bearing on the continuing existence of a compelling interest in fostering diversity among schoolchildren. The 1998 SONAR improbably reasoned that because the court seemed to be hostile to rigid racial quotas in employment, it would soon overrule its clear holdings in *Swann*, *McDaniel*, and *North Carolina Board of Education*.⁵²

⁴⁷ 1998 SONAR at 17.

⁴⁸ *Grutter*, 539 U.S. at 328 (“Today, we hold that the [defendant] has a compelling interest in attaining a diverse student body.”); *see also* *Fisher v. Texas*, 133 S.Ct. 2411 (2013); *Schuetz v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).

⁴⁹ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

⁵⁰ *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

⁵¹ *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

⁵² 1998 SONAR at 21 (“Given the dramatic changes in the holdings of the Supreme Court, circuit courts and district courts over the past seven to eight years, there is a serious question whether the imposition of a strict numerical definition of segregation, followed by the use of a race-based remedy . . . would be sustained.”).

In a passage that encapsulates its reasoning, the SONAR quotes at length a law review article which attempts to extrapolate future Supreme Court decisions from changes in the composition of the court. It notes that “the five-to-four decision in *Metro Broadcasting*⁵³ is surely the high water mark for diversity as a justification for racial preference” and “since [that] 1990 decision, four of the five Justices in the *Metro* majority have retired.”⁵⁴ It concludes that “[t]he four dissenters – Justices O’Connor, Kennedy, Scalia and Rehnquist – remain, and they will surely be joined by Justice Thomas in opposition to most forms of racial preference.”⁵⁵

3. New legal developments undermine the SONAR’s legal conclusions.

The SONAR’s predictions have since proven wildly incorrect. In 2007 the Supreme Court, in *Parents Involved in Community Schools v. Seattle School District No. 1*, eviscerated the legal analysis and prognostication that form the core of the 1998 SONAR.⁵⁶ It confirmed the existence of a compelling government interest in encouraging diversity and avoiding racial isolation in K-12 education, and reaffirmed the viability of flexible racial ratios. Any doubt that it existed, based in developments in higher education or employment law, was gone.

Parents Involved was decided in a 5-4 decision, and while Chief Justice Roberts wrote for the majority, his opinion is only joined in part by Justice Kennedy.⁵⁷ As a result, in the sections where Kennedy declines to join Roberts, Kennedy’s concurring opinion is controlling.⁵⁸

⁵³ *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (holding that FCC policies to encourage minority ownership of broadcast licenses are permissible).

⁵⁴ 1998 SONAR at 17 (citing Richard Kahlenberg, *Class Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1043 (1996)).

⁵⁵ *Id.*

⁵⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

⁵⁷ *Id.* at 701.

⁵⁸ *Id.*; see also, e.g., U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS 3-4 (2011) (“The portions of the plurality opinion that Justice Kennedy joined constitute the opinion of the Court.”).

Kennedy pointedly refused to join in Roberts' characterization of *McDaniel* as applying only to the Jim Crow South.⁵⁹ He also refuses to join Roberts' broad efforts to limit the force of *Swann* and the discretion of local educational authorities contained in section IV of Robert's opinion.⁶⁰ Furthermore, Justice Kennedy cites *North Carolina Board of Education* as continuing good law.⁶¹

Justice Kennedy reconfirmed the compelling interest in avoiding racial isolation and achieving diversity:

The nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest therefore exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.⁶²

Kennedy also clarifies that some "race-conscious" practices, which do not rely on individual racial classification, are "unlikely [to] demand strict scrutiny to be found permissible."⁶³ When undertaking generalized remedies, authorities need not even assert their compelling interest in diversity:

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. . . . [T]hey are free to devise race-conscious measures to address the problem of segregation in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by

⁵⁹ *Parents Involved*, 551 U.S. at 782-83 (Kennedy, J., concurring in part).

⁶⁰ *Id.*

⁶¹ *Id.* at 796.

⁶² *Id.* at 797-98.

⁶³ *Id.* at 789.

race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race.⁶⁴

As long as they do not allocate or withhold governmental benefits to individual students solely on the basis of race, such practices are not subject to strict scrutiny analysis. He continued:

Executive and legislative branches, which for generations have now considered these types of policies and procedures should be permitted to employ them with candor and with the confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.⁶⁵

The outcome *Parents Involved* reaffirmed *Swann*'s declaration of the broad authority of local education authorities to integrate their schools, with two minor exceptions, neither of which were present in the proposed rule. First, it prohibited school authorities from creating admissions policies for selective magnet schools that admitted or denied individual students solely on the basis of the individual student's race.⁶⁶ It nevertheless upheld the use of race as one of many characteristics for such admission decisions.

Second, while the court reaffirmed the ability of local authorities to use flexible ratios as a starting point to further the state's interest in avoiding racial isolation and encouraging diversity, it appears to narrow the power of local school districts to use rigid quotas or precise racial balancing in schools, which it continues to distinguish from flexible ratios.⁶⁷

⁶⁴ *Id.* at 788-89 (internal citations omitted). This reasoning was recently applied by the Third Circuit, which found that strict scrutiny does not apply to a race-conscious school assignment plan which assigned students on the basis of the neighborhood they live, without treating individual students of different racial backgrounds differently. *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011).

⁶⁵ *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part).

⁶⁶ *Id.*

⁶⁷ Justice Kennedy concurs in section III-A of Justice Robert's plurality opinion, which in footnote 10, declares that *Swann*'s approval of the use of rigid racial quota and precise racial balance was dicta. Kennedy, however, explicitly refuses to go further and join Robert's position in III-B and IV, which rejects the existence of a compelling governmental interest, and he cites *Swann* as good law without limiting its scope. *See id.* at 794.

Parents Involved reveals that Supreme Court only intended to limit the discretion of local educational officials to integrate their schools when these efforts classified individual students based on race and allocated benefits or burdens solely on that basis, types of decisions not at issue in the proposed rule. The United States Departments of Justice and Education recently recognized this conclusion by jointly issuing formal guidance applying *Parents Involved*, which concludes that “K-12 school districts have compelling interests both in achieving diversity and in avoiding racial isolation, and [can] voluntarily adopt measures to pursue these goals.”⁶⁸ This outcome thoroughly undermines the legal conclusions that supposedly necessitated Minnesota’s current rule.

- b. New evidence demonstrates that Minnesota is not permitted to exempt charter schools and open enrollment from its desegregation rule.

Open enrollment and charter schools play a central role in Minnesota’s education system. The state contains 148 charter schools, which currently enroll 39,000 students, and over 62,000 students are open enrolled in a non-resident district.⁶⁹ One out of eight of all Minnesota public school students are either open enrollees or attend a charter school, and the proportion is higher in the metropolitan area.⁷⁰

The charter school law has always required that charter schools are “subject to and shall comply with chapter 363A,” the Minnesota Human Rights Act provision prohibiting

⁶⁸ DEP’T OF JUSTICE & DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE, *supra* note 58, at 4 (“Together with the four dissenting Justices, Justice Kennedy recognized that K-12 school districts have compelling interests both in achieving diversity and in avoiding racial isolation, and he concluded that school districts could voluntarily adopt measures to pursue these goals.”).

⁶⁹ Minnesota Department of Education, Minnesota Education Statistics Summary, <http://w20.education.state.mn.us/MDEAnalytics/Summary.jsp>.

⁷⁰ *Id.* Minnesota’s charter system is concentrated in the metropolitan area, where most of the state’s minority students reside. *See, e.g.*, INSTITUTE ON METROPOLITAN OPPORTUNITY, CHARTER SCHOOLS IN THE TWIN CITIES: 2013 UPDATE.

discrimination in education on the basis of race, particularly in admission and expulsion decisions.⁷¹ Specifically reflecting integration requirements, the charter statute required that charter schools could not undermine local integration plan. The statute declared that a charter school could only limit admission to “residents of a specific geographic area” only in neighborhoods with significant minority population and “only as long as the school reflects the racial and ethnic diversity of the specific area.”⁷²

Nonetheless, the Board of Education explicitly exempts charter schools from its desegregation procedures. The final rule explains that “[f]or the purposes of [Rule 3535] only,” the term “school” does not include charter schools.⁷³ Nor are charters mentioned anywhere else in Rule 3535.

These exemptions did not appear in the proposed rule that the 1998 SONAR rejected.⁷⁴ The 1998 SONAR justifies this exemption only briefly, lumping charter schools together with a variety of specialized education programs (e.g., schools for students with limited English proficiency, Department of Human Services treatment facilities). It collectively describes these as “programs which are formed for students who may have needs that cannot or are not being met in standard school settings.” It argues that “[g]iven that these are not standard K-12 programs and are either optional or the result of parental or court placement it is reasonable to exempt them from planning aimed at integrating standard school sites.”⁷⁵ A recent study demonstrates that Minnesota is the only state that specifically exempts charter schools from

⁷¹ MINN.STAT. § 124D.10 subd. 8 (h) (2014); *see also* MINN.STAT. § 363A.13 (2014).

⁷² MINN.STAT. § 124D.10, subd. 8 (a) (3) (1999). This was later modified to “residents of a specific geographic area in which the school is located when the majority of students are members of underserved populations.” MINN.STAT. § 124D.10, subd. 9 (a) (3) (2014).

⁷³ MINN R. 3535.0110 subp. 8 (A) (“For purposes of parts 3535.0160 to 3535.0180 only, school does not mean . . . charter schools under Minnesota Statutes, section 124D.10.”).

⁷⁴ *See* 1998 SONAR at B7-B22.

⁷⁵ *Id.* at 30.

desegregation plans, with most state having law or rules requiring them to be in compliance with local desegregation plans.⁷⁶

In 1999, the open enrollment statute also specifically limited enrollments that might interfere with existing desegregation plans and goals.⁷⁷ However, in 2001, the open enrollment statutory language was altered based on advice from the Commissioner of Education that it was unconstitutional, building on the reasoning expressed by the 1998 SONAR.⁷⁸

The legislature clearly intended that both open enrollment and charter schools be subject to integration requirements. The actions exempting charter schools from the rule were unauthorized at the time of the current rule's release. However, new evidence demonstrates that the exemptions are even more problematic today.

First, the significance of the exemptions is increasing as both systems become more popular. Open enrollment in the metropolitan area has doubled since 2001.⁷⁹ And charter school enrollment has grown even more explosively: over sixteen-fold since the promulgation of Rule 3535.⁸⁰ In the 1997-1998 school year, metropolitan charters contained a total of 2,120 students, approximately one-half of one percent of the regional student population. By 2013, that figure had increased to 34,769, or seven percent of all students. The nonwhite student population is particularly concentrated in the charter system: in the metro area, 11.5 percent of minority students now attend a charter, up from approximately one percent in 1998.

⁷⁶ See ERICA FRANKENBERG AND GENEVIEVE SIEGEL-HAWLEY, CIVIL RIGHTS PROJECT, EQUITY OVERLOOKED: CHARTER SCHOOLS AND CIVIL RIGHTS POLICY 14 (2009).

⁷⁷ MINN.STAT. § 124D.03, subd. 4 (1999).

⁷⁸ Compare *id.* with MINN.STAT. § 124D.03, subd. 4 (2014); see also Act of June 30, 2001, ch. 6, 2001 1st Special Session Minn. Laws HF 2.

⁷⁹ INSTITUTE ON METROPOLITAN OPPORTUNITY, OPEN ENROLLMENT AND RACIAL SEGREGATION IN THE TWIN CITIES: 2000-2010 (2013).

⁸⁰ INSTITUTE ON METROPOLITAN OPPORTUNITY, CHARTER UPDATE 2013, *supra* note 70, at 2.

