No.

In the Supreme Court of the United States

OCTOBER TERM, 1974

JAMES L. MITCHELL, ACTING SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

DOROTHY GAUTREAUX, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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(L. Mitchell, Acting)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Housing and Urban Development, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The initial opinion of the district court (App. A, *infra*, pp. 1a-16a) is unreported. The initial opinion of the court of appeals (App. B, *infra*, pp. 17a-36a) is reported at 448 F. 2d 731. The district court's decision denying metropolitan-wide relief (App. C, *infra*, pp. 37a-40a) is reported at 363 F. Supp. 690. The court of appeals' decision reversing that order (App. D, *infra*,

pp. 41a-60a) and its decision denying rehearing (App. E, *infra,* pp. 61a-63a) are reported at 503 F. 2d 930 and 939.

Jurisdiction

The judgment of the court of appeals (App. F, *infra,* p. 64a) was entered August 26, 1974, and a timely petition for rehearing was denied on September 30, 1974. On December 20, 1974, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 13, 1975, and on February 7, 1975, Mr. Justice Brennen further extended the time for petitioning to February 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether, in light of *Milliken* v. *Bradley* (No. 73-434, decided July 25, 1974), it is inappropriate for a federal court to order inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation.

Statute Involved

Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Statement

In 1966, six black residents of Chicago, Illinois, brought this action against the Housing Assistance Administration, then an agency of the Department of Housing and Urban Development ("HUD"), on behalf of the class of black tenants in, and applicants for, public housing projects in Chicago (Complaint, pp. 2-3). The complaint alleged that HUD was "assist [ing] in the carrying on of a racially discriminatory public housing system within the City of Chicago" (Complaint, p. 2). Plaintiffs sought a declaratory judgment to that effect and an injunction against federal financial assistance to the Chicago Housing Authority ("CHA") "in support of the racially discriminatory aspects of the public housing system within the City of Chicago," together with "such other and further relief as the Court may deem just and equitable" (Complaint, pp. 15-16).

This action was stayed in the district court pending the initial disposition of the plaintiffs' companion suit against CHA. In that suit, the district court granted summary judgment against CHA, finding, *inter alia,* that its site-selection practices were racially discriminatory.[1] Illinois Revised Statute, Ch. 67½, § 9, required City Council approval of each proposed public housing site. Before seeking that approval, CHA submitted proposed sites to the alderman in whose ward the site was located for his approval. This informal pre-clearance procedure was held discriminatory because, although CHA had selected forty-one sites in predomi-

[1] *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907 (N.D. Ill.)

nantly white areas and sixty-two sites in black areas between 1955 and 1966, only two of the white sites, in contrast to forty-nine of the black sites, had been approved by the appropriate alderman and the City Council. *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907, 911 (N.D. Ill.).

To remedy this discrimination, the district court issued an injunction on July 1, 1969, which required specified affirmative action by CHA. *Gautreaux* v. *Chicago Housing Authority,* 304 F. Supp. 736 (N.D. Ill.). In addition to enjoining CHA from using the pre-clearance site-selection procedure, the order directed CHA to build its next 700 dwelling units in the predominantly white areas of Cook County.[2] Thereafter, three-fourths of CHA's new units were to be built in such areas, while the remaining one-fourth could be placed in the predominantly black portions of Cook County. CHA was also ordered to use its best efforts to increase the supply of dwelling units.[3]

The decree was subsequently modified by ordering CHA to propose sites for 1,500 dwelling units by a specified deadline. That order was affirmed by the

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[2] The order permitted one-third of these units to be placed outside of Chicago. The jurisdiction of CHA is limited to the City of Chicago (see Ill. Rev. Stat., Ch. 67½, §§ 3, 17(b)), but CHA is authorized to contract with the Cook County Housing Authority to operate in the areas of Cook County outside the City (see Ill. Rev. Stat., Ch. 67½, § 27c).

[3] The district court's decision was widely discussed in the legal journals. *E.g.,* Note, *Public Housing and Urban Policy: Gautreaux* v. *Chicago Housing Authority,* 79 Yale L.J. 712 (1970); Note, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief,* 122 U. Pa. L. Rev. 1330 (1974); Note, *Recent Cases,* 83 Harv. L. Rev. 1441 (1970); Note, *Comments,* 44 N.Y.U.L. Rev. 1172 (1969); Note, *Recent Cases,* 22 Vand. L. Rev. 1386 (1969).

court of appeals, *Gautreaux* v. *Chicago Housing Authority,* 436 F. 2d 306, 310 (C.A. 7), and this Court denied certiorari. 402 U.S. 922.

The district court then dismissed the action against HUD (App. A, *infra,* pp. 1a-16a), but the court of appeals reversed that decision and directed that summary judgment be entered for the plaintiffs (App. B, *infra,* pp. 17a-36a). That court held that "HUD's knowing acquiescence in CHA's admitted discriminatory housing program" violated the Fifth Amendment and the 1964 Civil Rights Act, 42 U.S.C. 2000d (App. B, *infra,* p. 29a).[4] It emphasized that its "holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency" and suggested that the district court might find that "little equitable relief above the entry of a declaratory judgment and a

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[4] The court stated that it was "fully sympathetic" to HUD's dilemma of either funding desperately needed public housing on sites in black areas approved by the City Council or "deny[ing] housing altogether to the thousands of needy Negro families of that city" (App. B. *infra,* pp. 29a, 31a).

The court acknowledged, moreover, that HUD had made "numerous and consistent efforts" toward desegregation of public housing in Chicago (App. B, *infra,* p. 28a). Indeed, in 1966, HUD rejected five of the sites selected by CHA which were among those specifically challenged in respondents' complaint. The sites were rejected because they were in areas of high black concentration and, in some cases, in areas also having a high concentration of public housing (Deposition of Joseph Burstein taken March 25, 1968, p. 105). 1966 was the first year the Chicago City Council approved any sites in white areas. See *Gautreaux* v. *Chicago Housing Authority, supra,* 296 F. Supp. at 911.

While the propriety of granting relief against the Secretary in these circumstances is open to question, that question is not being presented in this petition because the relief granted against the other defendants in this case would have substantially the same effect on HUD's programs in any event.

simple 'best efforts' clause will be necessary to remedy the wrongs which have been found to have been committed" (App. B, *infra,* p. 36a).

Since 1971, the district court has been attempting to frame and implement appropriate remedial decrees applicable to CHA and HUD.[5] In the order underlying this petition, the district court directed HUD to use its "best efforts to cooperate with CHA in its efforts to increase the supply of dwelling units, in conformity with" all applicable federal statutes, HUD rules and regulations, and the provisions of the judgment against CHA and all other final orders in this litigation (App. C, *infra,* p. 40a).

It rejected the order proposed by respondents, which would have directed CHA and HUD to use their best efforts to provide dwelling units outside the City in the portions of Cook, DuPage, and Lake Counties that comprise the Chicago Urbanized Area.[6] The district court also refused to conduct additional proceedings

[5] In one remedial decree, the district court enjoined HUD from releasing model cities funds to Chicago until the City approved 700 sites for public housing. *Gautreaux* v. *Romney,* 332 F. Supp. 366 (N.D. Ill.). The court of appeals reversed that order on the ground that it was improper to threaten the termination of one program, untainted by discrimination, in order to cure discrimination in a different program. *Gautreaux* v. *Romney,* 457 F. 2d 124 (C.A. 7).

In another remedial decree, the district court ordered CHA to proceed with the steps necessary to provide the previously ordered 1,500 dwelling units without regard to Illinois Revised Statute, Ch. 67½, § 9, which required CHA to obtain the approval of the City Council before acquiring real property. *Gautreaux* v. *Chicago Housing Authority,* 342 F. Supp. 827 (N.D. Ill.), affirmed, 480 F. 2d 210 (C.A. 7), certiorari denied, 414 U.S. 1144.

[6] Plaintiffs' Proposed Judgment Order and Memorandum filed September 25, 1972.

similar to those followed in *Bradley* v. *Milliken,* 484 F. 2d 215 (C.A. 6), reversed No. 73-434, July 25, 1974, designed to develop a plan to provide metropolitan-wide relief.[7] Instead, it concluded (App. C, *infra,* p. 38a):

> such relief * * * is simply unwarranted here because it goes far beyond the issues of this case. * * * The wrongs were committed within the limits of Chicago and solely against residents of the City. It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein.

On appeal, the Seventh Circuit (*per* Mr. Justice Clark) reversed this order and directed the district court to adopt "a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago * * * but will increase the supply of dwelling units as rapidly as possible" (App. D, *infra,* p. 59a). This Court's decision in *Milliken* v. *Bradley,* No. 73-434, decided July 25, 1974, was distinguished on the grounds that there was no tradition of local control of public housing comparable to the tradition in public schools, that the administrative problems of an inter-district remedy are far less serious for public housing than for schools, that there was evidence of racial discrimination in public housing in the Chicago suburbs, and that HUD and CHA had agreed that a metropolitan solution to the Chicago housing problem was necessary. Judge Tone

[7] Plaintiffs' Motion and Proposed Order, filed January 29, 1973

dissented on the ground that *Milliken* was controlling (App. D, *infra,* p. 60a).

In denying the government's motion for rehearing, the court of appeals concluded that the showing of a significant inter-district segregative effect required by *Milliken* as a precondition of an inter-district remedy was met in this case by the supposition that "defendants' discriminatory site selection within the City of Chicago may well have fostered racial paranoia and encouraged the 'white flight' " to the suburbs (App. E, *infra,* p. 62a).[8]

Reasons for Granting the Writ

The decision below conflicts with this Court's recent decision in *Milliken* v. *Bradley,* No. 73-434, decided July 25, 1974, which holds that separate governmental districts may not be consolidated for remedial purposes unless it is first shown "that there has been a constitutional violation within one district that produces a significant segregative effect in another district * * *. [W]ithout an inter-district violation and inter-district effect, there is no constitutional wrong calling for

[8] The court of appeals also directed that "intra-city relief should proceed apace without further delay" (App. E, *infra,* p. 63a). The district court then referred the case to a master "to determine and identify the precise causes of the five-year delay in implementing [the court's] judgment orders, and to recommend a plan of action that will expedite the realization of [its] various orders and judgments." *Gautreaux* v. *Chicago Housing Authority,* 384 F. Supp. 37-38 (N.D. Ill.). CHA's petition for mandamus seeking to vacate this referral was denied. *Chicago Housing Authority* v. *The Honorable Richard B. Austin,* No. 74-1926 (C.A. 7, decided January 24, 1975).

an inter-district remedy" (slip op. 25). Unless this conflict is promptly resolved, the implementation of federally assisted programs to improve low income housing will be seriously hampered, not only in Chicago but throughout the nation, and progress toward the goal of integrated housing will be impeded.

Uncertainty concerning the proper scope of relief in this case, and in others seeking affirmative relief for past allegedly discriminatory practices,[9] operates to discourage participation by suburban jurisdictions in federally assisted programs. Under the decision below, if a suburb approves new public housing, it risks an order directing that such units be made available, not only to the suburb's needy residents, but also to the plaintiff class in the center city suit—here, CHA's tenants and applicants.

This chilling effect extends beyond the traditional public housing programs to the new programs created by the Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633 *et seq.*, 42 U.S.C. 5301, *et seq.*, such as the block grant program[10] (88 Stat. 637,

[9] *Garrett, et al.* v. *City of Hamtramck,* 503 F. 2d 1236 (C.A. 6); *Hart* v. *Community School Board of Brooklyn* Nos. 74-2076, 74-2253, 74-2262, 74-2263 (C.A. 2, decided January 27, 1975); *Baker* v. *F&F Investment Company, HUD,* N.D. Ill., C.A. No. 69 C-15; *Francis E. Hale* v. *Memphis Housing Authority,* W.D. Tenn., C.A. No. C-73-410; *Dotson* v. *Lynn,* City of Toledo, N.D. Ohio, C.A. No. C74-531; *Griffin* v. *City of River Rouge,* E.D. Mich., C.A. No. 36516; *Palmer* v. *City of Jackson,* E.D. Mich., C.A. No. 4-72161.

