No. 74-1047

In the Supreme Court of the United States

OCTOBER TERM, 1974

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

vs.

DOROTHY GAUTREAUX, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

QUESTIONS PRESENTED

1. Whether *Milliken* v. *Bradley,* 418 U.S. 717 (1974), precludes a federal court from providing relief throughout a housing market area for discrimination carried on within a portion of the same area by the Department of

Housing and Urban Development in violation of both the Fifth Amendment and the Civil Rights Act of 1964.

2. Whether review on certiorari is premature where the judgment of a court of appeals is nonfinal, having remanded the case for additional evidence and for consideration of the issue of housing market area relief in light of the opinions of the court of appeals and of this Court in *Milliken* v. *Bradley*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . *U.S. Const. Amend. V.*
>
> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. *Section 601, Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d.*

STATEMENT

In 1971, reversing a 1970 order of the district court,* the Court of Appeals for the Seventh Circuit held that the Department of Housing and Urban Development ("HUD") had "violated the Due Process Clause of the Fifth Amendment . . . and also has violated Section 601 of the Civil Rights Act of 1964 . . ." *Gautreaux* v. *Romney*, 448 F.2d 731, 740 (CA 7, 1971). The holding was based on the determination that, in conjunction with the Chicago Housing Authority ("CHA"), HUD had exercised its powers in a manner which "perpetuated a racially discriminatory housing system in Chicago." *Id.* at 739. Although CHA officials were deeply involved in the discrimination and had previously been held separately liable,* the court's holding was not based on the "joint participation" doctrine of *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1963); rather, the court said HUD's actions "constituted racially discriminatory conduct in their own right." 448 F.2d at 739.** The case was remanded for appropriate relief to be determined by the district court, the court of appeals having stated that the extent of possible equitable relief, while extremely important, was not before it. *Id.* at 734. In particular, the court expressly declined to state a view as to whether requested relief involving the Chicago metropolitan area was "either necessary or appropriate." *Id.* at 736.

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* The unreported district court decision is reproduced as Appendix A to the petition for certiorari.

*Cases against CHA and HUD were originally filed simultaneously but separately. Proceedings against HUD were then stayed pending disposition of the suit against CHA. The two cases were later consolidated on HUD's motion. Reported decisions in the other phases of the case are as follows: (1) the original judgment order against CHA and a modification of it—296 F.Supp. 907; 304 F.Supp. 736; 436 F.2d 306, cert. denied, 402 U.S. 922 (1971); (2) an unsuccessful effort to enforce HUD's liability through the Model Cities Program—332 F.Supp. 366; 457 F.2d 124; (3) proceedings setting aside the Chicago City Council's veto power over CHA site selection—342 F.Supp. 827; 480 F.2d 210, cert. denied, 414 U.S. 1144 (1974); and (4) a recent reference to a special master to identify the reasons for delay in implementing earlier orders and to make recommendations—384 F.Supp. 37; ..... F.2d ..... (January 24, 1975).

** This prior determination of HUD's liability is the law of the case and is concededly not now at issue before this Court. (Petition, p. 5, n.4.) Thus, the duty "so far as possible [to] eliminate the discriminatory effects of the past," *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965), is here an independent obligation of HUD.

On remand the parties took the position that the effects of residential segregation were felt throughout the relevant housing market area and that metropolitan relief was therefore the desirable—and probably the only effective—form of relief in the case.* HUD's position was stated succinctly by its then Secretary, George Romney, as follows:

> "[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 of then Secretary of HUD, George Romney, Appendix Z, pp. 15-16, to HUD's Memorandum, December 7, 1971, Record Doc. 283, Attachment 6, Memorandum 2, p. 2.)

Subsequently HUD joined the respondents in representing to the district judge that "a metropolitan remedy is desirable." (Transcript of Proceedings, pp. 4, 6, February 22, 1972.)

CHA, which is not a petitioner here, likewise took the position that only a metropolitan remedy would be effective to remedy the effects of segregation in this case.

> "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." (CHA Memorandum, December 21, 1971, Record Doc. 167, p. 27.)

* HUD defines a housing market area as "the geographic entity within which nonfarm dwelling units are in mutual competition." (Department of Housing and Urban Development, Federal Housing Administration Techniques of Housing Market Analysis, January 1970, p. 10.) The Chicago housing market area consists of the six Illinois counties of Cook, DuPage, Kane, Lake, McHenry and Will. (Department of Housing and Urban Development, Analysis of Chicago, Illinois Standard Metropolitan Statistical Area Housing Market, June 1966, p. 1.)