The perceived role of charters has also changed. Reformers now heavily promote charter schools as a vital component of the educational system.⁸¹ For many politicians and organizations, charters are no longer seen as an alternative to traditional public instruction for students with special needs, but a substitute educational system, in which market mechanisms will select effective teaching methods and close achievement gaps.⁸²

As a result of these trends – which all available evidence suggests will continue for the foreseeable future – the reality of choice-based education no longer resembles the system described in the 1998 SONAR. Instead, Minnesota’s charter and open enrollment exemptions have the effect of excluding an ever-larger number of students – particularly nonwhite students – from the protections and benefits of its desegregation plan, and run the risk of destabilizing the plan altogether.

Additionally, a range of legal developments have highlighted the impermissibility of Minnesota’s exemptions. Recently, the United States Department of Education released guidance strongly suggesting that the exemptions are unconstitutional, because they allow a separate state-supported school district to interfere with and undermine the efforts of the state to integrate a dual school system.⁸³ On May 14, 2014, the Department’s Office for Civil Rights issued an official guidance document which declared that “charter schools located in a district subject to a

⁸¹ See, e.g., *What Are Public Charter Schools*, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, <http://www.publiccharters.org/get-the-facts/public-charter-schools/> (last visited June 16, 2014); *Who We Are*, CHARTER SCHOOL PARTNERS, http://charterschoolpartners.org/who_we_are.aspx (last visited June 16, 2014).

⁸² See, e.g., U.S. DEP’T OF EDUC., *CHARTER HIGH SCHOOLS: CLOSING THE ACHIEVEMENT GAP* (2006); *Why Charter Schools in Your Community*, CTR. FOR SCH. CHANGE, <http://centerforschoolchange.org/minnesota-charter-school-resources/understanding/community/> (last visited June 16, 2014); see also Motoko Rich, *A Walmart Fortune, Spreading Charter Schools*, N.Y. TIMES (Apr. 25, 2014).

⁸³ U.S. DEP’T OF EDUC., *GUIDANCE LETTER ON CHARTER SCHOOLS* (2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf>.

desegregation plan (whether the plan is court ordered, or required by a Federal or State administrative entity) must be operated in a manner consistent with that desegregation plan.”⁸⁴

This guidance comports with the Supreme Court’s holding in *Wright v. City of Emporia*.⁸⁵ In that case, the Court held that once a school desegregation plan was in place, a new school system could not be created that might impede the district’s ability to desegregate.⁸⁶ Specifically, the Court held that school district boundaries between city and suburban schools—even if drawn without discriminatory intent—could not limit the scope or effectiveness of a school desegregation remedy if respecting these boundaries could increase white flight from one of the local school districts.⁸⁷ (The Minnesota Department of Education classifies charter schools – either individually or in small groups of affiliated schools – as independent school districts.) And at least two other courts have held that charter schools cannot operate in a manner that would interfere with an existing school desegregation plan.⁸⁸

- c. New evidence demonstrates that the current rule has caused a significant increase in segregation in the Twin Cities metropolitan area.

Based on its erroneous assertion that Minnesota had no compelling interest in integration, the rule unilaterally exempted both charter schools and open enrollment from compliance with local integration planning. The SONAR asserted that because charters and open enrollment are

⁸⁴ *Id.* at 3-4.

⁸⁵ *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972).

⁸⁶ *Id.* at 470 (holding that “a new school district may not be created where its effect would be to impede the process of dismantling a dual system”).

⁸⁷ *Id.* at 462 (“[O]ther federal courts . . . have held that splinter school districts may not be created where the effect—to say nothing of the purpose or motivation—of the secession has a substantial adverse effect on desegregation of the county school district.”).

⁸⁸ *Berry v. Sch. Dist. Of Benton Harbor*, 56 F.Supp.2d 866, 70-72 (W.D. Mich. 1999); *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230 (1999).

based on parental choice, any segregation that results from their exemption does not constitute intentional segregation.⁸⁹

New data based on recently released studies demonstrate that the unreasonable desegregation rule, and particularly the exemption for charter schools and open enrollment, has led to a dramatic increase in racial segregation. The effects of these changes extend far beyond the individual students exercising school choice: by removing particular racial and ethnic groups into single-race enclaves, segregated charters and unrestricted open enrollment are creating segregation in public schools across the region.

1. Statistical studies show increasing segregation.

Racial isolation in the Twin Cities metropolitan area schools, rendered nonexistent by the state's 1978 integration rule, is again growing rapidly under Minnesota's current desegregation rule.⁹⁰ A variety of statistics show this pattern. In 1992, only two percent of the Twin Cities' predominantly nonwhite schools were racially segregated.⁹¹ By 2002, the percentage had increased to twenty percent and was rapidly accelerating.⁹² This represented an increase from nine to 109 schools and the trend has shown no sign of slowing.⁹³ The rate of increase was not only much faster than the national average, but is also particularly alarming when compared to other metropolitan areas, where equivalent figures have been much lower in the same time span.⁹⁴ In Portland, schools increased from two percent to nine percent segregated; in Seattle,

⁸⁹ 1998 SONAR at 30, 31-32.

⁹⁰ See MYRON ORFIELD & THOMAS F. LUCE JR., REGION: PLANNING THE FUTURE OF THE TWIN CITIES 105-06 (2010).

⁹¹ *Id.* at 105.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Of 79 integrated Twin Cities schools in 1992, only 44 percent remained integrated in 2002. Across the nation's 25 largest metropolitan areas, 65 percent of integrated schools stayed integrated in the same timespan. Less than a fourth of segregated schools managed to integrate during this period, both in the

schools increased from three percent to seven percent segregated; and in Pittsburgh, schools increased from nine percent to fourteen percent segregated.⁹⁵

Using a slightly different, simpler measure, the number of Minnesota elementary schools with more than 75 percent nonwhite students increased from 14 in 1995 to 91 in 2010.⁹⁶ These segregated schools are overwhelmingly poor: more than nine out of ten nonwhite segregated elementary schools in 2010 have poverty rates above 40 percent and more than seven out of ten show poverty rates above 75 percent.⁹⁷

Three new University of Minnesota studies show that in the Twin Cities charter schools are much more likely to be nonwhite segregated than traditional schools.⁹⁸ Likewise, charter students are much more likely to attend a segregated school than traditional public school students.⁹⁹ These studies demonstrate that most charter schools are either very nonwhite or single-race segregated.¹⁰⁰ Most of the very white school charter schools appear in areas where the local public schools are becoming more racially diverse.¹⁰¹ These same studies also

Twin Cities and nationwide. ORFIELD & LUCE, *supra* note 90, Table B.12-B.15. These statistics are based on data from the National Center for Education Statistics (NCES). To place these figures in context, the Twin Cities are the second whitest large metropolitan area in the United States. *See Population by Race/Ethnicity*, DIVERSITYDATA.ORG,

<http://diversitydata.sph.harvard.edu/Data/Rankings/Show.aspx?ind=177&sortby=Name>.

⁹⁵ See Institute on Metropolitan Opportunity, *Data Table of School Types in the 25 Largest Metropolitan Areas*, available at <http://www.law.umn.edu/metro/school-studies/integration-and-segregation.html>.

⁹⁶ See Institute on Metropolitan Opportunity, *Elementary School Race Data 1995 and 2010*, available at <http://www.law.umn.edu/metro/school-studies/integration-and-segregation.html>.

⁹⁷ See Institute on Metropolitan Opportunity, *School Types and Poverty in Twin Cities Schools*, available at <http://www.law.umn.edu/metro/school-studies/integration-and-segregation.html>.

⁹⁸ INSTITUTE ON METROPOLITAN OPPORTUNITY, *FAILED PROMISES: ASSESSING CHARTER SCHOOLS IN THE TWIN CITIES* (2008); INSTITUTE ON METROPOLITAN OPPORTUNITY, *UPDATE OF 2008 REPORT ON CHARTER SCHOOLS IN THE TWIN CITIES* (2012); INSTITUTE ON METROPOLITAN OPPORTUNITY, *CHARTER UPDATE 2013*, *supra* note 70.

⁹⁹ INSTITUTE ON METROPOLITAN OPPORTUNITY, *CHARTER UPDATE 2013*, *supra* note 70, at 5.

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.* at 6.

demonstrate that charters underperform public schools, even when controlling for their low-income and nonwhite student demographics.¹⁰²

Only about 20 percent of charter schools are integrated, a share that has changed little over the past two decades.¹⁰³ Over 50 percent of charters are nonwhite segregated.¹⁰⁴ By comparison, 40 percent of traditional public schools were integrated in 2012-2013, and only 22 percent were nonwhite segregated.¹⁰⁵

Most nonwhite segregated schools are in the urban core of the region and many are single-race schools.¹⁰⁶ Students of color attending charter schools were roughly twice as likely to be in a segregated school setting as their counterparts in the traditional public schools in 2012–2013.¹⁰⁷ 88 percent of black students in charters attended a segregated school, compared to 44 percent of black students at a traditional school; for Hispanic students, the corresponding figures are 76 to 38 percent; and for Asian students, 82 to 38 percent.¹⁰⁸

Additionally, for most racial groups, charter segregation has worsened since 2000, shortly after the new desegregation rule was promulgated.¹⁰⁹ The percentage of black students in segregated charters has grown from 81 to 88 in that span, while the percentage of Hispanic students in segregated charters has grown from 69 to 76 percent.¹¹⁰ For Asian students, the figures have improved, from 85 percent to 82 percent, but the vast majority of students remain in segregated institutions.¹¹¹

¹⁰² *Id.* at 8-11.

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

2. Competitive pressures created by the charter exemption are a primary cause of growing racial isolation.

A number of charter schools in the Twin Cities have competed by serving specific ethnic niches.¹¹² This practice concentrates poverty in ethnically-segregated schools, increasing the number of students of color in exactly the kinds of schools that research shows to be the lowest-performing.

Faced with the prospect of losing scarce funding to charters, and under competitive pressure to provide racial enclaves of their own, and public school districts have initiated similar ethnically-themed schools.¹¹³ For instance, Minneapolis Public Schools caved to parental pressure and opened the Hmong International Academy, intended as an alternative to the now-primarily-black Lucy Stark Laney Elementary – effectively consigning each student body to institutions made up of “their own” racial group.¹¹⁴ This trend, along with new “ethno centric” programs within traditional schools and some magnet schools, have further intensified segregation within the traditional public school system.¹¹⁵

This process is analogous to that used to create “segregation academies” in the Jim Crow South in the immediate aftermath of *Brown v. Board of Education*. In the 1950s and 1960s – the time known as “massive resistance” – Virginia reduced funding for traditional public schools, instead creating school vouchers for use in all-white “segregation academies.”¹¹⁶ The Supreme

¹¹² See INSTITUTE ON METROPOLITAN OPPORTUNITY, *FAILED PROMISES*, *supra* note 98, at 39-43; see also, e.g., Beth Hawkins & Cynthia Boyd, *The Rise of Voluntarily Segregated Schools: New Trend, Familiar Problems*, MINNPOST (Nov. 19, 2008).

¹¹³ Hawkins & Boyd, *Voluntarily Segregated Schools*, *supra* note 112 (“[T]he voluntarily segregated school has acquired a patina of desirability, even though numerous studies show minority students do better in integrated schools. . . . A key reason why is the rise of charter schools. . . . [I]n the core cities, they frequently are tailored to a single race or ethnicity.”).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See generally BENJAMIN MUSE, *VIRGINIA’S MASSIVE RESISTANCE* (1961).

Court struck this tactic down.¹¹⁷ In the Twin Cities, this process plays out across multiple dimensions: whites seek to separate from nonwhites, and higher-income minority groups, whose children are typically better-performing academically, attempt to separate from lower-income minority groups.