[10] The block grant program, 42 U.S.C. 5301, *et seq.*, is a form of special revenue sharing providing for the distribution of funds to units of local government on the basis of an objective formula weighing such factors as population, poverty and housing overcrowding. It supersedes programs such as the urban renewal,

42 U.S.C. 5303)[9] and the Section 8 subsidized housing program (42 U.S.C. 1437f).[11] Since these programs must themselves be nondiscriminatory (42 U.S.C. 2000d and (88 Stat. 649) 5309), progress toward the goal of integrated housing will be set back to the extent that the suburbs are deterred from participating in them.

Prompt review of the court of appeals decision by this Court will also avoid the possibly fruitless expendi-

model cities and neighborhood development programs, but the permissible uses for the new funds are essentially the same as those previously supported.

Each application by a local governmental unit for block grant funds must be accompanied by a "housing assistance plan," which must (1) survey existing housing and assess the housing assistance needs of lower-income persons, including those expected to reside in the community; (2) state a realistic annual goal for the number of units or persons to be assisted, and (3) indicate the general locations of the proposed housing (88 Stat. 638, 42 U.S.C. 5304 (a)(4)).

The Secretary is required to approve an application for a block grant unless it is (1) "plainly inconsistent" with generally available facts and data, (2) "plainly inappropriate" to meeting the needs identified by the recipient, or (3) not in compliance with applicable law (88 Stat. 639, 42 U.S.C. 5304(c)).

[11] The Section 8 program, 42 U.S.C. 1437f, initiates a new program of payments to lower-income tenants for the purpose of assisting them to occupy new, rehabilitated and existing family units. The basic subsidy to be paid by HUD is the difference between the market rent for the unit to be occupied and a percentage of the tenant's gross income. The housing may be provided by a local housing authority, or directly by contract between HUD and the owner of newly constructed property.

Determinations of tenant eligibility, tenant selection and tenant assignment are made by the owner or the housing authority, as the case may be. Nothing in the legislation requires any community to take steps to participate in the Section 8 program. The local community has substantial involvement in the critical decisions affecting a Section 8 program under the provisions of 42 U.S.C. 1439, to assure that such programs are consistent with local housing assistance plans, or other local housing programs.

ture of substantial efforts by the parties involved and the lower courts. The formulation of the area-wide plan which the court of appeals has directed will necessarily be a complex, time-consuming, and expensive undertaking involving numerous parties in the district court.[12] And this Court's decision in *Milliken* indicates that whatever plan eventually results will ultimately be declared to be an inappropriate remedy.

The court of appeals first attempted to distinguish *Milliken* as inapplicable to efforts to remedy discriminatory housing practices (App. D, *infra,* pp. 52a-59a). On rehearing, the court instead suggested that the record here supports inter-district relief under the test enunciated in *Milliken* (App. E, *infra,* pp. 62a-63a). Neither rationale is sound; the result below is basically inconsistent with *Milliken.*

A. *Milliken is controlling here.*

The court of appeals interpreted *Milliken* as deciding only that in the context of school desegregation, inter-district relief was impractical, and concluded that such relief was not impractical to remedy housing segregation. Both the premise and the conclusion are incorrect.

Milliken focused on the lack of evidence of any inter-district wrong, not on the impracticality of the relief sought. The Court's basic holding was that it was improper to use the population of one governmental unit as a racial reservoir available to cure racial discrimination occurring within a different governmental unit—

[12] There are more than 100 separate cities, villages and townships in the Chicago urban area. U.S. Dept. of Commerce, 1970 Census of Population, Vol. 1, Pt. 15, table 11, pp. 55-57.

regardless of the presence or absence of administrative problems. And, as a corollary, the Court indicated that an inter-district remedy would be appropriate where constitutional violations had been a substantial cause of inter-district segregation, despite problems of practicality (see slip op. at 25; see, also, White, J., dissenting, *id.* at 9).

In any event, similar considerations of practicality apply to fashioning such relief for public housing projects or for schools. The Court in *Milliken* noted that inter-district relief would be difficult to implement because it would require a massive restructuring of local governmental units and redefinition of their responsibilities (slip op. at 22-24). Similarly, inter-district relief in the housing field would require massive federal intervention in areas of peculiarly local responsibility. HUD's control over local public housing is far more limited than that of the State over local public schools. Although the public housing program rests upon federal financial support, and HUD's approval is required for many details of a local housing authority's operations, the initiative for public housing rests with local authorities.[13]

Perhaps even more importantly, the construction of public housing usually requires that many municipal services be expanded—not only the sewers, waterlines, and electricity directly required by the building, but also streets, schools, transportation and similar services required by the new residents. HUD has no authority to provide these services; they are the sole responsi-

[13] "It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility * * *." 42 U.S.C. 1401. See, *e.g.*, notes 10 and 11, *supra*.

bility of the community in which the housing is located (*James* v. *Valtierra*, 402 U.S. 137, 143 n. 4).[14] By contrast, in *Milliken*, the State had ultimate responsibility for the local school systems, which were state agencies (Marshall, J., dissenting, slip op. at 13-18). The State could thus more readily implement any inter-district relief ordered in *Milliken* than could HUD implement such relief in the instant case.

The court of appeals overlooked the necessity of arranging for all the required municipal services in concluding that the administrative problems of an inter-district housing remedy were "not remotely comparable" to the problems of inter-district school busing (App. D, *infra*, p. 53a). Since implementation of any inter-district remedy would require each of the more than 100 political jurisdictions in the metropolitan area that may be required to participate[15] to provide the necessary municipal services, the administrative problems involved are at least as great as those involved in inter-district busing. The experience in attempting to implement the Chicago-only remedy over the past five years indicates that an inter-district remedy may well pose practically insurmountable administrative problems.

B. *Inter-district relief is not supported by the findings in this case.*

In its order on rehearing, the court of appeals apparently conceded that *Milliken* requires a showing here that "there has been a constitutional violation within

[14] The other party to the suit, the Chicago Housing Authority, is similarly powerless over housing constructed in the suburbs.

[15] See note 12, *supra*.

one district that produces a significant segregative effect in another district" (*Milliken supra,* slip op. at 25). It concluded that such an effect is shown by the record here, because the discrimination in Chicago "may well have fostered racial paranoia and encouraged the 'white flight' phenomenon" (App. E, *infra,* p. 62a).[16] But it would have been equally plausible to assume that the constitutional violations which created segregated schools within Detroit had had a similar effect. Indeed, in contrast to the school systems involved in *Milliken,* there has evidently been no exodus of white tenants from Chicago housing projects to suburban public housing projects, since both the city and suburban public housing projects have predominantly black tenants. *Gautreaux* v. *Chicago Housing Authority, supra,* 296 F. Supp. at 910. Here, as in *Milliken,* "the Court of Appeals shifted the primary focus from a

[16] The court of appeals' prior opinion suggested (App. D, *infra,* p. 54a) that evidence of suburban discrimination appeared in plaintiffs' Exhibit 11. But of the twelve suburban projects identified in that exhibit, three are located in predominantly white census tracts, five are located in municipalities which have no predominantly white census tracts, two were completed in 1953 and the racial balance at that time is not shown, one is in a tract which apparently became predominantly black after approval and completion, and one is in a tract which was at the time of completion predominantly, but not exclusively, black.

Significantly, plaintiffs did not argue in the court of appeals that they had proved an inter-district wrong. Instead, relying upon *Bradley* v. *Milliken,* 484 F. 2d 215 (C.A. 6), before this Court reversed that decision, plaintiffs contended that "the circumstance that the violation in this case took place within the political boundaries of the City of Chicago affords no reason for limiting the remedy to those boundaries * * *." Reply Brief to Brief of Appellee HUD, p. 4, filed June 7, 1974; see, also, Plaintiffs' Memorandum, p. 11, filed August 14, 1974.

[city-wide] remedy to the metropolitan area only because of [its] conclusion that total desegregation of [the city] would not produce the racial balance which [it] perceived as desirable" (slip op. at 20). This approach is incorrect here, as it was in *Milliken,* because the Constitution does not require any particular racial balance in a given public facility—what it does require is a unitary system (*id.* at 21, 27).

The district court specifically found that "It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein" (App. C, *infra,* p. 38a). Accordingly, this case lacks the factual foundation that would, under *Milliken,* justify inter-district relief.[17]

[17] Even if it be assumed that *Milliken* requires only that *either* an inter-district wrong *or* an inter-district effect be shown (slip op. at 25-27; Stewart, J., concurring, *id.* at 3-4), neither showing was made here. The court of appeals simply stated that "it is reasonable to conclude from the record" that the housing authorities' actions "may well have fostered racial paranoia," and that the "extra-city impact of defendants' intra-city discrimination appears to be profound" (App. E, *infra,* p. 62). Such speculative conclusions are not sufficient to show an inter-district effect.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 1975.

Unreported

APPENDIX A

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No. 66 C 1460
(Filed September 1, 1970)

Dorothy Gautreaux, et al., plaintiff

vs.

George W. Romney, Secretary of the Department of Housing and Urban Development of the United States, defendant

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MEMORANDUM

The allegations of this complaint concern the same discriminatory pattern of public housing site selection considered by this court in the companion case and which was found to violate the Fourteenth Amendment to the Constitution. *Gautreaux v. Chicago Housing Authority,* 269 F. Supp. 907 (1969) and 304 F. Supp. 736 (1969). Proceedings in the instant suit against the Secretary of the Department of Housing and Urban Development were stayed pending resolution of that earlier suit. Ruling on defendant's pending motion to dismiss, plaintiffs' motion to consolidate and for discovery were deferred. The earlier suit having come to judgment, defendant has renewed its motion to dismiss,

which is to be treated as a motion for summary judgment under Rule 12(b), F.R.C.P. The plaintiffs have withdrawn their motions and have filed a motion for summary judgment which seeks to add the Chicago Housing Authority as a party defendant.

The amended complaint seeks a declaratory judgment that the defendant Secretary has "assisted in the carrying on, and . . . continues to assist in the carrying on, of a racially discriminatory public housing system within the City of Chicago" by granting federal financial assistance. ¶¶ 2, 20, Amended Count I. It is requested that defendant be permanently enjoined from further funding. The inappropriateness of that type of relief, however, has been conceded by all parties.

Although not expressly conceded, infirmities exist in Counts III and IV which are identical to those counts in 66 C 1459 wherein the court held that there was a failure to state a claim absent allegations of intentional and deliberate discrimination. *Gautreaux v. C.H.A.,* 265 F. Supp. 582, 584 (1967).[1] Accordingly, the motion to dismiss Counts III and IV is granted.

The renewed motion to dismiss as to Counts I and II is premised on five grounds: (1) that plaintiffs do not have standing or a capacity to sue this defendant; (2) that plaintiffs have failed to exhaust their administrative remedies; (3) for failure of jurisdiction over the

[1] "A public housing program conscientiously administered in accord with the statutory mandate surrounding its inception (Ill. Rev. Stats., Ch. 67-½, §§ 1, 2 et seq.) and free of any intent or purpose, however slight, to segregate the races, cannot be condemned even though it may not affirmatively achieve alterations in existing patterns of racial concentration in housing, however desirable such alterations may be. A showing of affirmative and discriminatory state action is required. * * *"

subject matter; (4) for failure to state a claim upon which relief can be granted; and (5) for failure to join an indispensable party, i.e. the Chicago Housing Authority under Rule 19. The last ground is now obviated by plaintiffs request for such joinder and in the light of *Powelton v. HUD,* 284 F. Supp. 809, 814 (D.C. Pa., 1968); *Bro. Locomotive Engrs. v. Denver & R.G.W.,* 290 F. Supp. 612, 615 (D.C. Colo. 1968); *Kletschka v. Driver,* 411 F. (2d) 436, 442 (C.A. 2, 1969); and unpublished opinion of my learned colleague Judge Hoffman in *Inmates of Cook County v. Tierney,* 68 C 504, this court would hold the joinder proper if the complaint withstands the other grounds of defendant's motion. In addition, the court having previously held in the earlier action (265 F. Supp. 582, 583) that said plaintiffs have standing to sue the Chicago Housing Authority and also holds that the same considerations must govern in this action and that standing exists in this suit. *Data Processing v. Camp,* 397 U.S. 150 (1970); *Barlow v. Collins,* 397 U.S. 159 (1970); *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967); *Flast v. Cohen,* 392 U.S. 83 (1968).

