IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 18681

DOROTHY GAUTREAUX, et al.,

Plaintiff-Appellees,

v.

THE CHICAGO HOUSING AUTHORITY, et al.,

Defendants-Appellants.

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR STAY OF MANDATE
PENDING PETITION FOR CERTIORARI

Plaintiffs respectfully urge this Court to deny defendants' motion. Over seven months have now lapsed since the issuance of the District Court's order of July 20, 1970. During such time this Court has held that defendants' procedural challenges to the District Court's order were unfounded and that "it was no abuse of discretion for the District Judge to impose deadlines for submission one year after the entry of the original 'best efforts' order." Defendants' petition for a rehearing by this Court having now been denied, defendants now seek further delay against the enforcement of the District Court's order by this motion for a stay of the issuance of the mandate.

It should of course be emphasized that although the defendants' motion seeks an order only through March 13, 1971 (by which time defendants state that they will have filed a petition for a writ of certiorari), Rule 41 of this Court provides that if prior to such date the Clerk of the Supreme Court files a notice with this Court that the petition for the writ of certiorari has indeed been filed in the Supreme Court, "the stay shall continue until final disposition by the Supreme Court."

Defendants' motion, which is accompanied by no allegation of any injury which might result from the issuance of the mandate, is not only without support in law but, if granted, would cause a continuing deterioration in plaintiffs' efforts to obtain a fair and prompt redress of those constitutional violations which are at the heart of this lawsuit. Despite all the procedural arguments which may be made in an abstract context, it is the plaintiffs, not the defendants, who continue on a daily basis to live in a racially segregated public housing system. It is the plaintiffs, not the defendants, who have been aggrieved by the violation of their constitutional rights. This Court is well aware of the arguments already made as to why the issue of delay has in itself become a critical factor in this action (including the impermissible "political considerations and community hostility" which the District Court and this Court have rejected). In addition to those many arguments, plaintiffs further urge that:

1. Additional delay at this time may not only seriously endanger the reservation of 1500 family units which the United States Department of Housing and Urban Development ("HUD") authorized defendant CHA to construct, but, as shown in the accompanying Affidavit, may substantially

impair future reservations which have not yet been sought. As plaintiffs stated in their brief to this Court filed September 23, 1970, in response to defendants' appeal from the July 20, 1970 order of the District Court, the District Court had been advised that HUD had "waited expectantly for the Authority to have the sites approved by the City Council" and considered CHA's delay "to be quite a serious matter." In July of 1970 the regional director of HUD indicated that delay by the CHA in moving forward on the 1500 units reserved to it might hinder HUD's ability to hold CHA's reservation for the family units and put into question CHA's ability to provide the units at a later date. (See p. 16, Brief for Plaintiffs-Appellees). If that was true in July of 1970, clearly it is even more poignant in February of 1971. At the same time, and at least as disturbing an aspect of this delay, the opportunity for defendants to obtain additional and much-needed reservations from the fiscal year 1971 allocations by HUD has been lost and its ability to obtain reservations from the 1972 allocations may already have been seriously prejudiced. Further delay in utilizing existing reservations may have a substantial impact upon the availability of public housing far beyond the 1500 units presently under reservation.

2. The passage of time operates not only to continue to deprive plaintiffs of their constitutional rights to live in a public housing system free from racial segregation, but further acts to impede efforts to obtain sites upon which new public housing may be constructed. It is readily apparent that the longer this matter is delayed the less likelihood there is that those sites which CHA has previously identified and located as conforming to the Judgement Order will remain as

available sites. As this Court is well aware, compliance with the Judgment Order requires the location and identification of numerous sites for public housing. Only the provision of public housing by CHA can begin to redress the constitutional wrongs to plaintiffs. The continued availability of such sites is in serious question the longer this matter continues to be delayed.

Defendants' continued insistence upon delay may be grounded in several factors of which this Court has been advised in the past. Whatever the reason, there is not a single showing by defendants of any injury, irreparable or otherwise, which could possibly occur to defendants by reason of the issuance of this mandate. Indeed, it is plaintiffs who are injured in a very real and substantial sense by the continued delays in this action. As the court stated in Taylor v. Board of Education of New Rochelle, 195 F.Supp. 231, 238 (S.D.N.Y. 1961), aff'd. 294 F.2d 366 (2d Cir. 1961), cert. den., 368 U.S. 940 (1962):

> "It is incumbent upon defendants to prove that they will be irreparably injured if the stay is not granted ... in this instance this court is being asked to weigh the constitutional rights of the plaintiffs against the administrative convenience of the Board of Education and to rule in favor of the latter. Merely to state the proposition is to reject it."