In Minnesota, the number of predominantly white charters in neighborhoods where the public schools are diverse is increasing, and many are located in suburban areas where the traditional schools are becoming more racially diverse.¹¹⁸ In 2000–2001, white charter students were actually less likely to be in a predominantly white school than their traditional school counterparts—56 percent compared to 81 percent.¹¹⁹ However, by 2012–2013, the share of white charter students in predominantly white schools had risen to 73 percent while it declined to 53 percent in traditional schools.¹²⁰

The number of predominantly white charters in the suburbs grew by 40 percent in just five years: from 20 percent in 2007–2008 to 28 percent in 2012–2013.¹²¹ More than a third of these were part of a single system of charters, the Friends of Education, which authorizes 17 charters in the Twin Cities area.¹²² Twelve of these schools are predominantly white—ten in the suburbs and two in St. Paul.¹²³

¹¹⁷ See Note, *Segregation Academies and State Action*, 82 Yale L. Rev. 1436 (1973); see also *Griffin v. Cnty Sch. Bd.*, 377 U.S. 218, 231-32 (1964).

¹¹⁸ INSTITUTE ON METROPOLITAN OPPORTUNITY, CHARTER UPDATE 2013, *supra* note 70, at 6.

¹¹⁹ INSTITUTE ON METROPOLITAN OPPORTUNITY, FAILED PROMISES, *supra* note 98, at 3.

¹²⁰ INSTITUTE ON METROPOLITAN OPPORTUNITY, CHARTER UPDATE 2013, *supra* note 70, at 5.

¹²¹ These counts exclude five predominantly white schools that are special cases. Sobriety High South, Arona Academy of Sobriety High, and Bluesky charter schools were predominantly white in both years, as were Lionsgate Academy in 2012-2013 and Liberty High School in 2007-2008. However, the Sobriety High Schools were very small (they have since closed), and their demographic mixes were likely determined by factors other than neighborhood and race. Similarly, Lionsgate Academy specializes in students with special needs related to autism, and Liberty High School was a special education school. Bluesky (which was located in Saint Paul in 2007-2008 and West Saint Paul in 2012-2013) is likely to be less closely tied to its neighborhood than other schools because it is an online school.

¹²² INSTITUTE ON METROPOLITAN OPPORTUNITY, CHARTER UPDATE 2013, *supra* note 70, at 6.

¹²³ *Id.*

By 2012–2013, 54 percent of very white charters had white student percentages more than five percentage points higher than the traditional schools within whose attendance boundary (or “catchment”) they were located.¹²⁴ Intentionally or otherwise, suburban charters are facilitating white flight from diverse traditional schools in the suburbs.

Stories about the emergence of some of these schools provides important context. They often appear or grew rapidly in racially diverse suburban areas, particularly when there was local opposition to school district actions which might increase racial integration in local schools. In the early 2000s, the Apple Valley-Rosemount school district was pressured by civil rights advocates to correct a racially gerrymandered school boundary.¹²⁵ The school at issue’s catchment connected a largely Latino occupied trailer part with a non-contiguous neighborhood where affordable rental housing was mostly inhabited by black families.¹²⁶ This non-contiguous boundary ensured that other nearby schools remained comparatively white.¹²⁷ Once this boundary was corrected, the state sponsored a new predominantly white charter school named Paidéia Academy located next to the newly integrated public school created by the boundary change.¹²⁸

In the early 2000s, as the Osseo school district attempted to integrate a white neighborhood school named Weaver Lake Elementary, the nearby all-white charter, Beacon

¹²⁴ *Id.*

¹²⁵ See Myron Orfield, *Regional Strategies for Racial Integration of Schools and Housing Post-Parents Involved*, 29 LAW & INEQ. 149, 155-56 (2011).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* For additional examples of the effect of attendance boundaries, see Margaret C. Hobday, Geneva Finn, and Myron Orfield, *A Missed Opportunity: Minnesota’s Failed Experiment with Choice-Based Integration*, 35 WM. MITCHELL L. REV. 936, 965-68 (2009).

Academy, surged in enrollment.¹²⁹ In 2010, the affluent high-performing Eden Prairie school district, which was 25 percent nonwhite, completed a controversial school redistricting plan that virtually eliminated racial differences that had been increasing across its elementary schools.¹³⁰ White parents fled in increasing numbers to the local all-white charter.¹³¹ The number of white students using open enrollment to attend schools in a neighboring district that was 90 percent white also increased significantly.

The Bloomington School District has twice attempted to draw integrated student boundaries. Each time it has been prevented from doing so both by white parent opposition and the existence of a predominantly white charter school, the Friendship Classical Academy.¹³²

3. The open enrollment exemption has facilitated white flight into suburban school districts and the concentration of minority students in the urban core.

A 2013 study analyzed the effects of open enrollment across the metropolitan area's sixty-nine school districts between 2000 and 2010.¹³³ It found that open enrollment increased segregation in the region, with the segregative trend growing stronger over time.¹³⁴ In 2009–2010, 36 percent of open enrollment moves were segregative, 24 percent were integrative, and

¹²⁹ See Baris Gumus-Dawes, Myron Orfield, and Thomas Luce, *Dividing Lines: East Versus West in Minneapolis Suburbs*, in *THE RESEGREGATION OF SUBURBAN SCHOOLS: A HIDDEN CRISIS IN AMERICAN EDUCATION* 113, 130 (Erica Frankenberg & Gary Orfield eds., 2012).

¹³⁰ See Susan Eaton, *Not Your Father's Suburb: Race and Rectitude in a Changing Minnesota Community*, *ONE NATION INDIVISIBLE* 8-9 (Feb. 2012), available at <http://www.onenationindivisible.org/wp-content/uploads/2012/03/ONIrptNotYourFathersSuburbFIN.pdf>.

¹³¹ *Id.* at 16.

¹³² Kenyatta Bolden, *Backing Down from Brown: The Resegregation of the Bloomington School District* (2004) (on file with Institute of Metropolitan Opportunity); Carrie Rudd, *Bloomington Middle School Boundaries* (2007) (on file with Institute of Metropolitan Opportunity); Kelly Smith, *Bloomington Releasing Proposed Boundary Maps*, *STARTRIBUNE* (Nov. 11, 2010); Kelly Smith, *Bloomington Schools Consider Changing Boundaries*, *STARTRIBUNE* (Dec. 5, 2010).

¹³³ INSTITUTE ON METROPOLITAN OPPORTUNITY, *OPEN ENROLLMENT*, *supra* note 79.

¹³⁴ *Id.* at 1.

the rest were race-neutral.¹³⁵ After the system was exempted from the desegregation rule, segregative moves grew significantly more common, rising from 23 percent to 36 percent.¹³⁶ This change was almost entirely a result of an increase in white open enrollees.

Minneapolis, St. Paul, and St. Cloud each lose substantial numbers of white students to nearby districts.¹³⁷ Students open enrolling out of these three city districts were much more likely to be white than those remaining behind, and virtually all were enrolling in districts with white shares substantially greater than the district they left.¹³⁸ Similarly, open enrollees into Minneapolis and St. Paul were not only much less likely to be white than a typical student in the districts they left, but they were less likely to be white than resident students in the two city districts.¹³⁹ Many racially diverse suburban districts also lost substantial numbers of white students to adjacent white suburban districts, and the districts that had the largest net gains from open enrollment were a group of predominantly white districts physically close to more diverse urban and suburban districts.¹⁴⁰

White students represented more than 87 percent of resident students in four districts—Minnetonka, Edina, Orono, and Mahtomedi—and 79 percent in a fifth—St. Anthony-New Brighton.¹⁴¹ Open enrollment inflows to each of these districts were also predominantly white—ranging from 77 to 94 percent white.¹⁴² In each case, inflows to these districts came from

¹³⁵ *Id.* Table 1. The shares are similar for the poverty measure. The threshold for classifying a move as segregative or integrative was an inter-district difference of more than 10 percentage points in the relevant shares. *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 12.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 16, 22.

¹⁴¹ *Id.* at 22.

¹⁴² *Id.*

districts that were more diverse on average than the receiving districts and, in each case, white students were over-represented in open enrollment (compared to the districts they came from).¹⁴³

The most dramatic story involves the Minnetonka district, which was the only one of the large westerns suburban districts that both derived a large share of its enrollment from open enrollment, but at the same time would not accept poor, nonwhite students from Minneapolis through the voluntary interdistrict transfer program connected to the Choice is Yours settlement.¹⁴⁴

Two of the three largest open enrollment flows into the Minnetonka School District are from Hopkins and Eden Prairie, two districts which are significantly more racially diverse (and diversifying more rapidly) than Minnetonka.¹⁴⁵ In 2009–2010, Minnetonka resident students were 90 percent white, compared to 66 percent in Hopkins and 75 percent in Eden Prairie.¹⁴⁶ In that year, 354 students open enrolled from Hopkins and 88 percent of them were white.¹⁴⁷ The difference between open enrollees from Eden Prairie and Eden Prairie's resident student mix were not as great – 156 students open enrolled from Eden Prairie to Minnetonka and 76 percent were white.¹⁴⁸ However, at that time, Eden Prairie had recently gone through a controversial planning process, which created more pro-integrative attendance boundaries for its elementary schools.¹⁴⁹ During that process, the threat of open enrolling to Minnetonka was raised more than

¹⁴³ *Id.* Although the racial differences are relatively small in some cases (e.g., the white share of students in Orono was only five points higher than the average for a typical sending district), they are consistent. *See id.* at 18 n.16.

¹⁴⁴ *The Choice Is Yours Program*, MINNEAPOLIS PUBLIC SCHOOLS, https://schoolrequest.mpls.k12.mn.us/the_choice_is_yours_minnesota_program.

¹⁴⁵ INSTITUTE ON METROPOLITAN OPPORTUNITY, OPEN ENROLLMENT, *supra* note 79, at 19.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See, e.g.*, Christine A. Samuels, *School Boundary Plan Divides Minn. Suburb*, EDUCATION WEEK (Oct. 5, 2011), available at http://www.edweek.org/ew/articles/2011/10/05/06eden_ep.h31.html; *Eden Prairie Schools Redistricting Lawsuit Expected*, FOX 9 (May 19, 2011), available at <http://www.myfoxtwincities.com/story/17598083/eden-prairie-schools-redistricting-lawsuit-expected>.

once by opponents of the plan, and it is likely that open enrollment (and the threat of leaving) still exacerbate tensions associated with racial change in the district.¹⁵⁰

The largest open enrollment flow into Minnetonka is from the Eastern Carver district. In 2009–2010, this included 417 students, 88 percent of whom were white.¹⁵¹ Although Eastern Carver is itself a predominantly white district, the district recently went through a boundary drawing process for its two high schools which maintained the separation between the city of Chaska (which is increasingly diverse) and the areas surrounding it (which are predominantly white).¹⁵²

The effect of open enrollment into Minnetonka weighed heavily on more racially diverse adjacent districts as they assessed potential boundary changes. As each of the four school districts has officially considered or implemented legally permissible pro-integrative boundary strategies, white parents whose children might be required to attend more racially integrated schools in their districts than they were presently attending either threatened to use, or actually used, the state supported open-enrollment system to attend much whiter schools in the Minnetonka School District.¹⁵³ Hopkins attempted to draw racially integrative boundaries in the early 2000s but reversed course when 170 students in the whitest school attendance area threatened to open enroll into Minnetonka.¹⁵⁴ Eastern Carver County decided against a racially integrative high school boundary decision at least partly in light of its already substantial open enrollment losses to Minnetonka.¹⁵⁵ Finally, in the most public of boundary decisions with racial

¹⁵⁰ See, e.g., *Students Flee Eden Prairie Schools in Open Enrollment for Neighboring Minnetonka*, FOX 9 (Jan. 19, 2011), available at <http://www.myfoxtwincities.com/dpp/news/eden-prairie-open-enrollment-minnetonka-schools-jan-19-2011>.