There remains the troublesome question of jurisdiction and failure to state a claim upon which relief can be granted. Count I of the Amended Complaint invokes the court's jurisdiction under § 1331,[2] 28 U.S.C. in that the "rights sought to be secured in this action are rights guaranteed by the due process clause of the Fifth

[2] § 1331. *Federal Question; amount in controversy;* costs. (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Amendment to the Constitution of the United States" and the matter in controversy exceeds the value of $10,000, exclusive of interest and costs.

Defendant contends there is lacking the requisite jurisdictional amount because no single plaintiff has an interest approaching $10,000 in any of the subsidies which the defendant has granted. Plaintiff responds that the amount in controversy is to be gauged by the "pecuniary result to either party which the judgment would directly produce" and in any event the rental interest of one of the plaintiffs, Robert M. Fairfax, who has been a tenant in CHA housing since 1945 would to date equal the sum of $15,000 even if it averaged $50 per month. (Response Brf. to Reply, p. 2 fn) Neither approach is sound. The rule governing dismissal for want of jurisdictional amount is that, unless the law gives a different rule, the sum claimed by the plaintiff in good faith at the time of filing controls. 1 Moore Fed. Prac. ¶ 0.91, pp. 825-828. Cf. *Giancana v. Johnson,* 335 F. (2d) 366 (C.A. 7, 1964), cert. den. 379 U.S. 1001. A monetary value is difficult to assess in cases where violation of fundamental constitutional rights is alleged, and it does not appear in this instance that the allegation is not made in good faith. Further, aggregation in class actions is permitted where "one or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Snyder v. Harris,* 394 U.S. 332, 335 (1969); *Brown v. Trousdale,* 138 U.S. 389 (1891). Where "the action is based on a public right, not on personal claims, the amount in controversy is the aggregated claim of the class, that is, the public's claim." 3A Moore Fed. Prac.

¶ 23.13, p. 3482; cf. *Potrero Hill Community Action v. Housing Authority of City and County of San Francisco,* 410 F. (2d) 974, 977 (C.A. 9, 1969).

From the argument that plaintiffs have standing to sue under the Fifth Amendment, plaintiff asserts that it is beyond dispute that an aggrieved citizen may sue a federal official for violation of his rights thereunder. In citing *Bolling v. Sharpe,* 347 U.S. 497 (1953) the plaintiff finds support for the application of the Fifth Amendment due process clause to that of the equal protection clause of the Fourteenth Amendment. The Supreme Court of the United States in that case dealt with the validity of segregation in the public schools of the District of Columbia. In holding that the District, being a body politic apart from the States, and thus not under the inhibition of the Fourteenth Amendment equal protection clause, the Supreme Court applied the Fifth Amendment due process clause because (p. 500)

> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. * * *"

In making that application, the Court said: (p. 498)

> "We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable to the District of

> Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized discrimination may be so unjustifiable as to be violative of due process. * * *"

Thus because of the unique status of the District of Columbia the Fifth Amendment was directly applied to implement desegregation of the public school in that district.

This is not to say that the Fifth Amendment does not apply as a restraint against federal officials, but its application has been confined to their actions as exercised under statutory authority apart from the Amendment alone, and except as such authority was exercised in violation thereof or under the common law. This is borne out by the plaintiffs cited cases of *Schneider v. Rusk,* 377 U.S. 163 (1963) wherein the Supreme Court of the United States held unconstitutional a section of the Immigration and Naturalization Act which resulted in loss of American citizenship acquired through naturalization by continuous residence for three years in the country of origin whereas an American born citizen did not suffer the same consequence. In *Kent v. Dulles,* 357 U.S. 116 (1958) a passport was denied under a regulation precluding granting the same to members of the Communist party. The Court concluded that no

statute delegated to the Secretary the kind of authority he exercised in promulgating the regulation and that he acted beyond his authority. In *Flast v. Cohen,* 392 U.S. 83 (1969) the expenditure of tax monies to finance instruction and instructional materials in religious schools was alleged to be in excess of the Secretary's authority under the Elementary and Secondary Education Act of 1965 and also that if such action was within the Act, then the Act was to that extent unconstitutional and void.

These cases found their premise for jurisdiction in unauthorized or undelegated exercises of power under existent Congressional statutes. With the exception of *Bolling v. Sharpe,* supra, they come within the exceptions to the right to sue the sovereign and find their premise not in the Fifth Amendment alone or any other Constitutional amendment, but in the circumscribed exercise of delegated authority under legislative enactments. From the passage of the Civil Rights Act, it also appears that Congress recognized that the Constitution in itself is not the source for authorizing a cause of action. No statutory premise is here alleged in Count I. Plaintiff stresses heavily that liability is on the basis of "joint participation" with the Chicago Housing Authority in perpetuating a racially discriminatory public housing pattern, *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1960).

The court holds that the Fifth Amendment in the circumstances here alleged by this suit does not authorize suit against the defendant Secretary and the general federal question jurisdiction section does not confer authority for such suit. Therefore, Count I fails

to state a claim over which this court has power to exercise jurisdiction or to grant relief and the same is dismissed.

Count II is premised on § 1331 and § 1343(4),[3] 28 U.S.C. in that the "rights sought to be secured in this action are rights secured by an Act of Congress providing for equal rights and for the protection of civil rights, to-wit, Title 42 U.S.C. § 2000d[4] [Section 601, Title VI of the Civil Rights Act of 1964] and the matter in controversy exceeds the value of $10,000, exclusive of interest and costs."

Under § 2000d-1, 42 U.S.C., the Secretary was authorized to promulgate rules and regulations to effectuate such nondiscriminatory action in any federally funded program. Compliance therewith

> "may be effected (1) by termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, * * * or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. * * *"

[3] " § 1343(4). *Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[4] § 2000d, 42 USC. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In meeting the government's contention that there exist genuine issues of material fact which preclude entry of summary judgment, plaintiff states that its motion for summary judgment admits that defendant made "numerous and consistent efforts . . . to persuade the Chicago Housing Authority to locate low-rent housing prjoects in white neighborhoods" and therefore no dispute exists as to any material fact. The only issue remaining is whether despite these salutary efforts on the part of defendant, did the continued approval and funding of a discriminatory housing program make the defendant a joint participant in the violations which CHA has been found to have committed; or, should the defendant in order to absolve itself of any of the illegal aura permeating CHA action have terminated federal financial assistance or followed another method as authorized under the Civil Rights Acts § 2000d-1 in lieu of continued funding and approval.

Plaintiff seeks to ground his claim for injunction to terminate funding on the theory of joint participation as found to exist in *Burton v. Wilmington Parking Authy.,* supra. Burton had been refused service by a restaurant operator who leased premises from an agency of the State of Delaware. The building in which the restaurant was located was on public land, was built with public funds for public purposes, and was owned and operated by an agency of the State. The court held that when a State leases property, the proscription of

the Fourteenth Amendment must be complied with by the lessee, stating (p. 725):

> "But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. * * * By its inaction the Authority and through it the State has not only made itself a party to the refusal but elicited to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle (leased restaurant) that it must be recognized as a joint participant in the challenged activity which on that account cannot be considered to have been purely private as to fall without the scope of the Fourteenth Amendment."

It is of importance to note that joint participation was applied where a private party violated constitutional rights and wherein the government by virtue of its identity with such private party had been held to be a party to such private act; i.e., such private party stands in the shoes of the public entity. *Simkins v. Cone Memorial Hosp.*, 323 F. (2d) 959 (C.A. 4, 1963); *Colnon v. Tompkins Square Neighbors, Inc.*, 294 F. Supp. 134 (D.C.N.Y., 1968). Thus, evidentiary hearings were held in *Burton* to "sift" facts as to whether private discriminatory conduct was imbued with governmental participation and to determine whether such private being became an instrumentality of the government. The CHA is a public body performing a governmental and public function and we are thus not concerned with

the "sifting" process to determine whether the acts of any private party were the acts of CHA or those of the federal government. But, plaintiff urges that CHA was found responsible in the earlier action although the acts fostering the illegal conduct were those of the City Council and that the measure of this defendant's liability must be the same. However, the responsibility of CHA was based on the theory of agency. Thus in *Cooper v. Aaron*, 358 U.S. 1 (1958) where the good faith attempts of the school district in desegregating was being frustrated by other state officials, the Court said:

> ". . . it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of respondents when vindication of those rights was rendered difficult or impossible by the actions of other state officials . . ." pp. 15-16.

They were held to be agents of the State even though the acts of the Governor and the Legislature made impossible the implementation of the desegregation of the public schools. Indeed, in the companion case CHA could not act without the City Council in the performance of its governmental function.

The court is asked to extend the joint participation principle of *Burton* to the approval and funding, with attendant supervision, of the Department of Housing and Urban Development, an executive department of the federal government. In effect, under the *Burton* analogy, that the acts of the Chicago Housing Authority and the Chicago City Council were the acts of the federal government; that in the performance of their

governmental functions they became the instrumentalities of the federal government and thus their acts became the acts of the federal government. To state such a proposition is to reveal its inapplicability. Except as the separate acts of each are the result of concerted action to commit the tort of discrimination, joint participation cannot be extended to separate and distinct political entities and sovereignties each of whom are autonomous in their governmental functions. No such activity on the part of separate governmental entities can be equated to the *Burton* application. It is an ever-recurring fact that federal governmental financing is granted with greater frequency where needed to improve the condition of citizens of states, counties and cities, without thereby making the federal government a partner in the end result. Funding and approval have not so reached into the operations of CHA so as to make its functions federal governmental functions. If this were so, every federal funding, accompanied by supervision, would per se become a federal function and subsequent use become federal action. Even *Hicks v. Weaver,* 302 F. Supp. 619, (D.C. La. (1969)) does not so hold.

The court is confronted, however, with a defendant who made efforts to correct the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the City Council would take. Justification for such action was made because

> ". . . faced with the tough dilemma of accepting some other sites proposed by the authority that were believed to be lawful but not optimal, or rejecting

> those sites and depriving potential housing tenants of improved shelter, HUD chose the former alternative."

In this court's view, the essence of defendant's wrong, if any, is not continued funding and approval but a purported dereliction of a stated statutory duty under § 2000d-1, i.e., HUD could have terminated funding or have used other means to insure compliance. Cf. *United States v. Frazier,* 297 F. Supp. 319 (D.C. Ala., 1968). The fact that the Secretary did not pursue either of those steps does not result in making him a joint participant with CHA.

While the suit is not couched in the remedy to enjoin an official act on the ground that it was not within the authority conferred upon the defendant, or that it was an improper exercise of such authority, or that Congress lacked power to confer the authority, it is in reality such an action and the only action which plaintiff can bring against this defendant. The court believes that plaintiffs have misconceived the remedial claim which should be taken and Count II of the amended complaint is dismissed for failure to state a claim upon which relief can be granted.

Because many of the amici and plaintiffs themselves have through their briefs emphasized the importance and necessity of this defendant's supervision through a precisely formulated decree, the court feels their plea must be dealt with at this time even though nothing remains of the action upon which to premise that relief. Therefore, even if the action were alleged to be in derogation of defendant's statutory duty and power, and even if the court were to find that such duty and

power were exercised in violation of plaintiffs' rights, the effect of the remedy sought as disclosed by plaintiffs and amici will be considered.

Where an agent or officer of the government purporting to act on its behalf have been held to be liable for his conduct which caused injury to another, the ground of liability must be found either in that he exceeded his authority or that it was not validly conferred. The action is therefore a personal action against the officer and not an action against the United States and an injunction against that officer is not against the sovereign for the sovereign cannot be enjoined.