These positions were consistent with positions earlier adopted by each party. In the prior separate proceedings against CHA a partial metropolitan remedy had been included in the initial remedial order. Among other provisions the order authorized a portion of the contemplated remedial housing to be located in the suburban Cook County portion of the housing market area outside Chicago. 304 F.Supp. at 739. (Chicago is located within Cook County.) Pursuant to that authorization CHA contracted with the Housing Authority of Cook County for "housing in areas outside the municipal boundaries of the City of Chicago . . . to house low-income families who are residents of Chicago and who are certified by CHA to be eligible for housing." (Attachment No. 14, p. 1, to CHA Report No. 5, Record Doc. 274.) The contract involved "leased housing" which federal housing laws required to be employed "in a manner calculated to meet the total housing needs of the community in which [dwelling units] are located." 42 U.S.C. §1421b(a) (3). In approving the contract, submitted to it for that purpose, HUD interpreted the statutory term "community" to refer to the Chicago housing market area:

> "[W]e have concluded that Section 23 [42 U.S.C. §1421b] units in a given 'locality' may be used to meet housing needs beyond the political boundaries of the locality . . . [W]hat Congress intended by the term 'community', as used in Section 23(a)(3) [42 U.S.C. §1421b(a) (3)], was not a political subdivision,

as such, but the housing market area in which the housing to be leased is located." (Attachment No. 11 p. 1, to CHA Report No. 5, Rec. Doc. 274.)

In urging the district court to dismiss the action against it (relief that was granted but then reversed by the court of appeals) HUD had contended that the voluntary metropolitan remedial steps it was then taking were all that was required to achieve the desired remedy.* It said that since the entry of the decree in the prior proceedings against CHA, HUD had focused on three objectives: improving the environment for Chicago public housing residents, providing additional federally subsidized housing in Chicago, and providing additional federally subsidized housing in the Chicago suburban area. (Affidavit of Don Morrow, June 8, 1970, p. 1, Record Item 52, Appeal #71-1073.) Respecting the third objective HUD advised the district court as follows:

> "Pursuit of the third objective of building in the suburbs has called for a multiplicity of actions. One level of our activity has been to help identify sites for low rent housing . . .

* The argument was made in opposition to plaintiffs' motion for summary judgment against HUD seeking relief relating to "that portion of HUD's resources which the Secretary in his discretion determines to allocate to the Chicago housing market area." (Appendix A to the petition, p. 15a.) HUD's brief included a section captioned, "The Plaintiffs' Objectives will be More Readily Achieved by the Voluntary Efforts of the Defendant (HUD) than by the Coercion of a Judicial Decree." (HUD Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 22, Record Item 52 in Appeal #71-1073, part of the Record in this case.)

> The development of the criteria was done in cooperation with the CHA and the Cook County Housing Authority . . .
>
> The Northeastern Illinois Planning Commission has agreed to undertake an identification of the locations within the Chicago metropolitan area where low and moderate income housing should be built . . . using the criteria . . . Added to these criteria will be the special attention urged by HUD to achieving the objective of a racial and economic balance in communities within the region. . .
>
> In the meantime to satisfy an immediate need for housing sites in Cook County, we have indicated to the Cook County Housing Authority that HUD will look favorably on a request for an advance loan to the Authority to identify sites in Cook County suitable for low rent housing. . ." (*Id.* 2-3.)

Nonetheless, in the proceedings on remand following the 1971 court of appeals opinion the district court ultimately denied plaintiffs' motion to consider metropolitan relief and entered a largely non-metropolitan judgment against HUD. 363 F.Supp. 690, 691.* The ruling against considering metropolitan relief was then appealed, whereupon the court of appeals reversed and remanded the 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." *Gautreaux* v. *Chicago Housing Author-*

* The judgment order directed HUD to use its best efforts to cooperate in implementing the remedial order previously entered against CHA. Since, as noted above, that order did include the option to provide some remedial housing in the suburban portion of Cook County, to that extent the judgment against HUD included a limited form of metropolitan relief.

ity, 503 F.2d 930, 940 (CA 7, 1974). The petition for certiorari followed.