¹⁵¹ INSTITUTE ON METROPOLITAN OPPORTUNITY, OPEN ENROLLMENT, *supra* note 79, at 22.

¹⁵² *Id.* at 19.

¹⁵³ See, e.g., *id.*; *Students Flee Eden Prairie Schools*, *supra* note 150.

¹⁵⁴ INSTITUTE ON METROPOLITAN OPPORTUNITY, OPEN ENROLLMENT, *supra* note 79, at 19.

¹⁵⁵ *Id.*

implications, Eden Prairie parents opposing the integrative boundary decision threatened to open enroll into Minnetonka when the district decided to implement the integrative decision.¹⁵⁶

Before, during, and after the boundary decisions in the four districts, and after they had refused to admit minority students from Minneapolis, the Minnetonka school district lured parents and students away from other districts through an expensive and unique paid-for advertising campaign undertaken in neighborhood local newspapers or through other media, including television and radio.¹⁵⁷ According to the superintendents and the Hopkins and Eden Prairie school districts, Minnetonka actively recruited these parents, even as the metropolitan newspapers noted that their actions would both cause more racial segregation in these districts and make it more difficult to draw racially integrated boundaries.¹⁵⁸ In 2010, as the neighboring Eden Prairie School District sought to implement pro-integrative boundary changes, Minnetonka increased its media expenditure resulting in white flight from Eden Prairie to Minnetonka.¹⁵⁹

The Supreme Court in *Keyes v. Denver School District No 1, Dayton Board of Education v. Brinkman* and *Columbus Board of Education v. Penick* declared that state-sanctioned transfer policies that systematically and foreseeably increase racial segregation in a district's schools or between school districts are improper.¹⁶⁰ In *Missouri v. Jenkins*, Justice O'Connor found that

¹⁵⁶ See, e.g., *id.*; *Students Flee Eden Prairie Schools*, *supra* note 150.

¹⁵⁷ See NAT'L COAL. FOR SCH. DIVERSITY, BUILDING SUPPORT FOR EDUCATORS IN RACIALLY CHANGING SUBURBS: NCSD STATEMENT ON SCHOOL BOUNDARY CHANGES IN EDEN PRAIRIE, MINNESOTA 4, available at http://www.school-diversity.org/pdf/NCSD_Eden_Prairie_Statement.pdf; see also Ron Schachter, *Students Wanted!*, DISTRICT ADMINISTRATION, <http://www.districtadministration.com/article/students-wanted> (visited June 18, 2014).

¹⁵⁸ *Id.*; interviews with John Schultz, Superintendent, Hopkins School District, and Melissa Krull, superintendent, Eden Prairie School District; see also Paul Grossel, *Number of Eden Prairie Students Leaving to Minnetonka Not Known Until March*, EDEN PRAIRIE NEWS (Jan. 21, 2011).

¹⁵⁹ See Lisa Kaczke, *Study: Open Enrollment Causing Segregation*, MINNESOTA SUN (Jan. 23, 2013).

¹⁶⁰ *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979). The failure to adhere to a district's approved integration plan is also a factor that may result in a finding of intentional segregation. See GARY ORFIELD, *MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY* 20 Table 1-1 (1978).

when suburban “districts ‘arrang[e] for white students residing in [urban] districts to attend [suburban] schools” that “Milliken I...permits interdistrict remedies.”¹⁶¹

The open enrollment exemption bears examination under Justice O’Connor’s construction of Milliken. The exemption enables the state, and its agents such as the Minnetonka school district, to engage in activities that systematically and foreseeably increase racial segregation. At the time of boundary-drawing controversies in the western suburbs, the segregative consequences of the tactics adopted by the Minnetonka school district were predicted by local commentators, and covered extensively in the Minneapolis Star Tribune and other media.¹⁶² The district has also broadly refused to adopt policies that would ameliorate the segregative effects of its behavior, such as joining the Choice Is Yours program with the City of Minneapolis; it continues to refuse to admit Minneapolis students under that program. The state has taken no action to require the Minnetonka school district to address these problems.

The Minnetonka episode is a clear illustration of the foreseeable and systematic segregative impacts of Minnesota’s open enrollment exemption. After the exemption was created, whites have more often used open enrollment to leave integrated schools than to attend them. White students are more likely to have parents with cars than can drive them to different school districts. Whites are more likely to have social networks informing them of the availability and quality of these whiter districts. Whites are more likely to feel comfortable moving to attend whiter school areas. In these ways, Minnesota’s open enrollment system

¹⁶¹ *Missouri v. Jenkins*, 515 U.S. 70, 110 (1995) (O’Connor, J., concurring) (citing *Milliken v. Bradley*, 433 U.S. 267 (1977)).

¹⁶² See, e.g., Katherine Kersten, *A Bad Idea Goes ‘Round and ‘Round*, STARTRIBUNE (Nov. 13, 2010); Myron Orfield, *Eden Prairie Plan Healthy, Thoughtful*, STARTRIBUNE (Nov. 18, 2010); Kelly Smith, *Eden Prairie Parents Turn Up Heat in School Battle*, STARTRIBUNE (Jan. 25, 2011); Jon Tevlin, *Busing Fight Feels Like Lots of Drama on a Smallish Stage*, STARTRIBUNE (Jan. 29, 2011); see also Beth Hawkins, *Eden Prairie School Board to Grapple with Contentious Boundary Plan Tonight*, MINNPOST (Nov. 23, 2010).

“arranges for” white students residing in a segregated city district to attend schools in whiter suburban districts and “arranges for” black students in integrated districts to attend segregated city schools and thus runs afoul of the Constitution.¹⁶³

II. A range of other errors and omissions render the 1998 SONAR and resulting rule unreasonable. These have been strengthened by new developments in law and social science.

The 1998 SONAR contained a number of inaccuracies, errors, and flawed interpretations, both of the state of the law and of social science research on racial integration. Although these problems were apparent and sometimes conspicuous at the time of the rule’s promulgation, additional research in the interim has only increased the salience of the original objections. They constitute a further basis further for declaring the current rule unnecessary and unreasonable.

- a. The SONAR dismissed the benefits of school integration without thoroughly reviewing the evidence.

Brown held that the “in the field of public education, the doctrine of separate but equal has no place. Separate education facilities are inherently unequal.”¹⁶⁴ The decision was based on the importance of public education to effective citizenship and success in life, and the clear – and in the court’s view irremediable – harms of educational segregation, particularly when that segregation carried the sanction of law.¹⁶⁵

¹⁶³ See *Jenkins*, 515 U.S. at 110.

¹⁶⁴ *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483, 495 (1954).

¹⁶⁵ *Id.* at 493-95.

The 1978 SONAR reported extensively on the benefit of racial integration and the harms of racial segregation.¹⁶⁶ The 1998 SONAR changes course and maintains there are few benefits of racial integration in schools.¹⁶⁷ In so doing, it only cites inaccurate and incomplete evidence assembled by Katherine Kersten in a commentary on the proposed rule, and ignores the far more abundant evidence on the benefits of racial integration.¹⁶⁸ Kersten has no expertise in any field related to school desegregation and her findings have been found to be both inaccurate and deceptively presented. The National Education Policy Center reviewed a more recent statement arguing against the benefits of integration provided by Katherine Kersten, and citing evidence used by the SONAR.¹⁶⁹ It found the review was incomplete, and that the author had “relie[d] heavily on anecdotes about desegregation policies,” while “ignor[ing] dozens of the most important peer-reviewed research studies that suggest strong relationships between racial, ethnic, and economic diversity and desegregation and academic gains.”¹⁷⁰

The recent *Parents Involved* decision has further revealed the degree to which the balance of academic research supports the benefits of school integration. The Supreme Court was presented with extensive empirical evidence on the effects of racial integration in schools. Briefs attesting to the benefits of integration were submitted by the (1) American Educational Research Association (AERA), (2) the American Psychological Association (APA), and (3) 553 Social

¹⁶⁶ 1978 SONAR at 3-4.

¹⁶⁷ 1998 SONAR at 59-62, B7-B11 (“Current sociological data indicates little, if any, correlation between desegregation efforts aimed at achieving a particular degree of racial balance and improved academic achievement of students.”).

¹⁶⁸ The discussion on pages B7 through B11 of the 1998 SONAR follows almost precisely from Katherine Kersten’s piece attacking the proposed rule. KATHERINE KERSTEN, CTR. FOR THE AM. EXPERIMENT, GOOD INTENTIONS ARE NOT ENOUGH: THE PERILS POSED BY MINNESOTA’S NEW DESEGREGATION PLAN (1995). Kersten updates her arguments in KATHERINE KERSTEN, CTR. FOR THE AM. EXPERIMENT, OUR IMMENSE ACHIEVEMENT GAP: EMBRACING PROVEN REMEDIES WHILE AVOIDING A RACE-BASED DISASTER (2012).

¹⁶⁹ Susan Eaton, *Review of Our Immense Achievement Gap*, NAT’L EDUC. POLICY CTR., <http://nepc.colorado.edu/thinktank/review-immense-achievement-gap> (last visited June 18, 2014).

¹⁷⁰ *Id.*

Scientists.¹⁷¹ Briefs disputing the benefits of integration were filed by (1) Drs. David Armor, Abigail and Stephen Thernstrom, and (2) Dr. John Murphy, Christine Rossell, and Herbert Walberg.¹⁷² The AERA and APA briefs presented a consensus statement on behalf of thousands of tenured professors and credentialed researchers in the two academic field best situated to evaluate integration's effects. In addition, the 553 scholars' brief was a statement of the nation's most accomplished scholars on this subject.

The pro-integration briefs cited scholarly evidence on the benefits of school integration.¹⁷³ Extensive research literature documents that racial and economic segregation hurts children and that the potential positive effects of creating more integrated schools are broad and long lasting.¹⁷⁴ The research shows that integrated schools boost academic achievement (defined as test scores, educational attainment, and expectations), improve opportunities for students of color, and generate valuable social and economic benefits including better jobs with better

¹⁷¹ Brief for American Educational Research Association as Amicus Curiae Supporting Respondents, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2925267; Brief for the American Psychological Association and the Washington State Psychological Association as Amici Curiae Supporting Respondents, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927084; Brief for 553 Social Scientists as Amici Curiae Supporting Respondents, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927079.

¹⁷² Brief for David J. Armor, Abigail Thernstrom, and Stephan Thernstrom as Amici Curiae Supporting Petitioners, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2453607; Brief for Drs. Murphy, Rossell, and Walberg as Amici Curiae Supporting Petitioners, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2459104.

¹⁷³ See, e.g., Brief for the American Psychological Association, *supra* note 171, at 2 ("Extensive psychological research shows that, under certain conditions, interaction among person of different races can diminish racial stereotypes and promote cross-racial understanding, empathy, and mutual respect.").

¹⁷⁴ See, e.g., Michael A. Boozer et al., *Race and School Quality Since Brown v. Board of Education*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY 269 (1992); Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research* in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99 (2001); Goodwin Liu & William Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791 (2005).

benefits and greater ease living and working in diverse environments in the future.¹⁷⁵ Other academic benefits for minority students include completing more years of education and higher college attendance rates.¹⁷⁶ Long-term economic benefits include a tendency to choose more lucrative occupations in which minorities are historically underrepresented.¹⁷⁷

Attending racially integrated schools and classrooms may reduce the achievement gap between white and minority students.¹⁷⁸ During the period when school integration was increasing, the racial achievement gap began to systematically narrow. The relation of integration and achievement is the most striking for black students. Since American schools

¹⁷⁵ See, e.g., Brief for the American Educational Research Association, *supra* note 171, at 9-13 (“More recent analyses of students’ test score data have confirmed positive effects on minority student achievement arising in schools with more diverse racial compositions, with no negative effects on white student achievement.”); *id.* at 19 (“[M]easures of educational outcomes, such as scores on standardized tests and high school graduation rates, are lower in predominantly minority schools.”); Brief for 553 Social Scientists, *supra* note 171, at 20a (“Research shows that attendance at racially integrated schools tends to improve students’ life opportunities, particularly those of nonwhite students.”).