The critical consideration is not the identity of the parties, however, but rather the result of the judgment or decree which might be entered. *Minn. v. Hitchcock,* 185 U.S. 373, 387 (1902). The perimeter of such remedy has been set forth in *Dugan v. Rank,* 372 U.S. 609, 620 (1963):

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend on the public treasury or domain, or interfere with the public administration,' * * * or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' "

Plaintiffs and amici contend that if HUD can feasibly contribute to a prompter remedy than that contained in the decree heretofore entered against CHA which would accelerate desegregation of public housing in Chicago and create more new low income housing not only in the central city but in the General Public Housing area encompassing the remainder of Cook County [304 F. Supp. 736, 737], then they are entitled

to an order calling for such efforts. Thus, the remedy should be framed with respect to that portion of HUD's resources which the Secretary in his discretion determines to allocate to the Chicago Housing Market area; that the order "will fashion the means of dealing with a major societal problem" which problem is that of increasing segregation of the races in the Chicago Metropolitan housing area and the serious lack of low income housing. Reference is made to major governmental study commissions which have reported on evidence that the problem is not confined to the central city but that much of that problem is engendered through existence of a circle of surrounding white suburbs.

Buttressed by these scholarly reports, the plaintiffs appeal to this court is found in the language of the Supreme Court of the United States in *Louisiana v. United States,* 380 U.S. 145, 154 (1964):

> "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

However, even that case does not give free license to the court to determine and encompass issues not existent in the complaint before it. [See Fn. 17, p. 154].

It appears clear to this court that the relief so earnestly desired by plaintiffs and amici would entail a decree operative against the defendant in his official capacity and not otherwise. The relief sought would not be effected by merely ordering the cessation of conduct. Cf. *Hicks v. Weaver,* supra. The defendant

Secretary could satisfy the suggested methods of implementation to be contained in this decree only by acting in his capacity as Secretary of the Department of Housing and Urban Development in discharging the myriad functions and programs entrusted to him by Congress.

This court does not have jurisdiction to direct and control the policies of the United States and the government must be permitted to carry out its functions unhampered by judicial intervention.

Although the preceding consideration is not required in the light of the disposition made of the pending motions, the egregious problem involved and adjudged in the companion case, and the earnest and dedicated efforts of counsel for plaintiffs and amici to seek implementation of corrective efforts already in effect, impels this court to explore the putative limits of its powers and in so doing finds them effectively circumscribed.

An order has this day been entered sustaining the defendant's motion to dismiss and dismissing the complaint.

/s/ Richard B. Austin
RICHARD B. AUSTIN
Judge, United States
District Court

Dated: September 1, 1970.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 71-1073 SEPTEMBER TERM 1970—APRIL SESSION 1971

DOROTHY GAUTREAUX, ET AL., PLAINTIFFS-APPELLANTS,

v.

GEORGE W. ROMNEY, Secretary of the Department of Housing and Urban Development, DEFENDANT-APPELLEE

SEPTEMBER 10, 1971

448 F.2d 731

Before SWYGERT, *Chief Judge*, DUFFY, *Senior Circuit Judge* and FAIRCHILD, *Circuit Judge*.

DUFFY, *Senior Circuit Judge*. This suit is brought against the Secretary of the Department of Housing and Urban Development (HUD). Plaintiffs are all Negro tenants or applicants for public housing in the City of Chicago. They seek, on behalf of themselves and all other Negroes similarly situated, a declaration that the Secretary has "assisted in the carrying on . . . of a racially discriminatory public housing system, within the City of Chicago, Illinois." Plaintiffs further seek to enjoin the Secretary from making available to the Chicago Housing Authority any federal financial

assets to be used in connection with or in support of the racially discriminatory aspects of the Chicago public housing system. "Such other and further relief as the Court may deem just and equitable" is also requested.

Stated another way, the complaint herein challenges the role played by HUD [1] and its Secretary in the funding and construction of certain public housing in the City of Chicago. The role played by the Chicago Housing Authority (CHA), which is not a party to this suit, in the construction of the same public housing already has been held to have been racially discriminatory (*Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907 (N.D.Ill., 1969).[2] Further construction of public housing by CHA on a segregated site selection basis has been permanently enjoined. (304 F. Supp. 736). A good many of the facts pertaining to this present controversy are reported at 296 F. Supp. 907; 304 F. Supp. 736 and in this Court's decision at 436 F.2d 306 (7 Cir., 1970), cert. den. 402 U.S. 922 (1971). We shall avoid unnecessary repetition where possible.

The complaint in this case was filed simultaneously with the complaint in the *Gautreaux* v. *CHA* case, an

[1] The Department of Housing and Urban Development was created by Public Law # 89-174, enacted on September 9, 1965. All duties of the Public Housing Administration and other predecessor agencies were transferred to the authority of HUD by that law. We shall refer to HUD as both the predecessor and present agency.

[2] Because of the racial distinctions expressly found to be present in the tenant assignment and site selection practices involved in the public housing sites at issue in the CHA case and in this present suit, we do not deal with a situation such as confronted the Supreme Court in its recent decision of *James* v. *Valtierra,* 402 U.S. 137 (1971).

order of the District Court stayed all proceedings in this suit until disposition of the companion CHA case. Defendants moved to dismiss the complaint herein and filed certain affidavits and documents in support of said motion. On October 31, 1969, plaintiff moved for summary judgment under Rule 56 (F.R.C.P.) asserting that no dispute as to any material fact existed.

On September 1, 1970, the District Court entered its memorandum opinion dismissing all four counts of this complaint. Count I had been brought under the general federal question statute (28 U.S.C. § 1331) and the Fifth Amendment to the United States Constitution. It alleged that the Secretary, through his action in funding and approving CHA's racially discriminatory programs, had violated the Due Process Clause of that amendment. The Court first found that plaintiffs had standing to bring suit under all counts and that the requisite jurisdictional amount was present. The Court then concluded that "the Fifth Amendment under the circumstances here alleged [did] not authorize this suit." This ruling was a holding that there was a lack of jurisdiction to bring Count I.

Jurisdiction as to Count II was grounded on 28 U.S.C. § 1331 and 28 U.S.C. § 1343(4). Count II alleged that the Secretary's acts had violated 42 U.S.C. § 2000d (Section 601 of the Civil Rights Act of 1964). The District Court dismissed Count II for failure to state a claim upon which relief could be granted.[3] The Court's dismissal was based upon the finding that HUD's financial assistance to CHA was insufficient to

[3] Since supporting affidavits and other documents had been submitted by both parties, this should actually be treated as the grant of a motion for summary judgment. Rule 12(b), Rule 56 F.R.C.P.

make it a "joint participant" in CHA's racially discriminatory conduct.

Counts III and IV were identical with Counts I and II respectively, except that deliberate discriminatory conduct on the part of CHA had not been alleged. The District Court dismissed these counts for failure to allege such deliberate CHA action.

Finally, the Court expressed the view that the doctrine of sovereign immunity was, in part, applicable to bar this suit.

This appeal followed. The Government has abandoned both the lack of jurisdiction as to Count I and sovereign immunity as possible grounds for affirmance. Plaintiffs have not strongly contested the dismissal of Counts III and IV of the complaint. Thus, the central question presented for review reduces to whether summary judgment in favor of either party is proper on Counts I or II of the complaint. The Government argues that the District Court's grant of summary judgment in its favor is proper and advances as an additional ground for affirmance the contention that the case is now moot.

The Government's position on appeal is that this present suit is somewhat superfluous inasmuch as full and complete equitable relief has been made available to these same plaintiffs through the *Gautreaux* v. *Chicago Housing Authority* case. See: 296 F. Supp. 907; 304 F. Supp. 736. The Government is said to be in complete agreement with the "aims and objectives" of that case and that proposition is not strongly contested by the plaintiffs here.

We understand this contention by the Secretary to

bear upon only two issues: mootness, and the scope of any equitable relief which might be deemed necessary by the District Court. The second issue, the extent of possible equitable relief is extremely important, but is not before this Court on this present appeal. We deal here only with whether summary judgment in favor of either party is proper on the issue of the Secretary's alleged *liability* for events which occurred in prior years. Liability for past conduct is totally separate from the question of appropriate future relief. In deciding the liability issue, it would thus not be appropriate for us to consider the effect which the decree entered in the companion case (304 F. Supp. 736) might have in minimizing the need for an extensive decree in this suit.

Similarly, a determination of just what type of equitable remedy might be appropriate in cases of this sort is a question best left initially to the sound discretion of the District Court. *Brown* v. *Board of Education* (Brown II), 349 U.S. 294 (1955); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). Even though to the writer of this opinion it might appear that extensive relief would not be necessary, we do not, in any way, wish to anticipate the District Court on an issue properly for its decision.

Thus, the only issue presently before us which might be affected by the entry of the *Gautreaux* v. *CHA* injunction is mootness. We shall consider the effect of the prior injunction as it bears on that issue.

Before turning to the issues, however, this Court wishes to state its strong support for the actions of the District Judge throughout the course of this entire

litigation. The District Judge who decided the *Gautreaux* v. *CHA* case and who has supervised the decree entered thereto, is the same District Judge who dismissed this present suit. The administration of the decree in the former case has unquestionably been a difficult and time-consuming task, presenting unique problems for resolution,[4] and generating enormous public interest. This Court would be extremely reluctant to interfere with the exercise of that District Judge's sound discretion in matters pertaining to this controversy, and no statement in this opinion should be so construed. Nevertheless, since important issues of law are presented by this appeal and since the basis of the District Court's dismissal of this present suit below seems to have been a feeling that "the putative limits [of the Court's] powers" had been "effectively circumscribed," rather than a feeling that discretion dictated the dismissal of a suit thought to be unnecessary, it is apparent that review by this Court is compelled.

JURISDICTION AS TO COUNT I.

Since courts always are free to review jurisdiction, we shall examine this point briefly even though not contested by defendant on appeal. We find jurisdiction under 28 U.S.C. § 1331 and the Fifth Amendment to be present in this case. The jurisdictional statute speaks in alternative terms with respect to the "Constitution, laws *or* treaties of the United States. . . ." [5] Thus, a

[4] For an account of at least one set of unique problems confronting the District Judge see this Court's opinion in *Gautreaux* v. *Chicago Housing Authority,* 436 F. 2d 306.

[5] The statute reads in full: "The district courts shall have

plain reading would seem to encompass a suit of this present type which directly challenges conduct alleged to have violated the Fifth Amendment. That such a reading is correct was settled by the Supreme Court in *Bell* v. *Hood,* 327 U.S. 678 (1946) where the Court held that: ". . . where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit." 327 U.S., 681-2. See also: *Bolling* v. *Sharpe,* 347 U.S. 497 (1954); *Hicks* v. *Weaver,* 302 F. Supp. 619 (D.La., 1969). Jurisdiction would still exist even though we were of the opinion that no cause of action under Count I had been stated. *Bell* v. *Hood, supra,* at 682. Since all other requirements under 28 U.S.C. § 1331 have been met, we find that jurisdiction is present under Count I to bring a suit in equity challenging alleged racial discrimination which is said to have violated the Fifth Amendment.[6]

SOVEREIGN IMMUNITY.

Since the defendant has chosen to abandon any claim of sovereign immunity on appeal, we do not think that that point merits an extended discussion on our part. In any case, the doctrine does not bar a suit such as this which is challenging alleged unconstitutional and unauthorized conduct by a federal officer. *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Bolling* v. *Sharpe, supra; Shan-*

original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States."

[6] We agree with the District Court that the requisite jurisdictional amount has been stated.

non v. *HUD,* 436 F. 2d 809 (3 Cir., 1970). See also: *Powelton Civic Homeowners Association* v. *HUD,* 284 F. Supp. 809 (E.D.Pa., 1968); *Hicks* v. *Weaver, supra.*

MOOTNESS.