See also Coppedge v. Franklin County Board of Education, 293 F.Supp. 356, 364 (E.D.N.C.1968), aff'd. 404 F.2d 1177 (4th Cir., 1968):

> "The defendants' conduct in this case . . . is a reflection of the marked community hostility to desegregation which brought about the initial rejection by this court and the Court of Appeals for the Fourth Circuit of defendants' freedom of choice plan. It is now well settled, however, that community hostility to desegregation, even in the form of the probability or threat of white pupils fleeing from districts in which Negroes significantly outnumber them,

> does not provide a legal defense against desegretation. The court specifically holds that the duty of affirmative action to comply with the letter and spirit of the orders of this Court applies and will continue to apply irrespective of the filing of any further appeals, motions for a stay, or other proceedings, until such time as such Orders have been set aside by a court of competent jurisdiction."

The views of the CHA have been heard and adjudicated in two courts. It is time to end the delay in the enforcement of proven constitutional rights and to begin at last the process of remedy. The procedural issues that have been raised by CHA have been thoroughly briefed by the parties, examined and resolved by this Court. It is extremely questionable whether the kind of issue raised by the defendants will cause certiorari to be granted by the Supreme Court. Such a dubious speculation should not cause the constitutional rights of the plaintiffs, established by the District Court and recognized by this Court, to continue to play a secondary role to procedural issues raised by the defendants. The statement by the court in Allen v. County School Board of Prince Edward County, 207 F.Supp. 349, 351 (E.D.Va. 1962), in refusing further delay by extension, is applicable in the context of this case:

> "This is a suit in equity instituted by the infant plaintiffs requesting this court to declare and insure them, and all other similarly situtated, their constitutional rights. To further abstain is to further delay -- and further delay in the formal education of 1,700 children would create an irreparable loss."

For all the foregoing reasons, plaintiffs respectfully urge this Court to deny defandants' motion to stay the issuance of this Court's mandate to the district court.

Respectfully submitted

_____
Milton I. Shadur
One of the Attorneys for
Plaintiffs-Appellees

February 23, 1971

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PROOF OF SERVICE

Received a copy of the foregoing Memorandum in Opposition to Defendants' Motion for Stay of Mandate Pending Petition for Certiorari, this 23rd day of February, 1971.

Mayer, Brown & Platt and
Kathryn M. Kula, Attorneys
for Defendants-Appellants

By: Mayer, Brown & Platt

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On Appeal from the Judgment of the United States District Court for the Northern District of Illinois

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

AFFIDAVIT

The undersigned, Alexander Polikoff, being first duly sworn, on oath says:

1. He is one of the counsel for plaintiffs-appellees in this matter.

2. Affiant has been advised by the Department of Housing and Urban Development ("HUD") that the reservation of 1500 units

for non-elderly public housing allocated to the Chicago Housing Authority ("CHA") by HUD was allocated from reservations available for fiscal year 1970 (that is, for the year from July 1, 1969 to June 30, 1970).

3. Affiant has been advised by Mr. C. E. Humphrey, Executive Director of CHA, that CHA had not applied to HUD for a reservation for non-elderly units allocable from fiscal year 1971 reservations. Mr. Humphrey said that the reason CHA had not so applied was that CHA had not yet used its current 1500 unit reservation, and that HUD was unlikely to grant CHA a new reservation when a previous reservation remained unused.

4. Affiant has been advised by HUD that HUD has already allotted all non-elderly unit reservations for fiscal year 1971 to applicants therefor, and that excess applications for such fiscal year reservations are currently being assigned to fiscal year 1972 reservations.

5. By reason of the foregoing, CHA's delay in utilizing the existing 1500 unit reservation has already precluded CHA from obtaining any of the reservations allocable to fiscal year 1971, and may have already prejudiced CHA's ability to obtain reservations allocable to fiscal year 1972. Any further delay in utilizing the existing reservation may increase such prejudice.

Further affiant sayeth not.

_____
Alexander Polikoff

Subscribed and sworn
to before me this
____ day of February, 1971

_____
Notary Public