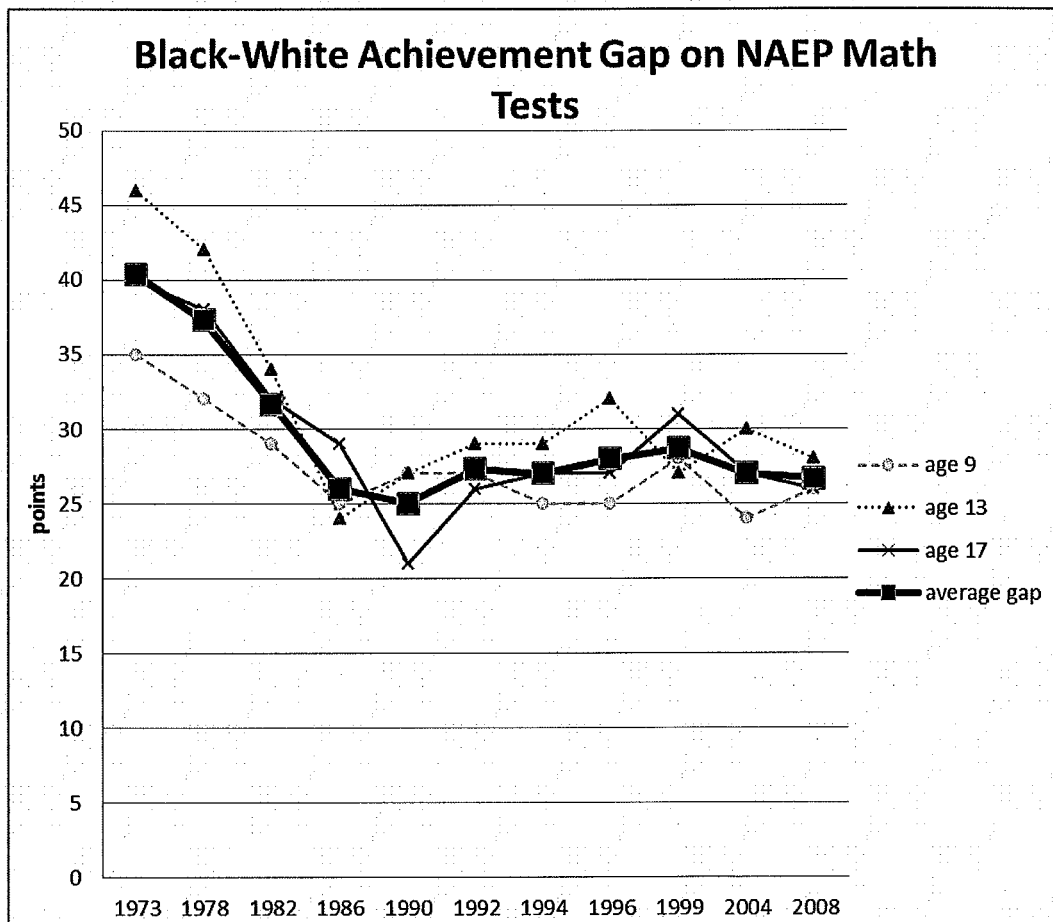
¹⁷⁶ Brief for 553 Social Scientists, *supra* note 171, at 39a-40a (“Students in predominantly minority schools are also less likely to graduate from college, *even after accounting for prior test scores and socioeconomic status.*” (emphasis added)).

¹⁷⁷ *Id.* at 8-9 (“Minorities who graduate from integrated schools are also more likely to have access to the social and professional networks that have historically been available to white students and can provide additional information about college-going opportunities and access to professional jobs. Thus, minorities who graduate from integrated schools also tend to earn higher degrees and major in varied disciplines, such as architecture and the sciences.”); see also Orley Ashenfelter, William J. Collins & Albert Yoon, *Evaluating the Role of Brown v. Board of Education in School Equalization, Desegregation, and the Income of African Americans*, 8 AM. L. & ECON. REV. 213 (2006); Jomills H. Braddock & James M. McPartland, *How Minorities Continue to Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. OF SOC. ISSUES 5 (1987); Robert Crain & Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment* (Center for Social Organization in Schools, 1985).

¹⁷⁸ See, e.g., Brief of 553 Social Scientists, *supra* note 171, at 25a (noting that the Department of Defense schools, which develop assignments that require interracial and intergroup contact, have a “substantially lower racial achievement gap than most states”); see also Roslyn Arlin Mickelson, *Segregation and the SAT*, 67 OHIO ST. L. J. 67 (2006); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513 (2003); Kathryn Borman et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida’s Schools*, 41 AM. ED. RES. J. 605 (2004); Russel W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TEACHERS COLLEGE REC. 1999 (2005); Geoffrey D. Borman & N. Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman’s Equality of Educational Opportunity Data*, paper presented at the annual meeting of the American Educational Research Association in San Francisco, Cal. (2006).

began to resegregate in the 1990s, the narrowing has stopped and the gap has begun to increase. Many scholars believe there is striking evidence that these patterns are related.¹⁷⁹ Chart One, below, illustrates these trends with NAEP math scores since 1973. Since the research also shows that integrated schools do not result in lower test scores for white students, integration is one of the very few strategies demonstrated to ease one of the most difficult public policy problems of our time.

Chart One



¹⁷⁹ Eric. A. Hanushek, *Black-White Achievement Differences and Governmental Interventions*, AM. EDUC. ASS'N PAPERS AND PROCEEDINGS 24 (May 2001); Ronald Ferguson & Jal Mehta, *An Unfinished Journey: the Legacy of Brown and Narrowing the Achievements Gap*, PHI DELTA KAPPAN 656 (May 2004); Jaekyung Lee, *Multiple Facets of Inequality in Racial and Ethnic Achievement Gaps*, 79 PEABODY J. EDUC. 51 (2004); Douglas Harris & Carolyn D. Herrington, *Accountability, Standards, and the Growing Achievement Gap: Lessons from the Past Half-Century*, AM. J. EDUC. 209 (Feb. 2006).

Integrated schools also generate long-term social benefits for students. Students who experience interracial contact in integrated school settings are more likely to live, work, and attend college in more integrated settings.¹⁸⁰ Integrated classrooms improve the stability of interracial friendships and increase the likelihood of interracial friendships as adults.¹⁸¹ Both white and non-white students tend to have higher educational aspirations if they have cross-race friendships.¹⁸² Interracial contact in desegregated settings decreases racial prejudice among students and facilitates more positive interracial relations.¹⁸³ Students who attend integrated schools report an increased sense of civic engagement compared to their segregated peers.¹⁸⁴ Integrated schools also enhance the cultural competence of white students and prepare them for a more diverse workplace and society.

Disputing the benefits of integration were six experts – only two of whom had published significant peer-reviewed studies on the topic. Armor and Thernstrom’s brief presented a review of the social science literature and concluded that desegregated schools did not improve academic, long-term, or social outcomes for students.¹⁸⁵ The brief of Murphy, Rossell, and

¹⁸⁰ Jomills H. Braddock, Robert L. Crain, and James M. McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259 (1984).

¹⁸¹ RICHARD D. KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE (2001); Maureen Hallinan & Richard Williams, *The Stability of Students’ Interracial Friendships*, 52 AM. SOC. REV. 653 (1987).

¹⁸² Maureen Hallinan & Richard Williams, *Students’ Characteristics and the Peer Influence Process*, 63 SOC. OF EDUC. 122 (1990).

¹⁸³ Jennifer Jellison Holme, Amy Stuart Wells & Anita Tijerina Revilla, *Learning through Experience: What Graduates Gained by Attending Desegregated High Schools*, 38 EQUITY & EXCELLENCE IN EDUC. 14 (2005); Melanie Killen & Clark McKown, *How Integrative Approaches to Intergroup Attitudes Advance the Field*, 26 J. APPLIED DEVELOPMENTAL PSYCH. 612 (2005); Thomas Pettigrew & Linda Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH. 751 (2006).

¹⁸⁴ Michal Kurlaender, John T. Yun, *Fifty Years After Brown: New Evidence of the Impact of School Racial Composition on Student Outcomes*, 6 INT’L J. EDUC. POL’Y RES. & PRAC. 51 (2005).

¹⁸⁵ See, e.g., Brief for David J. Armor, et al., *supra* note 172, at 5 (“[T]here is no evidence of a clear and consistent relationship between desegregation and such long-term outcomes as college attendance, occupational status, and wages, a fact that should not be surprising given the weak and inconsistent effect of desegregation on achievement.”).

Walberg argued the narrower point that forced integration did not improve outcomes for students.¹⁸⁶

As the Court was considering the cases, the National Academy of Education, a non-partisan organization dedicated to fostering public understanding of education and educational research, convened a panel of scholars to analyze both sets of briefs.¹⁸⁷ A second panel of social psychologists also evaluated the briefs.¹⁸⁸ Both panels strongly agreed that the preponderance of the social science evidence strongly indicates positive relationships among school racial diversity, academic achievement, and intergroup relations, with the National Academy of Education noting that race-neutral remedies are “limited in their ability to increase diversity” and not as likely to be successful as race-conscious alternatives.¹⁸⁹

- b. The 1998 SONAR inaccurately predicted that the proposed, more expansive desegregation rule would cause white flight.

The 1998 SONAR argued that the proposed desegregation rule it would cause white flight. It did so by highlighting studies that show the flaws of single-district desegregation.¹⁹⁰ But

¹⁸⁶ See, e.g., Brief for Dr. Murphy, et al., *supra* note 172, at 8 (“[T]he evidence suggests that compulsory racial balancing efforts sometimes harm students.”).

¹⁸⁷ NAT’L ACAD. OF EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES (2007).

¹⁸⁸ Roslyn Arlin Mickelson, *Twenty-First Century Social Science of School Racial Diversity and Educational Outcomes*, 69 OHIO ST. L.J. 1173 (2008).

¹⁸⁹ NAT’L ACAD. OF EDUC., *supra* note 187, at 45 (“In summary, the research evidence supports the conclusion that the overall academic and social effects of increased racial diversity are likely to be positive. . . . Because race-neutral alternatives . . . are quite limited in their ability to increase racial diversity, it is reasonable to conclude that race-conscious policies for assigning students to schools are the most effective means of achieving racial diversity and its attendant positive outcomes.”); Mickelson, *Twenty-First Century Social Science*, *supra* note 188, at 1222 (“The twenty-first century social science summarized in this Article indicates that diverse schooling has positive effects on achievement, intergroup relations, and life course trajectories. . . . The findings . . . are consistent with the conclusions reached by the Respondents’ [pro-integration] amici, but they are at odds with those of the Petitioners’ [anti-integration] amici.”).