As noted previously, this appeal follows the entry of an extensive Judgment Order in *Gautreaux* v. *Chicago Housing Authority,* 304 F. Supp. 736, as modified in 436 F. 2d 306. The decree provides in part that CHA shall not ". . . seek any approval or request or accept any assistance from any government agency with respect thereto . . ." unless the plan for such assistance complies with other provisions of the Court's decree. The Secretary contends that HUD's stated full agreement with the aims and objectives of the Judgment Order, along with the issuance of an injunction against the exact practices now before us, make this present controversy moot.[7]

To some extent, the Secretary's argument is that its own voluntary promise to abide by the decision in the companion case and to stop any further racially discriminatory acts on its part is a viable ground for this Court to dismiss for mootness. We have no doubt that such assertions are offered in good faith, but we do not think that they are sufficient for us to hold this appeal moot. It long has been held that ". . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.,*

[7] Had the cases been consolidated and decided together, the possibility of mootness would not, of course, have arisen. Thus, in *Hicks* v. *Weaver, supra,* the Court entered an injunction against *both* the local housing authority and the Secretary of HUD.

does not make the case moot." *United States* v. *W. T. Grant,* 345 U.S. 629, 632 (1953).

A more persuasive argument is that the injunction entered in *Gautreaux* v. *CHA* renders this controversy moot since CHA is now prohibited from "accept[ing] any assistance from [HUD]" unless CHA's programs strictly comply with the specifications of the decree in that case. Thus, it is argued, a ruling here would be merely "advisory," lacking "concrete legal issues, presented in actual cases. . . ." *United Public Workers of America* v. *Mitchell,* 330 U.S. 75, 89 (1947), quoted in *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969).

We conclude, however, that the entry of the companion decree does not make this suit moot. The fact that some of the injunctive relief originally requested is no longer possible does not affect the issues presently before us. "Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests." *Powell* v. *McCormack,* 395 U.S. 486, 496, n. 8 (1969). In this suit, both declaratory and injunctive relief against construction of specific projects was originally sought. Since some of those projects now have been completed, it is obvious that full injunctive relief in favor of plaintiffs cannot now be given. But that fact does not, of itself, make this case moot. *Shannon* v. *HUD, supra,* at 822.[8] At the present time, a declaratory judgment as

[8] The *Shannon* court stated: "The defendants suggest that because the project has been completed and occupied by rent supplement tenants there is no longer any relief which may feasibly be given. The completion of the project and the creation of intervening rights of third parties does indeed present a serious problem of equitable remedies. It does not, however, make the case moot in the Article III sense. Relief can be given in some form."

well as such "other and further relief as the court may deem just and equitable" is requested.

Plaintiffs have contended that such "other and further relief" might include a more vigorous utilization of the several different types of housing programs which HUD administers in the form of a decree aimed at ". . . remedying the continuing effects of the discrimination of the past."[9] Such a decree arguably would represent an equitable remedy going beyond the scope of relief made available through the companion case and, it is contended, might facilitate the overall desired goal of desegregating the public housing sites around Chicago metropolitan area. We express no view on whether such requested relief is either necessary or appropriate. However, as long as a decree utilizing certain HUD programs still remains a possible form of relief not already available through the other case, this Court cannot deem the controversy moot. *Powell* v. *McCormack, supra.*

Moreover, even if only the declaratory judgment were demonstrated to be appropriate at this time, this Court would not necessarily be compelled to dismiss for mootness as long as the requisite "case" or "controversy" exists. "A court may grant a declaratory relief even though it chooses not to issue an injunction or mandamus. . . . A declaratory judgment can then be

[9] For example, we are advised that "Section 236 Housing" is a low income housing program designed to increase the flow of such housing by favorable interest assistance payments to the mortgage lender. Unlike the public housing programs now before us, local governmental approval is not required for such housing to be constructed. See also: "Section 235" and "Section 231" housing programs.

used as a predicate to further relief, including an injunction." *Powell* v. *McCormack, supra,* at 499.

Contrary to the Secretary's arguments, we do not think that the controversy here has been rendered "abstract" by the injunction against CHA's further use of federal funds in a manner not in compliance with the *Gautreaux* v. *CHA* plan. A determination of whether or not the Secretary's own past conduct violated the Constitution or applicable federal statute remains very much of an open question. The entry of a declaratory judgment here would have significant consequences in determining the extent of any "further relief" deemed necessary, in the event that practices found to be discriminatory were resumed. Most important of all, the decree in the CHA case, thorough though it may be, is not binding against HUD or its Secretary.[10] Thus, at the present time, plaintiffs are in the anomalous position of having the full force of the federal judicial power at their command to enforce proven rights against CHA, yet having to rely solely on the voluntary promises of a party whose role is equally important, whose decisions pertaining to this matter may prove to be among the best means of insuring full compliance with the "aims and objectives" of the CHA decree,[11] but who never has been a party to that case or bound by its terms.

[10] Thus this suit is unlike *Watkins* v. *CHA,* 406 F.2d 1234 (7 Cir., 1969) where reinstatement of previously evicted named plaintiffs rendered the cause moot, as between the original parties to that same case.

[11] Favorable HUD action, for example, might have been a factor in the district court's decision to modify the "best efforts" clause of the original Judgment Order in that case so as to order submission

Under such circumstances, we must conclude that the issues before us are "capable of repetition yet evading review" and that the case is not moot. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498 (1911), quoted in *Moore* v. *Ogilvie,* 394 U.S. 814 (1969). Viewed another way, we are confronted here with ". . . a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden* v. *Zwickler, supra,* at 108.

WHETHER A CLAIM IS STATED UNDER THE FIFTH AMENDMENT OR SECTION 601 OF THE 1964 CIVIL RIGHTS ACT

We turn then to the merits. The Government admits that HUD approved and funded CHA-chosen regular family housing sites between 1950 and 1969, knowing that such sites were not "optimal" and that the reason for their exclusive location in black areas of Chicago was that "sites other than in the south or west side, if proposed for regular family housing, invariably encounter [ed] sufficient opposition in the [Chicago City] Council to preclude Council approval." (Letter from a Public Housing Administration Official to the Chairman of the West Side Federation, October 14, 1965).

Nevertheless, the District Court found that HUD had followed this course only after having made "numerous and consistent efforts . . . to persuade the Chicago Housing Authority to locate low-rent housing projects in white neighborhoods." That finding is not directly challenged on appeal. Moreover, given the acknowledged desperate need for public housing in Chicago,[12] HUD's decision was that it was better to fund a segregated housing system than to deny housing altogether to the thousands of needy Negro families of that city.

of approximately 1500 sites to the City Council in accordance with a specific timetable. See: 436 F.2d 306, 310.

On review of the District Court's action, we shall treat all of the above facts as true. The question then becomes whether or not, even granting that "numerous and consistent efforts" were made, HUD's knowing acquiescence in CHA's admitted discriminatory housing program violated either the Due Process Clause of the Fifth Amendment or Section 601 of the Civil Rights Act of 1964.[13] Given a previous court finding of liability against CHA (296 F. Supp. 907), the pertinent case-law compels the conclusion that both of these provisions were violated.

HUD's approval and funding of segregated CHA housing sites cannot be excused as an attempted accommodation of an admittedly urgent need for housing with the reality of community and City Council resistance. This question was argued and settled in the companion case as to these exact housing sites and the same City

[12] The Government's brief points to affidavits submitted by many of the present plaintiffs which starkly illustrate that fact. Plaintiff Gautreaux has accepted public housing in Negro areas only because she had been living in a one bedroom apartment with a family of six. Plaintiff Odell Jones had moved to segregated public housing with his wife and three children to escape their two rooms in which "the rats had begun to run over the house at will."

[13] "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Council. The District Judge there well stated the applicable rule:

> "It is also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued." (296 F.Supp. at 914).

This court applied much the same rule in affirming a modification of the Judgment Order in the companion decision and in ordering submission of 1500 HUD approved sites to the City Council in accordance with a specific timetable. In rejecting a plea for delay, we pointed to several cases holding ". . . that 'abstention' is inappropriate in constitutional cases of this sort and that community hostility is no reason to delay enforcement of proven constitutional rights." (436 F.2d at 312.)

Courts have held that alleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools. *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907; *Kennedy Park Homes Assn.* v. *City of Lackawanna,* 436 F.2d 108 (2 Cir., 1970), cert. den. 401 U.S. 1010 (1971). Moreover, the fact that it is a *federal* agency or officer charged with an act of racial discrimination does not alter the pertinent standards, since ". . . it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling* v. *Sharpe, supra,* at 500. See also: *Green* v. *Kennedy,* 309 F. Supp. 1127, 1136 (D.C.D.C. 1970), appeal dismissed 398 U.S.

956 (1970). The reason for courts' near uniform refusal to examine purported good faith motives behind alleged discriminatory acts was, perhaps, most succinctly put by the Supreme Court in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725 (1963): "It is no consolation to an individual denied the equal protection of the laws that it was done in good faith."

The fact that a governmental agency might have made "numerous and consistent efforts" toward desegregation has not yet been held to negate liability for an otherwise segregated result. Thus, for example, in *Cooper* v. *Aaron,* 358 U.S. 1 (1958) the local school board admittedly had been "going forward with its preparation for desegregating the Little Rock [Arkansas] school system" (358 U.S. at 8), but was still held liable when it abandoned those plans in the face of stiff community and state governmental resistance. See also: *Watson* v. *City of Memphis,* 373 U.S. 526, 535 (1963); *Green* v. *Kennedy, supra,* at 1136.

With the foregoing considerations in mind, then, it is apparent that the "dilemma" with which the Secretary no doubt was faced and with which we are fully sympathetic, nevertheless cannot bear upon the question before us. For example, we have been advised that any further HUD pressure on CHA would have meant cutting off funds and thus stopping the flow of new housing altogether. Taking this assertion as true, still the basis of the "dilemma" boils down to community and local governmental resistance to ". . . the only constitutionally permissible state policy. . . ." *Green* v. *Kennedy, supra,* at 1137, a factor which, as discussed above, has not yet been accepted as a viable excuse for a segre-

gated result. So, even though we fully understand the Secretary's position and do not, in any way, wish to limit the exercise of his discretion in housing related matters, still we do not feel free to carve out a wholly new exception to a firmly established general rule which, for at least the last sixteen years, has governed the standards of assessing liability for discrimination on the basis of race.[14]

Turning to the facts now before us, there can be no question that the role played by HUD in the construction of the public housing system in Chicago was significant. The great amount of funds for such construction came from HUD. Between 1950 and 1966 alone HUD spent nearly $350,000,000 on CHA projects. The Secretary's trial brief acknowledged that "in practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance." We find no basis in the record with which to disagree with that conclusion. Moreover, within the structure of the housing programs as funded, HUD retained a large amount of discretion to approve or reject both site selection and tenant assignment procedures of the local housing authority. HUD's "Annual Contributions Contract" contained detailed provisions concerning program operations and was accompanied by eight pages of regulations on the subject of site selection alone.

It also is not seriously disputed on appeal that the Secretary exercised the above described powers in a

[14] ". . . it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown* v. *Board of Education* (Brown II), *supra,* at 300.

manner which perpetuated a racially discriminatory housing system in Chicago, and that the Secretary and other HUD officials were aware of that fact. The actual aspects of that segregated system are fully described at 296 F. Supp. 907 and we shall not recount them here. The fact that HUD knew of such circumstances is borne out by the District Court's specific finding in this suit that HUD tried to block "the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the City Council would take." This finding is supported by, among other record items, the HUD letter to the West Side Federation previously referred to (page 15), and by the affidavit of HUD official Bergeron recalling his unsuccessful attempts in the early 1950s "to enlist [Mayor Kennelly's] assistance in having project sites located in white neighborhoods."

On such facts, and given the inapplicability of HUD's "good faith" arguments, we are unable to avoid the conclusion that the Secretary's past actions constituted racially discriminatory conduct in their own right.[15] The fact that the Secretary's exercise of his

[15] Our holding thus is not based on the "joint participation" doctrine set forth in *Burton* v. *Wilmington Parking Authority, supra,* and relied upon in the District Court litigation below. We need not discuss the applicability of that doctrine, for it is concerned with a different inquiry, namely, "upon identifying the requisite 'state action' ". (*Griffin* v. *Breckenridge,* 402 U.S. . . . , 39 Law Week 4691) sufficient to render admitted discrimination actionable under the Fourteenth Amendment. In any event, contrary to the Government's assertions on appeal, "joint participation" already has been "extended" to federal government operations. *Simpkins* v. *Moses T. Cone Memorial Hospital,* 323 F.2d 959 (4 Cir., 1963), cert. den. 376 U.S. 938; *Smith* v. *Hampton Training School for Nurses,* 360 F.2d 477 (4 Cir., 1966).

powers may have more often reflected CHA's own racially discriminatory choices than it did any ill will on HUD's part, does not alter the question now before us.

We are fully sympathetic to the arguments advanced by the Government on appeal, especially, as mentioned above, to the very real "dilemma" which the Secretary faced during these years. On the other hand, against such considerations are not only the principles of law discussed heretofore, but also two recent decisions which hold against this same defendant (or predecessor) and which deal with similar facts. *Shannon* v. *HUD, supra; Hicks* v. *Weaver, supra.* We do not think we should ignore those cases.

In holding the Secretary liable on nearly identical facts as are now before us, the *Hicks* court reasoned as follows:

> "As noted above, HUD was not only aware of the situation in Bogalusa [Louisiana] but it effectively directed and controlled each and every step in the program. HUD thus sanctioned the violation of plaintiffs' rights and was an active participant since it could have halted the discrimination at any step in the program. Consequently, its own discriminatory conduct in this respect is violative of 42 U.S.C. § 2000d." (302 F. Supp. at 623).

Likewise, in *Shannon* the Third Circuit recently enjoined further action on a HUD decision to change a proposed housing project in Philadelphia from the originally contemplated owner occupied buildings to a 100% rent supplement assistance program (which was found to be the "functional equivalent of a low rent

public housing project.") (436 F.2d at 819). The *Shannon* court acknowledged that HUD was vested with broad discretion to supervise its various programs, but held, nevertheless, that ". . . that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing . . . and in favor of fair housing. . . ." (436 F.2d at 819.)

We can find no viable basis for distinguishing the *Hicks* and *Shannon* decisions. The Secretary contends that the relief requested in those two cases differed from that which is sought here. The Government's argument is entirely correct, but has no bearing on the issue of actual liability which, as mentioned previously (page 6) is the only issue now before this Court. The Government's further contention, advanced at oral argument, that *Shannon* should be distinguished as involving only a more stable integrated neighborhood trying to stave off additional public housing, is also factually correct, but legally insignificant. Such a factor might arguably affect the standing of individual plaintiffs to bring suit, but it does not alter the pertinent standard for answering the question of whether or not racial discrimination in the funding and approval of particular programs has occurred.

Finally, we emphasize, as did the *Shannon* court, that ". . . there will be instances where a pressing case may be made for the rebuilding of a racial ghetto." (436 F.2d at 822.) However, the situation before us now *already* has been held not to constitute such a pressing case, and such is the determinative factor. Where the Court in the companion decision previously has held

that CHA's "deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued" (296 F. Supp. at 914), it is not possible with consistency to apply a lesser standard against HUD in assessing whether it too is liable for its role on the same identical facts.

So, even while we are fully sympathetic to the arguments advanced by the Secretary on appeal, we must conclude that the great weight of the caselaw favors plaintiffs' position. Since there exist no controverted issues of material fact, we conclude that summary judgment should be granted in plaintiffs' favor on both Counts I and II of the complaint. We hold that HUD, through its Secretary, violated the Due Process Clause of the Fifth Amendment (*Bolling* v. *Sharpe, supra; Hicks* v. *Weaver, supra*) and also has violated Section 601 of the Civil Rights Act of 1964 (*Shannon* v. *HUD, supra; Hicks* v. *Weaver, supra*).

In so holding we state *only* that the Secretary must be adjudged liable on these particular facts and again point out that our holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency. It may well be that the District Judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple "best efforts" clause will be necessary to remedy the wrongs which have been found to have been committed.

Such considerations, however, are not the subject for present decision, and we defer to the District Court for their resolution.

REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DOROTHY GAUTREAUX, et al., Plaintiffs, vs. GEORGE W. ROMNEY, Secretary of the Department of Housing and Urban Development, et al., Defendants.	Civil Action Nos. No. 66 C 1459 No. 66 C 1460 (Consolidated) (Filed September 11, 1973)

363 F. Supp. 690

MEMORANDUM OPINION and JUDGMENT ORDER

The facts of these cases have often been recited and need no repetition here.* This matter comes before me today on plaintiffs' motion (1) to defer my ruling on the proposed final judgment orders submitted by HUD and plaintiffs; (2) to determine that it is necessary to consider a metropolitan plan for relief; and (3) to provide for the preparation of such plans by HUD and CHA. For the reasons stated below, that motion is denied.

Stated simply, this lawsuit attacks racial discrimination in public housing within the City of Chicago.

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* *See Gautreaux v. Chicago Housing Authority,* 265 F. Supp. 582 (N.D. Ill. 1967), 296 F. Supp. 907 (N.D. Ill. 1969), 304 F. Supp. 736 (N.D. Ill. 1969, *aff'd,* 436 F.2d 306 (7th Cir. 1971); *Gautreaux v. Romney,* 448 F.2d 731 (7th Cir. 1971); 342 F. Supp. 827, *aff'd,* Slip Opinion dated May 18, 1973 (7th Cir.).

Both defendants have previously been found liable to plaintiffs because they either fostered or tolerated the unconstitutional implementation of federal housing statutes. And, having already entered an appropriate judgment against CHA, what remains before me is the relief to be obtained from HUD.

Plaintiffs' motion asks me to consider the propriety of metropolitan area relief similar to that granted in *Bradley v. Milliken,* Slip Opinion Nos. 72-1809 and 72-1814, 42 U.S.L.W. 2022 (6th Cir. 1973), which was a case dealing with racial segregation in the Detroit public school system. But, although such relief may have been justified in *Bradley,* it is simply unwarranted here because it goes far beyond the issues of this case. Unlike education, the right to alequate housing is not constitutionally guaranteed and is a matter for the legislature. *Lindsey v. Normet,* 405 U.S. 56, 74 (1972). Of course, once such legislation is enacted into law, it is constitutionally impermissible to administer it in a racially discriminatory manner. Here, for example, the evils of racial discrimination in public housing were fostered by decisions of the housing authority of the City of Chicago and tolerated by the federal agency which financed such projects.

However, the wrongs were committed within the limits of Chicago and solely against residents of the City. It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein. After years of seemingly interminable litigation, plaintiffs now suggest that I consider a metro-

politan plan for relief against political entities which have previously had nothing to do with this lawsuit. The factual basis for their request is an opinion of an urbanologist that by the year 2000 the entire geographic area of the City of Chicago will be within the limited public housing area as defined by the judgment order entered on July 1, 1969. This is simply inadequate to support a request to consider imposing obligations upon those who were and are incapable of discriminatory site selection within the City of Chicago.

Furthermore, plaintiffs should not have to be reminded that no public housing has been built in this City since my order of July 1, 1969 because the municipal authorities refused to approve sufficient sites for such housing and recently because of a lack of funds. But, now that one of those obstacles has been eliminated by the Seventh Circuit's recent affirmance of my order to build housing in Chicago without City Council approval, plaintiffs have curiously raised an issue that would let the principal offender, CHA, avoid the politically distasteful task before it by passing off its problems onto the suburbs.

Therefore, for the reasons stated above and in defendant HUD's memorandum of March 30, 1973, plaintiffs' motion to consider metropolitan relief is denied. Further,

A. IT IS HEREBY ORDERED, ADJUDGED AND DECREED: That plaintiffs' motion for summary judgment on Counts I and II of the complaint in Case Number 66 C 1460 be and hereby is granted;

B. IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the defendant, George W.

Romney, Secretary of the Department of Housing and Urban Development, his successors, his officers, agents, servants, employees, representatives, and each of them shall use their best efforts to cooperate with CHA in its efforts to increase the supply of dwelling units, in conformity with:

(a) all federal statutes applicable to the low rent housing program;

(b) rules and regulations promulgated by HUD for the administration of said program; and,

(c) the provisions of the Judgment Order entered by this court in the companion case (No. 66 C 1459) on July 1, 1969, as amended, as well as all other final, non-appealable orders entered by this court from time to time in these proceedings;

C. IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the defendant George W. Romney, Secretary of the Department of Housing and Urban Development, his successors, officers, agents, servants, employees, representatives, and each of them are hereby permanently enjoined and restrained from approving and funding development programs for low rent family public housing in the City of Chicago which are inconsistent with the terms of this Judgment Order.

ENTER:

/s/ Richard B. Austin
Judge, United States District Court

DATED: September 11, 1973

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 74-1048 and 74-1049

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellants,

v.

CHICAGO HOUSING AUTHORITY and JAMES T. LYNN, Successor to George W. Romney, Secretary of the Department of Housing and Urban Development, et al.,
Defendants-Appellees.

ARGUED JUNE 4, 1974—DECIDED AUGUST 26, 1974

503 F.2d 930

Before CLARK, *Associate Justice,*[1] CUMMINGS and TONE, *Circuit Judges.*

MR. JUSTICE CLARK: Appellants, black tenants in and applicants for public housing, brought these consolidated cases separately in 1966 against the Chicago Housing Authority (CHA) and the Secretary of Housing and Urban Development (HUD) respectively, charging that CHA had intentionally violated 42 U.S.C. § 1981 and § 1982 in maintaining existing patterns of

[1] Associate Justice Tom C. Clark of the Supreme Court of the United States (Ret.) is sitting by designation.

residential separation of races by its tenant assignment and site selection procedures, contrary to the Equal Protection Clause of the Fourteenth Amendment; and that HUD had "assisted in the carrying on . . . of a racially discriminatory public housing system within the City of Chicago" in violation of the Fifth Amendment. Appellants sought an injunction against CHA restraining such practices and requiring CHA to remedy the past effects of its unconstitutional site-selection and tenant-assignment procedures by building any future public housing units in predominantly white areas. This appeal grows out of the decision of the district court on remand for a determination of appropriate relief pursuant to separate findings that both CHA and HUD were responsible for *de jure* segregation in the public housing program in Chicago. In 1969 the District Court found with the appellants on the merits and since that time has devoted its efforts to effectuating this ruling. After some four years of hearings, several judgment orders and four appeals, the District Court on the last remand called on the parties to propose a "comprehensive plan" to remedy past effects of the public housing segregation indulged in by CHA and HUD, including "alternatives which are not confined in their scope to the geographic boundary of the City of Chicago." HUD proposed, and the District Court, after an evidentiary hearing, ordered a plan under which HUD would "cooperate" with CHA in the latter's efforts to increase the supply of public housing units but eliminated any relief not confined to the geographic boundary of the City of Chicago and refused to impose any specific affirmative obligations upon

HUD beyond its "best efforts". 363 F. Supp. 690 (1973). The appellants contend that a metropolitan area remedial plan including housing in suburban areas, as well as those within the limits of Chicago, is necessary to remedy the past effects of said unconstitutional public housing segregation policy and attain that racial balance required by the Fourteenth Amendment. Given the eight year tortuous course of these cases, together with the findings and judgment orders of the District Court and the opinions of this Court (now numbering five), we believe the relief granted is not only much too little but also much too late in the proceedings. In effect, appellants, having won the battle back in 1969, have now lost the war. We are fully aware of the many difficult and sensitive problems that the cases have presented to the able District Judge and we applaud the care, meticulous attention and the judicious manner in which he has approached them. With his orders being ignored and frustrated as they were, he kept his cool and courageously called the hand of the recalcitrant. Perhaps in the opinion on remand on the third appeal, 457 F. 2d 124 (1972), the repetition of a statement in the opinion on remand in the second appeal, 448 F. 2d 731 that: "It may well be that the District Judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple 'best efforts' clause, will be necessary . . ." led the beleaguered District Judge to limit any plan to the boundaries of the City of Chicago and the "best efforts" of CHA and HUD. This is to be regretted and we trust that upon remand the matter will be expedited to the end that the segregated public

housing system which has resulted from the action of CHA and HUD will be disestablished, and the deficiency in the supply of dwelling units will be corrected as rapidly as possible and in the manner indicated in this opinion.