¹⁹⁰ See Cindy Lavorato & Frank Spencer, *Back to the Future with Race-Based Mandates: A Response to Missed Opportunity*, 36 WM. MITCHELL L. REV. 1748, at 1752-58.

single-district integration has qualitatively different consequences than metropolitan integration, which is one of the most effective known strategies to reduce white flight and to make schools and neighborhoods more racially stable. Forty years of history and data demonstrate that integrated neighborhoods in regions with large-scale, metro-wide school-integration plans were much more stable than those in metropolitan areas without such plans.¹⁹¹ Indeed, metropolitan integration is far more effective in stabilizing white flight than neighborhood-based schools.¹⁹²

Minnesota's State Board of Education, which took over the task of mandatory racial integration from the federal courts in 1983, attempted to adopt a metropolitan integration rule that provided for racially integrated schools and that effectively counteracted white flight and stabilized fragile neighborhood racial integration.¹⁹³ The State Board noted year after year, in study after study, with increasing apprehension, the decreasing effectiveness of single district integration programs in the face of the problem of white flight.¹⁹⁴ While the schools of the region were pursuing racial integration one district at a time, it became harder and harder for diverse districts to compete for white students with the newer, whiter districts in suburbs – districts that

¹⁹¹ See Myron Orfield & Thomas Luce, *America's Diverse Suburbs: Challenges and Opportunities*, 23 HOUS. POL'Y DEB. 395 (2013); Myron Orfield & Thomas Luce, *Minority Suburbanization and Racial Change* (paper presented at Race and Regionalism Conference, May 6, 2005), available at https://www.law.umn.edu/uploads/a1/10/a11029ead2a1ee72b2877e270803faf3/17_Minority_Suburbanization_Full_Report.pdf.

¹⁹² See Orfield & Luce, *Minority Suburbanization*, *supra* note 191.

¹⁹³ In 1983 the Commissioner of Education, the principal state executive branch education authority, was the secretary and executive officer of the State Board of Education. MINN. STATE DEP'T OF EDUC., A HISTORY OF THE STATE DEPARTMENT OF EDUCATION IN MINNESOTA 11-14, available at <http://www.mnddc.org/past/pdf/60s/67/67-AHO-MDE.pdf>. A decade after Minneapolis, as an administrative agency of the State, was found to have intentionally segregated its schools, the federal court dissolved its jurisdiction over the busing plan in reliance on the Commissioners' commitment to maintain mandatory desegregation by state administrative rule. See *Booker v. Special School District No. 1*, No. 4-71 Civ. 382, slip op. at 6 (D. Minn. June 8, 1983) (cited in Cheryl W. Heilman, *Booker v. Special School District No. 1: A History of School Desegregation in Minneapolis, Minnesota*, 12 LAW & INEQ. 127, 172 n.314 (1993)); MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 41-43 (1997); Heilman, *supra*, at 127-28, 171-73 (1993). The school district was never returned to local control for desegregation purposes and never formally declared "unitary" under the rubric of *Freeman v. Pitts*, 503 U.S. 467 (1991).

¹⁹⁴ See Hobday, et al., *supra* note 128, at 952-55.

often lacked in affordable housing, resulting in schools with virtually no poor or minority children.¹⁹⁵

In dismissing the State Board's plan as likely to itself cause white flight, the 1998 SONAR focused on single-district studies of mandatory busing programs from the early 1970s.¹⁹⁶ These forty-year-old studies of single-district plans were not only outdated, but are misleading when evaluating the implications of a multi-racial, choice-driven, regional plan like that proposed by the State Board.¹⁹⁷ A court has not ordered a forced busing remedy since the early 1980s; virtually all integration plans today are choice- and incentive-based.¹⁹⁸

The SONAR briefly implies that even metropolitan-level integration causes the flight of white children to private schools.¹⁹⁹ However, there is no current evidence to support this contention. Again, the cited data are forty years old, based on different types of plans than the State Board proposal, and are from a study with a very small sample.²⁰⁰ More recent data show that areas with metropolitan-level integration programs exhibit private school attendance rates similar to or, in some cases less than, the national average. For instance, private school

¹⁹⁵ See *id.*; ORFIELD, METROPOLITICS, *supra* note 193, maps 3-8 to 5-1.

¹⁹⁶ 1998 SONAR at 53-56 (discussing the likelihood of single-city and single-district integration plans of creating white flight). The SONAR only acknowledged the deficiency of single-district studies in a brief footnote, where it dismissed analysis of multi-district remedies as irrelevant because they "are not within the power of this Commissioner to adopt." See *id.* at 54 n.29. This conclusion is incorrect. See *infra* Section II(d).

¹⁹⁷ Black-white integration presents different issues than the integration of whites, blacks, Asians, and Latinos. See Genevieve Siegel-Hawley, *The Integration Report, Issue 18*, THE INTEGRATION REP. (Apr. 8, 2009), available at <http://theintegrationreport.wordpress.com/2009/04/08/issue-18/>; INSTITUTE ON RACE AND POVERTY, A COMPREHENSIVE STRATEGY TO INTEGRATE TWIN CITIES SCHOOLS AND NEIGHBORHOODS 15-19 (2009).

¹⁹⁸ See GARY ORFIELD & SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 17-18 (1997); William C. Symonds, *Brown v. Board of Ed.: A Bittersweet Birthday*, BUSINESSWEEK (May 17, 2004), at 61, available at <http://www.businessweek.com/stories/2004-05-16/brown-v-dot-board-of-ed-a-bittersweet-birthday>; Richard D. Kahlenberg, *The Trouble with Distance*, THE NEW REPUBLIC (2010) (book review).

¹⁹⁹ 1998 SONAR at 79 (citing James S. Coleman, *New Incentives for Desegregation*, 7 HUMAN RIGHTS 10 (1978)); see also Lavorato & Spencer, *supra* note 190, at 1792.

²⁰⁰ See Lavorato & Spencer, *supra* note 190, at 1792.

attendance rates in metropolitan areas with active, large-scale integration programs averaged 11.7 percent in 2008.²⁰¹ This is barely different from the national average of 10 percent reported by the Council for American Private Education, and virtually indistinguishable from the 10.6 percent of students that attend private schools in the Twin Cities.²⁰²

The connection between school integration and white flight has received extensive academic examination. In 1975, the famous educational researcher James Coleman had found that single-district school desegregation plans increased white flight, but he did not find the same loss in countywide districts—in fact, Coleman himself noted that metropolitan-wide desegregation plans experienced little, if any, white flight.²⁰³

Coleman's white flight report set off a bevy of academic studies. These studies repeatedly emphasized that white flight from urban centers was a background constant in all diverse cities and that this flight was related not only to race in schools and neighborhoods, but to growing poverty, crime, fiscal inequality which caused taxes to rise in the face of declining services, low local spending on schools and other local services desired by the middle-class, new home types and inexpensive financing, and desire for more space. These scholars noted that every racially

²⁰¹ The included metropolitan areas are Durham, NC (9.4 percent), Greensboro, NC (7.3 percent), Indianapolis, IN (10.3 percent), Lakeland, FL (8.0 percent), Louisville, KY (16.2 percent), Raleigh, NC (7.8 percent), and Tampa, FL (10.7 percent). See Institute on Metropolitan Opportunity, *Summary of Public and Private School Enrollment by Metro*, available at <http://www.law.umn.edu/metro/school-studies/integration-and-segregation.html>.

²⁰² See Institute on Metropolitan Opportunity, *Public and Private School Enrollment*, *supra* note 201; *Facts and Studies*, COUNCIL FOR AM. PRIVATE EDUC., <http://www.capenet.org/facts.html> (last visited June 19, 2014).

²⁰³ JAMES D. COLEMAN, SARA D. KELLY & JOHN A. MORE, *TRENDS IN SCHOOL SEGREGATION* 64 (1975). For a discussion of the impact of this study, see Gary Orfield, *Research, Politics, and the Anti-Busing Debate*, 42 L. & CONTEMP. PROBS. 41 (1978) ("This [white flight] paper, a highly tentative interpretation, which included a number of speculative conclusions unrelated to the research, began to influence national policy even before it was published later that year. The impact of the paper increased when Coleman gave a series of wide-ranging interviews, which were carried in major newspapers and on television. Because of his academic stature and previous notoriety . . . Coleman's comments and speculations were treated as if they were proven research findings.").

diverse American city had white flight, whether it had a school desegregation plan or not.²⁰⁴ In the end, most scholars had trouble assigning much of the flight to the separable influence of forced integration.²⁰⁵ Some scholars found much smaller losses in countywide districts where whites would have to move greater distances to avoid integration, and that the degree of white flight was highly related to availability of nearby very-white suburban school enclaves. The easier it was for whites to move to nearby all-white districts, the greater the level of flight. In areas where the white suburban school districts were relatively far away or where the suburbs were racially diverse, white flight declined sharply.²⁰⁶

By 1992, it was clear that metropolitan areas that implemented large-scale mandatory geographic plans (such as Indianapolis, Indiana; Broward, Florida; Hillsboro, Ohio; Clark County, Nevada; Nashville, Tennessee; and Duval, Florida) had the least white flight of any large racially diverse U.S. school districts.²⁰⁷ From 1968 to 1988, three of the top six large U.S. school districts (and more than half of the top twenty) with the most stable white enrollment had operated mandatory metropolitan-level busing since the early 1970s; the others either were white and growing fast or almost all non-white.²⁰⁸ On the other hand, from 1968 to 1988, the largest

²⁰⁴ Reynolds Farley, Toni Richards & Clarence Wurdock, *School Desegregation and White Flight*, 53 SOC. EDUC. 123 (1980); William H. Frey, *Central City White Flight; Racial and Non-Racial Causes*, 44 AM. SOC. R. 425 (1979); Christine Rossell, *School Desegregation and White Flight*, 90 POL. SCI. Q. (1975); Gary Orfield, Symposium on White Flight (Aug. 1975) papers of Reynolds Farley, Michael W. Giles, Luther Munford, William L. Taylor & Gary Orfield.

²⁰⁵ See COLEMAN, TRENDS, *supra* note 203.

²⁰⁶ See Farley, *supra* note 204, at 130; COLEMAN, TRENDS, *supra* note 203, at Table 14.

²⁰⁷ GARY ORFIELD & FRANKLIN MONFORT, STATUS OF SCHOOL DESEGREGATION: THE NEXT GENERATION 17, 22 (1992) (finding that “the trend towards isolation in big cities occurs in districts with varying forms of desegregation, including . . . voluntary transfers,” and is “different only in those areas with county-wide mandatory plans which can include city and suburban schools in one district, or where the courts ordered city-suburban desegregation on a large scale”), *available at* <http://files.eric.ed.gov/fulltext/ED415291.pdf>.

²⁰⁸ GARY ORFIELD & FRANKLIN MONFORT, RACIAL CHANGE AND DESEGREGATION IN LARGE SCHOOL DISTRICTS: TRENDS THROUGH THE 1986-97 SCHOOL YEAR 9-10 (1988), *available at* <http://files.eric.ed.gov/fulltext/ED415291.pdf>.

decline in white enrollment in large U.S. school districts occurred in district with no desegregation plans.²⁰⁹

In areas with metropolitan-level school integration plans, residential integration increased faster and there was much less evidence of housing discrimination by real estate agents than in areas without such integration. Instead of steering families to certain neighborhoods based on schools, agents were more likely to say that all neighborhoods had good schools. Newspaper advertisements for sales or rental were also less likely to list schools in a discriminatory manner.²¹⁰

By the 1990s, regional integration plans in Raleigh-Wake County and Charlotte-Mecklenburg (which had been desegregated by *Swann*) actually began to increase the proportion of white students – in effect, creating “reverse white flight.”²¹¹ Wake County had integrated voluntarily and without a court order, and Charlotte was released from its court order in the early 1990s. In both areas, pro-integration advocates won significant victories in elections in 1995 against neighborhood-school proponents, and voters decided to keep metropolitan desegregation plans in place.²¹² Wake County not only has schools that rank among the nation’s most integrated, but its neighborhoods are also among the least segregated. It has also been one of the fastest-growing metropolitan areas in the country.

Continuing research after the 1998 SONAR has strengthened these conclusions.

A recent statistical study has demonstrated a strong connection between school integration and the likelihood of neighborhoods to undergo demographic transitions into greater

²⁰⁹ ORFIELD & MONFORT, STATUS OF DESEGREGATION, *supra* note 207.

²¹⁰ Diana M. Pearce, *Deciphering the Dynamics of Segregation: The Role of Schools in the Housing Choice Process*, 13 URBAN REV. 85, 88 (1981).

²¹¹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 401 U.S. 1 (1971); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825 (1995).

²¹² Orfield, *Metropolitan School Desegregation*, *supra* note 211.

Another recent comparative study of several metropolitan areas between 1970 and 2010 (Louisville-Jefferson, Kentucky; Richmond-Henrico, Virginia; Charlotte-Mecklenburg, North Carolina; and Chattanooga-Hamilton, Tennessee) found a strong relationship between the existence of an effective metropolitan school integration plan and improvements in residential integration.²¹⁴ Additionally, the study showed that cities which either created or ended metropolitan-wide desegregation plans during the period of study saw corresponding declines or increases in housing segregation.²¹⁵

- c. The current rule unreasonably narrows the standard for intentional discrimination, improperly exempting potentially discriminatory programs from its remedies.

The present rule creates a standard to prove intentional discrimination that is much higher than is required by the Supreme Court.

In *Keyes v. Denver School District No.1*, the Supreme Court outlined series of official actions (*Keyes* acts) that commonly accompanied intentional discrimination by local school authorities.²¹⁶

Keyes acts included: the drawing or alteration of attendance zones that had racially segregative effects; a pattern of school construction in which the location of new schools or expansion of existing schools systematically increased segregation throughout the system, or the failure to relieve overcrowding at segregated sites in ways that could increase integration; hiring, promotion, or faculty placement decisions with racially disparate impacts; perpetuation or exacerbation of district segregation by strict adherence to a neighborhood school policy in the

²¹⁴ Genevieve Siegel-Hawley, *City Lines, County Lines, Color Lines: An Analysis of School and Housing Segregation in Four Southern Metropolitan Areas, 1990-2010*, 115 TEACHERS COLLEGE RECORD 1 (2013).

²¹⁵ *Id.*

²¹⁶ *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973); *id.* at 234-35 (1973) (Powell, J., concurring).

face of residential segregation; and transfer policies that systematically increase racial segregation in a district's schools.²¹⁷ *Keyes* and its progeny held that, if one or more of these actions was present and was motivated in part by intent to discriminate, the district was segregated by law.²¹⁸

Keyes acts were present in virtually every racially segregated school district in the United States. Further, in almost all reported cases involving *Keyes* acts, plaintiffs were successful in establishing intentional discrimination.²¹⁹

Columbus v. Penick held that if school authorities took an official action in where a disparate racially impact was foreseeable – including but not limited to the *Keyes* actions – such evidence could support a finding of intentional discrimination.²²⁰ Specifically, *Penick* held:

[A]ctions having foreseeable and anticipated disparate impact are relevant evidence in proving the ultimate fact, forbidden purpose. [Our] cases do not forbid 'the foreseeable effect standard from being utilized as one of several kinds of proof from which an inference of segregative intent may be drawn.' Adherence to a particular policy or practice 'with full knowledge of the predictable effects of such adherence upon the racial imbalance in the school system is one factor among others which may be considered by a court in determining whether an inference of segregative intent may be properly be drawn.'²²¹

Arlington Heights created a framework that supplemented *Keyes* and *Penick* in the school context.²²² This framework could help a fact finder determine whether an official action resulting in a racially disparate impact also represented a case of disparate treatment.

Arlington Heights held that when the motivation for an official action, which resulted in a pattern of disparate racial impact, was unexplainable on grounds other than race discrimination,

²¹⁷ *Id.* at 209, 234-35.

²¹⁸ *Id.*

²¹⁹ See Mark Tushnet, *A Clerk's Eye View of Keyes v. Sch. Dist. No. 1*, 90 DENV.U. L. REV. 1139, 1147 (2013); ORFIELD, MUST WE BUS, *supra* note 160, at 23; Owen Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFFAIRS 3, 22-26 (1974).

²²⁰ *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

²²¹ *Id.* at 464-65.

²²² *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

it constitutes discriminatory treatment.²²³ If the action was explainable on other grounds, however, the plaintiff must prove that discriminatory intent was a motivating factor in the decision.²²⁴ It does not have to prove that discriminatory intent was the sole motivating factor or even a predominant factor underlying the decision.²²⁵

Arlington Heights laid out additional contextual issues (*Arlington* factors) which that could be utilized, in addition to the *Keyes-Penick* analysis, to determine whether an official action having disparate racial impacts were also cases of disparate racial treatment. The court declared that these factors “[identify], without purporting to be exhaustive, [the] subject of proper inquiry in determining whether racially discriminatory intent existed.”²²⁶

The present rule in Minnesota narrows the tests laid out in these three cases. In doing so, it unreasonably exempts actions that may violate constitutional prohibitions against discrimination.

The present rule does not reflect the fact that certain types of official actions are commonly associated with discriminatory conduct. Although the *Keyes* issues are to be

²²³ *Id.* at 266.

²²⁴ *Id.* at 265-66.

²²⁵ *Id.*

²²⁶ *Id.* at 268. These issues included:

Does the action bear more heavily on one race than another?

Does the historical background of the decision reveal a series of action taken for invidious purposes?

Does the specific sequence of events leading up to the challenged conduct also shed light on the decision-maker’s purposes? In this light, the court noted that up-zoning to prevent affordable housing after a project had been proposed or approved was such an example. (In the school context, modifying or withdrawing and integrated attendance plan in the fact of protest might present parallel conduct.)

Departures from the normal course procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision to the contrary.

The legislative or administrative history may be highly relevant, especially if there were contemporary statements by members of the decision-making body, minutes of its meetings, or reports. *Id.*

considered by the commissioner, the rule provides no guidance that connect them with common patterns of discrimination.²²⁷

Additionally, under the present rule, the commissioner cannot use foreseeability (the fact that “the racially identifiable composition of the schools was predictable given policies or practices of the district”) or disparate impact (“[w]hether the racial composition of the schools is the result of acts which disadvantage one race more than another”) to infer discrimination, unless this finding is accompanied by one of three other listed discriminatory actions.²²⁸ The 1998 SONAR, in explaining this sharply limited standard, quotes *Penick* for the proposition that “disparate impact and foreseeable consequences, without more, do not establish a constitutional violation.”²²⁹

This interpretation severely narrows the circumstances under which there can be an inference of intentional discrimination, far beyond the limits established by the Supreme Court. First, *Arlington Heights* held that disparate impact alone can establish intentional discrimination

²²⁷ MINN R. 3535.0130 subp. 2(A) (1)-(3) (2013).

²²⁸ Minn. Rule. 3535.0130, subp. 1 (2013) (“The commissioner’s finding of discriminatory intent must be based on one or more of the following, *except that the commissioner shall not rely solely on item D or E or both*:

- A. The historical background of the acts which led to the racial composition of the school, including whether the acts reveal a series of officials’ actions taken for discriminatory purposes;
- B. whether the specific sequence of events resulting in the school’s racial composition reveal a discriminatory purpose;
- C. departures from the normal substantive or procedural sequence of decision-making, as evidenced, for example, by the legislative or administrative history of the acts in question; especially if there are contemporaneous statements by district officials, or minutes or reports that demonstrate a discriminatory purpose;
- D. Whether the racial composition of the schools is the result of acts which disadvantage one race more than another; as evidenced, for example, when protected students are bused further or more frequently than white students; and
- E. *Whether the racially identifiable composition of the schools was predictable given policies or practices of the district*” (emphasis added)).

²²⁹ 1998 SONAR at 35.

in the rare circumstance where there is no non-discriminatory reason for the decision.²³⁰ The rule does not allow such a finding.

More importantly, *Penick* holds that foreseeability and disparate impact permit a court to infer discrimination.²³¹ While foreseeability and disparate impact *alone* do not establish discrimination or shift the burden of proof, they clearly allow the factfinder the discretion to consider a multitude of other factors – factors the Supreme Court has never attempted to exhaustively list or limit, and many of which may be unique to the circumstances at hand.²³² By contrast, the current Minnesota rule effectively eliminates foreseeability or disparate impact from the test for intentional discrimination, because its restriction only enables a factfinder to consider these factors *only when* a fully independent basis for finding discriminatory intent is also present.

In a similar fashion, this provision of the Minnesota rule distorts the meaning of the *Arlington Heights* contextual factors, which were designed to help a factfinder determine whether disparate treatment was present. *Arlington Heights* did not require the factfinder to prove that discrimination took one of a small set of previously delineated forms.²³³ Instead, it stated that prior discrimination, an unusual sequence of events, procedural departures, or official

²³⁰ *Arlington Heights*, 429 U.S. at 267.

²³¹ *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (“The District Court also recognized that under [earlier cases] disparate impact and foreseeable consequences, without more, do not establish a constitutional violation. . . . Those cases do not forbid the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn.” (internal quotations omitted)) For the difference between a presumption and an inference, see generally KENNETH S. BRAUN, ET AL., MCCORMICK ON EVIDENCE §§ 338, 342, & 344 (7th ed. 2013); MICHAEL A. GRAHAM, EVIDENCE: A PROBLEM, LECTURE AND EVIDENCE APPROACH 611-12 (2011).

²³² See, e.g., *Penick*, 443 U.S. at 464-65; *Arlington Heights*, 429 U.S. at 268 (“The foregoing summary [of *Arlington* factors] identifies, *without purporting to be exhaustive*, subjects of proper inquiry in determining whether racially discriminatory intent existed.” (emphasis added)).

²³³ *Arlington Heights*, 429 U.S. at 268.

statements were *examples* of the type of evidence that could help a fact finder infer whether discriminatory intent was present.²³⁴

Arlington Heights explicitly stated that its list of factors is not exhaustive.²³⁵ Instead, it cites *Keyes*, with its list of *Keyes* acts, with approval.²³⁶ And later, *Penick* finds its foreseeability analysis grounded in both *Keyes* and *Arlington Heights*.²³⁷ These facts all suggest that there are many bases upon which a court can infer discrimination.

The statute's conception of intentional discrimination is much narrower than the Supreme Court's in several other respects.

The Supreme Court in *Keyes*, *Penick*, and *Dayton v. Brinkman* declare that optional attendance boundaries that have racially disparate impacts can support an inference of intentional discrimination on the part of the school district.²³⁸ The Minnesota rule instead improperly declares that segregation based on parental choice cannot support a finding of discrimination.²³⁹

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 265 (citing *Keyes* as an example of a case reaffirming the principle that proof of discriminatory impact is required, but "disproportionate impact is not irrelevant" (quoting *Washington v. Davis*, 426 U.S. 229 (1976))).

²³⁷ *Penick*, 443 U.S. at 464 (holding that the lower court, in applying a foreseeability analysis, was "amply cognizant of the controlling cases," namely *Keyes*, *Washington*, and *Arlington Heights*).

²³⁸ *See, e.g.* *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 192 (1973) (affirming the District Court's determination that the use of "so-called 'optional zones'" supported a finding "deliberate racial segregation"), *rev'd on other grounds, id.* at 216; *Penick*, 443 U.S. at 453 (affirming the District Court's determination that the Columbus Board of Education's maintenance of optional attendance zones was one factor demonstrating purposefully discriminatory conduct); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413 (affirming the District Court's determination that "optional attendance zones," appearing alongside racially imbalanced schools, were evidence of constitutionally prohibited discrimination), *rev'd on other grounds, id.* at 414.