We shall not burden this opinion with the details [2] of the eight-year delay that has thus far deprived the appellants of the fruits of the District Court's judgment entered on July 1, 1969. In addition the unconstitutional action of CHA has stripped thousands of residents of the City of Chicago of their Fifth and Fourteenth Amendment rights for a score of years. Indeed, anyone reading the various opinions of the District Court and of this Court quickly discovers a callousness on the part of the appellees towards the rights of the black, underprivileged citizens of Chicago that is beyond comprehension. As far back as 1954, the District Court found that CHA had continuously refused to permit black families to reside in four public housing projects built before 1944; and that as far back as 1954 CHA has imposed a black quota on the four projects to the end that at the beginning of 1968 black tenants only occupied between 1 percent to 7 percent of the 1654 units in the projects. The non-white population of Chicago at that time was 34.4 percent. In 64 public housing sites, having 30,848 units (other than the four above mentioned), the tenants were 99 percent black. All during this period Illinois law required that CHA secure prior approval of new sites for public housing from the City Council of the City of Chicago, but the

[2] For a detailed statement of the facts see the dissenting opinion of Judge Sprecher, 457 F. 2d at 129.

District Court found that CHA set up a pre-clearance arrangement under which the alderman in whose ward a site was proposed would receive an informal request from CHA for clearance. The alderman, the Court found, to whom sites in the white neighborhoods were submitted, vetoed the sites and the City Council rejected 99½ percent of the units proposed for white sites while only 10 percent were refused in black areas. Moreover, the Court found that during this period about 90 percent of the waiting list of some 13,000 applicants to CHA for occupancy in its projects were black. These findings were neither challenged nor appealed. Furthermore, as early as July 1, 1969, a judgment order was entered herein, requiring CHA to build 700 new housing units in predominantly white areas and requiring 75 percent of all future units built by CHA to be constructed in such areas. This judgment also ran against the City Council of the City of Chicago (not then a party) on the basis of notice. Finally, CHA was directed by the District Court to "affirmatively administer its public housing system . . . to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures . . . [and] use its best efforts to increase the supply of Dwelling Units as rapidly as possible . . .". 304 F. Supp. 736 (1969). No appeal was taken from this judgment.

Appellants and the District Court waited patiently for a year and a half but CHA submitted no sites for family dwellings to the City Council. The appellants contacted CHA and were advised that CHA had no intention to submit sites prior to the Chicago mayoralty election of April, 1971. The parties then asked for

and were given informal hearings, so as to prevent publicity, and finally the District Court modified its "best efforts" provision in the July 1, 1969 judgment order so as to affirmatively require CHA to submit sites for no fewer than 1500 units to the City Council for approval on or before September 20, 1970. This order was appealed by CHA and affirmed, 436 F. 2d 306, *cert. den.* 402 U.S. 922 (1971).

Meanwhile, in the separate suit against HUD filed simultaneously with the one against CHA (and now consolidated), the District Court had dismissed all four counts. On appeal this Court held that HUD had violated the due process clause of the Fifth Amendment and reversed with directions to enter a summary judgment for the appellants. This Court found that HUD had approved and funded family housing sites chosen by CHA in black areas of Chicago. HUD's explanation was "it was better to fund a segregated housing system" than deny housing altogether. This Court found that in the sixteen years (1950-1966) HUD spent nearly $350 million on such projects "in a manner which perpetuated a racially discriminatory housing system in Chicago"; that its excuse of community and local government resistance has not been accepted as viable and that this Court was "unable to avoid the conclusion that the Secretary's past actions constituted racial discriminatory conduct in their own right." *Gautreaux* v. *Romney,* 448 F.2d 731 (7th Cir. 1971).

During the progress of this litigation, HUD was conferring with the City of Chicago concerning grants under the Model Cities Program (established by the Demonstration Cities and Metropolitan Development

grant was made for the calendar year 1970. However for the 1971 calendar year HUD required a "letter of intention" signed by the Mayor of Chicago, the Chairman of CHA and the Regional Administrator of HUD, indicating how Chicago's large housing deficiency would be met. Under this letter CHA was to acquire sites for 1700 units within a specified timetable. HUD approved $26 million and had released $12 million when the opinion in *Romney, supra,* came down. Appellants then sought an injunction from the District Court restraining further payments by HUD under the Model Cities Program unless and until sites in predominantly white areas for 700 dwellings units had been certified to the City Council for approval (at the time only 288 had been approved). The District Court granted this relief but on appeal the order was reversed. 457 F.2d 124 (7th Cir. 1972). On remand the District Court entered a summary judgment against HUD, consolidated the cases and entered an order calling for each of the parties to file suggestions for a "comprehensive plan" to remedy the past effects of the public housing segregation, including "alternatives which are not confined in their scope to the geographic boundary of the City of Chicago."

HUD proposed a "best efforts" judgment order under which it would "cooperate" with CHA in the latter's efforts to increase the supply of housing units in accordance with the earlier judgment order against CHA and reported in 304 F. Supp. 736. Its proposed relief was confined to the geographic boundaries of the City of Chicago. Its "best thinking" was that the letter of intention previously mentioned and signed by the Mayor, the Regional Administrator of HUD and CHA

matter of the relocation housing deficiency of 4300 units and did not spell out any "comprehensive plan to remedy the past effects". Appellants' proposed plan provided a mechanism by which CHA could supply remedial housing in suburban areas as well as within Chicago and required HUD to administer its programs affirmatively to ensure that the order was carried out. At the hearing the appellants introduced evidence of the need for a metropolitan plan and the unreliability of HUD's "best efforts". HUD offered evidence of the lack of funds then available and CHA offered no evidence. On December 8, 1972, *Bradley* v. *Milliken,* 484 F.2d 215 (6th Cir. 1972) came down, holding that a remedial plan involving suburban school districts in the metropolitan area of Detroit was necessary to disestablish existing segregation. Appellants then requested a "*Bradley* plan" order. On September 11, 1973, the District Court sustained the HUD proposal and this appeal resulted.

1. *Scope of Review*

We agree with the appellees that the District Court did not hold that it lacked power to adopt a metropolitan plan but rather that on the facts shown such relief was unwarranted. While neither CHA nor HUD concedes that the District Court has power to require compliance with a plan that includes areas outside the official boundaries of the City of Chicago, they both conclude that the District Judge's holding was not predicated on a lack of such power. At least until *Milliken* v. *Bradley,* —— U.S. ——, 42 LW 5249, the law was clear that political subdivisions of the States may be readily bridged when necessary to vindicate

federal constitutional rights. *Ex parte Virginia,* 100 U.S. 339 (1880); *Brown* v. *Board of Education,* 349 U.S. 294, 300-301 (1954); *Board of Education* v. *Swann,* 402 U.S. 1, 27 (1971); *Griffin* v. *County Board,* 377 U.S. 218 (1964); *Bradley* v. *Milliken,* 484 F.2d 215, 250 (6th Cir. 1973); *Haney* v. *County Board,* 410 F.2d 920 (8th Cir. 1969). The equal protection clause speaks to the state, and the state cannot escape its obligations under that clause by delegating some of its governmental functions to local units. *Hall* v. *St. Helena Parish School Board,* 197 F.Supp. 649 (E.D.La. 1961), affirmed, 368 U.S. 515; *Reynolds* v. *Sims,* 377 U.S. 533, 575; *Hart* v. *Community School Board,* —— F.Supp. ——, 42 LW 2428 (E.D.N.Y. 1974). Cf. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 178.

We turn then to the Supreme Court's opinions in *Milliken* v. *Bradley.* That case clarifies an important equitable limitation on the substantial body of law just cited but does not overrule it. The Chief Justice's opinion for the Court assumes *arguendo* that the actions of local government are attributable to the state, 42 LW 5259, and it notes that school district lines are not sacrosanct if they conflict with the Fourteenth Amendment, 42 LW 5257. However, "[p]roceeding from . . . basic principles [of remedies]," 42 LW 5255-5256, the Court holds that metropolitan relief does not follow automatically from these premises. 42 LW 5259. Boundary lines may be "bridged," but not "casually ignored." Consolidation of 54 independent school districts would present overwhelming problems of logistics, finance, administration and political legitimacy. The Court gives great deference to the "deeply rooted" and "essential" tradition of local control of

the public schools. Unless the Michigan legislature completely restructured relevant statutes, the District Judge would become both de facto legislature and metropolitan school superintendent. 42 LW 5257. The conclusion that inter-district school desegregation is "in order" and "appropriate" only where there has been what the Court terms "an inter-district violation" (42 LW 5258) must be read in this light. Only an inter-district violation justifies incurring all the difficulties attendant on inter-district school desegregation.

This reading of the opinion is conclusively reinforced by Justice Stewart's concurrence, which expressly states the holding:

> "the Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction.
>
> . . . . .
>
> "The opinion of the Court convincingly demonstrates that traditions of local control of schools, together with the difficulty of a judicial supervised restructuring of the local administration of schools, render improper and inequitable such an inter-district response to a constitutional violation found to have occurred only within a single school district." 42 LW 5260-5261 (citation omitted).

Justice Stewart's view is pivotal because his vote makes a majority when added to any of the other opinions. It is also significant that the Chief Justice's opinion does not indicate any disagreement with Justice Stewart's understanding.

Milliken v. *Bradley* therefore fits into an established

line of precedent. Beginning in *Brown I,* the Court recognized that remedial complexities may limit or delay implementation of the constitutional right to school desegregation. 347 U.S. 483, 495. In *Brown II,* the Court emphasized local school problems, and in a passage quoted by both the Chief Justice and Justice Stewart in *Milliken,* reminded that "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." 349 U.S. 294, 300. Long experience in reconciling practical problems with demands for total desegregation eventually resulted in the following rule:

> "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Comm'rs,* 402 U.S. 33, 37.

An alternative phrasing is the requirement "that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 46. We understand *Milliken* v. *Bradley* to hold that the relief sought there would be an impractical and unreasonable over-response to a violation limited to one school district.

In view of the dominant theme of the majority opinion as a whole, the fact that any application of the opinion to factual situations other than the one before the Court would be dictum, and particularly in view of Justice Stewart's opinion for the fifth vote, we conclude

that the majority opinion in *Milliken* v. *Bradley* deals with equitable limitations on remedies.

Our task therefore, and that of the District Judge, is to determine how great a degree of public housing desegregation is practical. *Milliken* v. *Bradley* dealt only with schools. Public housing may be quite different; indeed, both the Chief Justice's and Justice Stewart's opinions implied that the result as to schools might be different if housing discrimination were shown. 42 LW 5253, n. 7; 42 LW 5261. Compare *Watson* v. *City of Memphis,* 373 U.S. 526, 532-534, holding that because

> "[d]esegregation of parks and other recreational facilities does not present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, . . . it is patent . . . that the principles enunciated in the second *Brown* decision have absolutely no application [to parks]."

2. *A Metropolitan Plan is Necessary and Equitable*

After careful consideration and reflection we are obliged to conclude that on the record here it is necessary and equitable that any remedial plan to be effective must be on a suburban or metropolitan area basis. This could entail additional time but not under proper management since the intra-city portion of the plan may proceed without any further delay. In the meanwhile the suburban or metropolitan phases of the plan can be perfected (new parties, if necessary, etc.) and effectuated without delaying or interfering with the intra-city phase of the comprehensive plan. There are

only five housing authorities (in addition to CHA) involved, and while voluntary cooperation is not indicated, a Court order directing that those not volunteering were to be made parties might help. On the record here we are not able to discuss—much less pass upon—the validity of any specific metropolitan plan. We leave that for the district court on remand.

Our decision in regard to the necessity and equity of suburban or metropolitan area action is predicated on the following:

The equitable factors which prevented metropolitan relief in *Milliken* v. *Bradley* are simply not present here. There is no deeply rooted tradition of local control of public housing; rather, public housing is a federally supervised program with early roots in federal statutes. See 42 U.S.C. § 1401 *et seq.; Gautreaux* v. *Romney,* 448 F.2d 731, 737-740 (7th Cir. 1971). There has been a federal statutory commitment to non-discrimination in housing for more than a century, 42 U.S.C. § 1982, and the Secretary of HUD is directed to administer housing programs "in a manner affirmatively to further the policies" of non-discrimination, 42 U.S.C. § 3608(d)(5). In short, federal involvement is pervasive.