²³⁹ MINN. R. 3535.0110 subp. 3 (A) (3) ("It is not segregation for a concentration of protected students or white students to exist within schools or school districts . . . if the concentration of protected students has occurred as the result of choices by parents, students, or both.").

Keyes also held that discrimination in a substantial part of a school district would be sufficient to presume that the entire district was segregated by law.²⁴⁰ When a district was found to be discriminated by law, or de jure segregated, *Green v. New Kent County* mandated that that discrimination must be eliminated “root and branch.”²⁴¹ To remedy de jure segregation, courts must require the districts to be racially integrated both in terms of students and faculty and that all facilities and extra-curricular activities be made equal.

The Minnesota rule does not apply this *Keyes* presumption that discrimination found in a substantial part of the district requires a full root and branch remedy. While the rule requires evidence regarding remedies to be collected, it is not for its proper remedial purpose, but in order, through some unspecified method, to establish whether intentional discrimination existed.²⁴²

At the time of the current Rule 3535’s promulgation, the school boards of Minneapolis and Saint Paul strenuously objected to this narrowing of the standard for intentional discrimination.²⁴³ In comments filed with the state’s Commissioner of Children, Families, and Learning, the boards argued that the “Rule would mandate that the Commissioner not find *de jure* segregation to exist even in situations where a federal court (or any other person looking at the situation) could and would find that condition to exist.”²⁴⁴ Both school boards took a highly

²⁴⁰ *Keyes*, 443 U.S. at 203 (“[C]ommon sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. . . . [P]roof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system.”).

²⁴¹ *Green v. Cnty. Sch. Bd. of New Kenty Cnty., Va.*, 391 U.S. 430, 437-38 (1968).

²⁴² MINN. R. 3535.0130, subp. 2 (2013).

²⁴³ Comments of the Saint Paul Pub. Sch. Bd., to the Minn. Commissioner of Education (Feb. 1, 1999) (on file with the Institute on Metropolitan Opportunity); Letter from Bill Green, Chairperson of the Minneapolis Bd. of Educ., to Christine Jax, Minn. Comm’r of Children, Families, & Learning (Nov. 5, 1998) (on file with the Institute on Metropolitan Opportunity).

²⁴⁴ Comments of the Saint Paul Pub. Sch. Bd., *supra* note 243, at 13; Letter from Bill Green, *supra* note 243, at 10.

negative view as a result, concluding that “it appears that the proposed Rule is designed to shelter certain forms of *de jure* segregation that are more subtle than the absolute prohibitions imposed by the Southern states prior to *Brown v. Board of Education* but nonetheless are real and effective.”²⁴⁵

- d. The 1998 SONAR inaccurately found the proposed desegregation rules exceeded the state Department of Education’s delegation of authority.

The 1998 SONAR inaccurately asserted that the proposed rule exceeded the delegation for rulemaking from the legislature and suggested that it would violate the principles announced in the Supreme Court’s decision in *Milliken v. Bradley*, stating that “the *legal* authority to require [an inter-district] remedy is highly questionable, absent express legislative authority for such rules and absent a finding of intentional discriminatory conduct.”²⁴⁶

1. The legislature’s delegation of authority was sufficient to enact an inter-district remedy.

Contrary to the SONAR’s interpretation, Minnesota has the power to impose inter-district remedies on local governmental units. Moreover, it delegated this broad authority to the State Board, for the express purpose of remedying school segregation.

- i. Minnesota has plenary power over local government, education and matters of school desegregation.

²⁴⁵ Comments of the Saint Paul Pub. Sch. Bd., *supra* note 243, at 13; Letter from Bill Green, *supra* note 243, at 10.

²⁴⁶ 1998 SONAR at B2 (emphasis in original).

The Minnesota Constitution provides the legislature the power to create, organize, consolidate, divide, dissolve and reshape all school districts and alter their function and internal structure at will.²⁴⁷ The Minnesota Supreme Court has held that local governments “possess no inherent powers and are purely creatures of the legislature.”²⁴⁸

In the area of education the state power over local school districts is further increased by Minnesota Constitution’s Article Thirteen, Section One, which provides that “it is the duty of the legislature to establish a general and uniform system of public schools” and that “[t]he legislature may make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”²⁴⁹

The Minnesota Supreme Court has held that “[u]nder this provision the Legislature is granted plenary powers over all matters relating to public schools excepting only as those same are restricted by constitutional provisions.”²⁵⁰ Indeed, the court regarded this principle as nearly self-evident: “Recognizing the existence of limited local interest in the matter of education, this court has so frequently affirmed the doctrine that the matter of education is a matter of state and not local concern that it is unnecessary further to review the authorities at this date.”²⁵¹

- ii. Minnesota has declared a strong interest in racial integration in schools and has prohibited segregation in schools.

²⁴⁷ Minn. Const. art. XII, § 3.

²⁴⁸ *Breza v. City of Minnetrista*, 795 N.W.2d 106, 110 (Minn. 2006).

²⁴⁹ Minn. Const. art. XIII, § 1.

²⁵⁰ *State ex rel. Bd. of Educ. of City of Minneapolis v. Erickson*, 190 Minn. 216, 222 (1933); *see also* *Bd. of Educ. of City of Minneapolis v. Houghton*, 181 Minn. 576, 579-80 (“Acting under the mandate of the Constitution, legislative action was taken. The Legislature possessed almost unlimited power over all matters relating to public schools, excepting only where restrictions are imposed by express constitutional provisions. . . . The maintenance of public schools is not a matter of local but of state concern.” (internal quotations omitted)).

²⁵¹ *Erickson*, 190 Minn. at 222.

Under the state code, Minnesota “does not condone separating school children of different . . . racial backgrounds into distinct public schools,” but that “[i]nstead the state’s interest lies in offering children a diverse and nondiscriminatory educational experience.”²⁵² The code also provides that “no district shall classify its pupils with reference to race, color, social position, or nationality, nor separate its students into different schools or departments upon any of such grounds,” and that “[a]ny district so classifying or separating any of its pupils . . . shall forfeit its share of all apportioned school funds for any apportionment period in which such classification, separation, or exclusion shall occur or continue.”²⁵³ As an independent basis of civil rights protection that does not rely on the Equal Protection clause of the Fourteenth Amendment, this statute does not require the proof of intentional discrimination to withhold state funds.

Elsewhere, state law provides: “It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race.”²⁵⁴ Under the same provision, it is “an unfair practice to exclude . . . or otherwise discriminate against any person seeking admission as a student, or a person enrolled as a student because of race.”²⁵⁵

- iii. The delegation of rule-making power to the State Board of Education to create integration rules was extremely broad.

Until 1999, educational policy was under the control of the State Board of Education. Minnesota law provided that the State Board of Education “shall adopt goals for and exercise

²⁵² MINN. STAT. § 124D.855 (2013).

²⁵³ MINN. STAT. § 123D.30 (2013).

²⁵⁴ MINN. STAT. § 363A.13 subd. 1 (2013).

²⁵⁵ *Id.* at subd. 2.

- e. The 1998 SONAR wrongly determined that the Minneapolis School District has been declared unitary.

The 1998 SONAR inaccurately suggested that the Minneapolis School District was declared unitary.²⁶⁶ As a result of this error, the SONAR erroneously concludes that Minnesota no longer has a compelling governmental interest in integration and can do virtually nothing to integrate its local schools.

However, even if Minnesota's governmental interest in school integration were to vanish upon achievement of unitary status, it is nevertheless clear that Minneapolis was never declared a unitary school district. Given the continued existence of a dual district, the state has available all the powers it would need to redress a situation in which intentional segregation is present. Moreover, by eliminating the remedial provisions of the previous desegregation plan and the proposed rules before a declaration of unitary status, the State likely violated the federal constitution.

In 1983, Judge Larson withdrew his jurisdiction over the Minneapolis school desegregation case.²⁶⁷ He did so in reliance on an affidavit that the Commissioner of Education would maintain integrated schools in Minneapolis and throughout the state under the terms of Minnesota Rule 3535, which mirrored the terms of his court order in Minneapolis.²⁶⁸ Judge Larson never declared the district "unitary" and assured the parties that he would intervene if Minneapolis ceased compliance with terms of his injunction as embodied in the state desegregation rule, or if the state did not fulfill its duty under his injunction.

²⁶⁶ See 1998 SONAR at B1-B2.

²⁶⁷ *Booker v. Special Sch. Dist. No. 1*, No. 4-71 Civ. 382 (D. Minn. June 8, 1983); see also Cheryl W. Heilman, *Booker v. Special School District No. 1: A History of School Desegregation in Minneapolis, Minnesota*, 12 LAW & INEQ. 127, 171-73 (1993).

²⁶⁸ See *id.* (citing Affidavit of John Feda, Commissioner of Minnesota Department of Education (Apr. 29, 1983)).

In *Oklahoma v. Dowell*, the Supreme Court declared that a specific and clear finding of unitary status must be made before the parties can assume that the court's injunction is terminated.²⁶⁹ In *Dowell*, a federal district court found that the school district had complied with its desegregation order for many years and, in 1977, dissolved its jurisdiction based on its belief the district would continue to comply with the order, very much like Judge Larson in the *Booker* case.²⁷⁰ In 1984, the district sought to implement a more segregated school attendance plan. Plaintiffs brought suit arguing that even though the court had dissolved its jurisdiction, Oklahoma City schools had not been declared unitary and were still bound by the terms of the court's injunction.²⁷¹ The Supreme Court, per Justice Rehnquist, agreed, holding that the "the 1977 order did not dissolve the desegregation decree, and the District Court's unitariness finding was too ambiguous to bar respondents from challenging later action by the Board."²⁷²

The Court continued:

We therefore decline to overturn the conclusion of the Court of Appeals that ... the 1977 order ... did not finally terminate the Oklahoma City school litigation. In *Pasadena City Bd. of Education v. Spangler*, we held that a school board is entitled to a rather precise statement of its obligations under a desegregation decree. If such a decree is to be terminated or dissolved, respondents as well as the school board are entitled to a like statement from the court....

[T]he preferable course is to remand the case to that court so that it may decide, in accordance with this opinion, whether the Board made a sufficient showing of constitutional compliance as of 1985, when the [new assignment plan] was adopted, to allow the injunction to be dissolved. The District Court should address

²⁶⁹ Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma Cnty., Okl. v. Dowell, 498 U.S. 237, 244-45 (1991).

²⁷⁰ *Id.* at 241-42 (citing *Dowell v. Bd. Of Educ. of Oklahoma City Pub. Sch.*, No. Civ-9452 (W.D. Okla. Jan. 18, 1977) ("The Court has concluded that the [desegregation plan] worked and that substantial compliance with the constitutional requirements has been achieved. . . . [T]he Court Does not foresee that the termination of its jurisdiction will result in the dismantlement of the plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished . . . [T]he Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court.")).

²⁷¹ *Id.* at 242.

²⁷² *Id.* at 244-45.

itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable....

After the District Court decides whether the Board was entitled to have the decree terminated, it should proceed to decide respondent's challenge to the [new assignment plan]. A school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like, but it of course remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment. If the Board was entitled to have the decree terminated as of 1985, the District Court should then evaluate the Board's decision to implement the [new assignment plan] under appropriate equal protection principles.²⁷³

There has never been a *Dowell* finding in Minneapolis. Until there is, the Minneapolis School District remains a dual district. As such, the elimination of the remedial portions of the old rule and the proposed rule was itself unconstitutional and will remain so until a finding of unitariness is made. In so doing, the court must determine whether the Minneapolis school district's conduct since 1983 is in compliance with the "mandate of the Equal Protection Clause of the Fourteenth Amendment."²⁷⁴

²⁷³ *Id.* at 247-50.

²⁷⁴ *Id.* at 250.