Similarly, the administrative problems of building public housing outside Chicago are not remotely comparable to the problems of daily bussing thousands of children to schools in other districts run by other local governments. CHA and HUD can build housing much like any other landowner, and whatever problems arise would be insignificant compared to restructuring school systems as proposed in *Milliken* v. *Bradley.*

In *Milliken* v. *Bradley,* the Chief Justice emphasized

that there was no evidence of discrimination by the suburban school districts affected. Here, although the record was not made with the Supreme Court's *Milliken* opinions in mind, there is evidence of suburban discrimination. Plaintiff's Exhibit 11 indicates that of twelve suburban public housing projects, ten were located in or adjacent to overwhelmingly black census tracts. And although the case was not limited to public housing, it is not irrelevant that we recently took judicial notice of widespread residential segregation "in Chicago and its environs." *Clark* v. *Universal Builders, Inc.*, —— F.2d —— (7th Cir. No. 72-1655, 1974) slip op. 15. We went on to hold that a prima facie showing had been made that this segregation had discriminatory effects throughout the metropolitan area.

Finally, the possibility of metropolitan relief has been under consideration for a long time in this case. While they disagree as to what relief the District Court should order, the parties are in agreement that the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work.

The HUD General Counsel is quoted as saying:

> "The provisions in State housing authorities laws which authorize a city housing authority to operate . . . in a county or other city with the consent of the governing body concerned, were included in these laws because it was realized that many cities would have to utilize the areas outside their borders in meeting their low-rent housing needs. It was recognized that the elimination of slums and the provision of decent housing for

> families of low income in the locality are matters of metropolitan area scope but of primary concern to the central city because the problem and impact are intensified there. In effect, therefore, the State legislatures have determined that the city and its surrounding area comprise a single 'locality' for low-rent housing purposes." (Pls.' Exh. 13, pp. 3-4).

Likewise, an applicable HUD regulation states in part: "[H]ousing market areas often are independent of arbitrary political boundaries . . .". (Pls.' Exh. 16, p. 1).

And CHA itself in a memorandum of December 21, 1971, (Record Doc. 167 at p. 27) said:

> "CHA fully agrees that public housing must be metropolitan in nature, and not confined to the City of Chicago. It has so stated on numerous occasions before this court. It has offered testimony that a dispersal program for public housing will not work unless it is operated on a metropolitan basis."

HUD has taken a similar position:

> "[T]he impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community. The City and the suburbs together make up what I call the 'real city.' To solve problems of the 'real city,' *only metropolitan-wide solutions will do.*" (Statement by Secretary Romney, Appendix Z, pp. 15-16, to HUD's Memorandum, De-

cember 17, 1971, Record Doc. 283, Attachment 6, Memorandum 2, p. 2, emphasis added.)

And Samuel J. Simmons, former Assistant Secretary for Equal Opportunity of HUD, said:

> Central cities are losing Whites and gaining Blacks. In spite of a gradual increase in the number of Blacks and other minorities living in the suburbs, the fact of the White noose around the country's largest cities is a largely unchanged reality. The White trek to the suburbs has continued unabated in the last ten years and in the majority of the large metropolitan areas White and Blacks still live largely separate lives . . . *It is impossible to solve central city problems in the central city alone.*" (Pls.' Exh. 7, pp. 3-4, emphasis added.)

In fact, HUD joined the appellants in a joint representation to the District Judge that "the parties are of the view that a metropolitan remedy is desirable." Tr. pp. 4, 6, Feb. 22, 1972. While it later said: "it is by no means clear" that a metropolitan remedy is necessary, it reaffirmed subsequently "the desirability of a metropolitan wide plan" and explained that its previous statement was only raising "various legal objections to the particular plan plaintiffs have proposed . . ." Tr. Rec. Doc. 310 p. 7-10 HUD Memorandum.

In addition to CHA's and HUD's strong, positive statements as to the necessity for a metropolitan plan here, the appellants also offered the testimony of a recognized demographer who estimated that a continuance of present trends in black and white census tracts

would lead to at least a 30 percent black occupancy in every census tract in Chicago by the year 2000. The District Judge himself added support to this thesis; however his prediction was 1984:

> "[E]xisting patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago. On the basis of present trends of Negro residential concentration and of Negro migration into and White migration out of the central city, the President's Commission on Civil Disorders estimates that Chicago will become 50% Negro by 1984. By 1984 it may be too late to heal racial divisions." (296 F. Supp. 907, 915).

If this prediction comes true it will mean that there will be no "general Public Housing Area" left in Chicago on which CHA could build desegregated public housing. In the ten-year period 1960-1970 the population of the City of Chicago declined by 183,000 people, a decrease of 505,000 whites and an increase of 322,000 blacks. The expert demographer further testified that by providing desegregated housing opportunities in the suburban areas, the rate of white exodus from the city would diminish. There was no testimony to the contrary. In fact "White flight" has brought on the same condition in most of our metropolitan cities, such as Indianapolis, Indiana. See *United States* v. *Board of School Commissioners,* 332 F. Supp. 655, 676 (1971); also as to Atlanta, Georgia; *Calhoun* v. *Cook,* 332 F. Supp. 804, 805 (1971). Like conditions—but aggravated—exist in Washington, D. C. and Cleveland, Ohio.

The realities of "White flight" to the suburbs and

the inevitability of "resegregation" by rebuilding the ghettos as CHA and HUD were doing in Chicago must therefore be considered in drawing a comprehensive plan. The trial judge back in 1969 ordered scattered-site, low-rise housing—despite much criticism—but the experts now agree that such requirements are mandatory. His warning that "By 1984 it may be too late to heal racial divisions", rather than a cliche, is a solemn warning as to the interaction of "White flight" and "black concentration". It is the most serious domestic problem facing America today. As Assistant Secretary Simmons further advises:

> "As Whites have left the cities, jobs have left with them. After 1960, three-fifths of all new industrial plants constructed in this country were outside of central cities. In some cases as much as 85% of all new industrial plants located outside central cities were inaccessible to Blacks and other minorities who swelled ghetto populations." (Pls.' Exh. 9, p. 3).

These words also convey a solemn warning, *i.e.,* we must not sentence our poor, our underprivileged, our minorities to the jobless slums of the ghettos and thereby forever trap them in the vicious cycle of poverty which can only lead them to lives of crime and violence.

By way of concluding, we have carefully read the records in these cases and find no evidence that the suburban or metropolitan area should not be included in a comprehensive plan. All of the parties, the Government officials, the documentary evidence, the sole expert and the decided cases agree that a suburban or metropolitan area plan is the *sine qua non* of an effective remedy. In fact the Judge himself recognized its

importance in his original judgment order by authorizing housing units to be provided in suburban Cook County on a voluntary basis. See 304 F. Supp. at 739. Furthermore, in his order of December 23, 1971, calling for the preparation by the parties of a "comprehensive plan", he wisely included the following paragraph:

> "3. In the preparation of such plan or plans, the parties are requested to provide the Court with as broad a range of alternatives as seem to the parties feasible as a partial or complete remedy for such past effects, including, if the parties deem it necessary or appropriate to provide full relief, alternatives which are not confined in their scope to the geographic boundary of the City of Chicago."

In light of all of these considerations we can but conclude that the District Court's finding as to not including in a comprehensive plan of relief areas outside the City of Chicago, *i.e.,* the suburban or metropolitan area, was clearly erroneous.

3. *Action on Remand*

The judgment order of September 11, 1973, is reversed and the causes are remanded for further consideration in the light of this opinion, to wit: the adoption of a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago which has resulted from CHA's and HUD's unconstitutional site selection and tenant assignment procedures but will increase the supply of dwelling units as rapidly as possible.

It is so ordered.

TONE, *Circuit Judge,* dissenting.

I respectfully dissent based on my reading of the majority decision in *Milliken* v. *Bradley,* ——U.S. ——, 42 U.S.L.W. 5249 (July 25, 1974). I recognize that that case involved facts significantly different from those in the case at bar, but the "controlling principle" stated and applied there seems to me to be applicable here. That principle is that the remedy must be commensurate with the constitutional violation found, and, therefore, an inter-district remedy is not justified unless the evidence shows an inter-district violation. (42 U.S.L.W. at 5258 and 5261.) This seems to me to preclude metropolitan relief here. No violation outside the city has even been alleged, let alone proved, as the District Court pointed out. *Compare, United States* v. *Board of School Comm. of the City of Indianapolis,* —— F.2d —— (7th Cir. August 21, 1974), Slip Op. at 14-17, 27.

I do not disagree with this court's persuasive argument that a metropolitan plan is needed to reduce segregation in the metropolitan area. The record does not support that relief in this case, however, in view of the stricture of *Milliken* v. *Bradley.*

APPENDIX E

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604
September 30, 1974

Before

Hon. TOM C. CLARK, Associate Justice[1]
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

Nos. 74-1048, 74-1049

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellants,

vs.

CHICAGO HOUSING AUTHORITY and
JAMES T. LYNN, Etc., et al.,
Defendants-Appellees.

503 F.2d 939

ORDER
On Rehearing

On rehearing, we reaffirm our view that the trial judge should not have refused to "consider the propriety of metropolitan area relief." His conclusion

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[1] Associate Justice Tom C. Clark of the Supreme Court of the United States (Ret.) is sitting by designation.

that the only factual basis for plaintiffs' request was the opinion of an urbanologist ignores much of the record and, in particular, the statements of the parties themselves to the effect that "only metropolitan-wide solutions will do."

The requested relief does not go "far beyond the issues of this case," as the trial judge suggests. Rather, it is reasonable to conclude from the record [2] that defendants' discriminatory site selection within the City of Chicago may well have fostered racial paranoia and encouraged the "white flight" phenomenon which has exacerbated the problems of achieving integration to such an extent that intra-city relief alone will not suffice to remedy the constitutional injuries. The extra-city impact of defendants' intra-city discrimination appears to be profound and far-reaching and has affected the housing patterns of hundreds of thousands of people throughout the Chicago metropolitan region.

[2] The trial judge himself made the following statement in his 1969 opinion in this matter:

> "Two further results of CHA's participation in a policy of maintaining existing patterns of residential separation of the races must be mentioned. First, as Dr. Baron's Affidavit discloses, the 188,000 White families eligible for public housing have understandably chosen in the main to forego their opportunity to obtain low cost housing rather than to move into all Negro projects in all Negro neighborhoods. This is an ironic but predictable result of a segregationist policy of protecting Whites from less than half as many (76,000) eligible Negro families. Second, existing patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago. On the basis of present trends of Negro residential concentration and of Negro migration into and White migration out of the central city, the President's Commission on Civil Disorders estimates that Chicago will become 50% Negro by 1984. By 1984 it may be too late to heal racial divisions." *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907, 915 (N.D. Ill. 1969).

It is in this sense, we believe, that the Supreme Court requires a showing that "there has been a constitutional violation within one district that produces a significant segregative effect in another district." *Milliken* v. *Bradley*, 42 U.S.L.W. at 5258. We therefore reaffirm our remanding of this case for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in *Milliken* v. *Bradley*. In the meantime, intra-city relief should proceed apace without further delay.

A majority of the judges in regular active service not having requested that a vote be taken on the suggestion for an *en banc* rehearing, and a majority of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellees for a rehearing in the above-entitled appeal be, and the same is hereby denied.

Judge Tone adheres to his prior dissent.

APPENDIX F

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604
August 26, 1974

Before
Hon. TOM C. CLARK, Associate Justice *
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

No. 74-1048, 74-1049

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellants,
vs.
CHICAGO HOUSING AUTHORITY, etc., et al.,
Defendants-Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of September 11, 1973, of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and this cause be and the same is hereby REMANDED to the said District Court for further consideration in accordance with the opinion of this Court filed this day.

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* Associate Justice Tom C. Clark of the Supreme Court of the United States is sitting by designation.

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