SUMMARY OF ARGUMENT

Segregation by the Department of Housing and Urban Development (HUD) here occurred within federal housing programs federally supervised to achieve national housing objectives, among which is the deconcentration of housing opportunities for low income minorities. Because the effects of limiting minority housing opportunities are felt throughout the housing market area in which the limitation occurs, in seeking to achieve the deconcentration objective HUD uses the housing market area as the relevant geographic unit. The appropriate "district" as regards HUD's liability in this case is therefore the Chicago Housing Market Area, and the housing market area relief ordered by the court of appeals is not "inter-district" relief in the *Milliken* v. *Bradley* sense. (Section IA.)

Moreover, unlike the *Milliken* situation, here there is evidence of segregation in the suburban part of the housing market area, not just in the central city. (Section IB.) *Milliken* also does not control here because of the absence of the equitable factors that loomed large in the *Milliken* decision, of any racial balance notion in the decision of the court of appeals in this case, and of any procedural impropriety in approaching the question of metropolitan relief. (Section IC.)

The court of appeals opinion will not hamper the implementation of federal programs; rather, the opinion below is consistent with the policy of the law. (Section II.)

Finally, the practice of this Court not to grant certiorari to review a nonfinal judgment should be followed

here. There is no history of housing desegregation litigation in this Court comparable to the two decades of school desegregation litigation during which the Court has grappled with school desegregation remedies, nor any litigation at all in which the complex federal statutory housing scheme is considered in relation to the obligation of the district court to consider the use of all available techniques to achieve desegregation. A record in which these matters have not been adequately explored—especially where, as here, the range of remedial options open to the district court is considerable—is a treacherous record for deciding issues of far-flung import. (Section III.)

ARGUMENT

The petition for certiorari should be denied because (1) the decision of the Court of Appeals does not conflict with *Milliken* v. *Bradley,* (2) concern that the decision will hamper implementation of federal programs is not well founded, and (3) no remedial plan yet having been prepared, review by this Court now would be premature.

I. The Decision Below Does Not Conflict With Milliken.

The Government reads *Milliken* v. *Bradley* as laying down a firm rule, uniformly applicable in all circumstances "regardless of the presence or absence of administrative problems," that an "inter-district" remedy for segregation may never be justified absent inter-district segregative acts or effects. (Petition pp. 8, 12.) Even on that theory, the Court of Appeals decision in this case is correct and does not conflict with *Milliken* for two independent reasons: (A) no inter-district remedy is involved as to HUD, the sole petitioner in this case (Section A below); and (B) unlike the situation in *Milliken,* here there is evidence of constitutional violations by HUD in the suburban as well as the central city portion of the geographic area proposed to be included in the remedial decree (Section B). But we do not read *Milliken* as does the Government, and we believe that even apart from the two distinctions just noted other factors decisive in *Milliken* and not present here demonstrate that the decision below and *Milliken* are not in conflict (Section C).

A. No Inter-District Remedy is Involved as to HUD.

This case involves segregation occurring within federal housing programs, federally supervised to achieve national housing objectives. In its administration of those programs—particularly respecting the source of its liability in this case, the limitation of minority housing opportunities to areas of existing minority concentration—HUD defines and uses "housing market areas" that are metropolitan in scope and bridge local political boundary lines. Applicable HUD regulations together with numerous HUD statements both within and without this case show that the effects of so limiting minority housing opportunities are felt throughout a housing market area and are not confined to the narrower locality or political jurisdiction in which the limitation occurs. The relevant "district" as regards HUD's liability in this case is therefore the Chicago Housing Market Area. Since that is the area within which the court of appeals opinion requires the effects of HUD's discrimination—within the same area—to be cured, the proposed remedy is not "inter-district" as regards HUD. A brief elaboration will demonstrate that for this reason the decision of the Court of Appeals does not conflict with *Milliken.*

Unlike the *Milliken* situation, the Court is here confronted with segregation that has occurred within federal programs.* The role of local agencies, though important, is subordinate to the ultimate supervision and responsibility of HUD to administer federal housing programs

* The housing programs involved in this case are familiarly called the "conventional," "turnkey," "leased housing" and "housing assistance" programs, respectively, and are established by the United States Housing Act of 1937, as amended. 42 U.S.C. §§1409 et seq., 1421b, 1437f.

to achieve national housing objectives. While maximum responsibility is to be vested in state-created housing agencies (subject, however, to giving "due consideration to accomplishing" and "consistent with" federal objectives, 42 U.S.C. §§1401, 1437), HUD possesses "ultimate supervision and authority in carrying out the objectives of the Housing Act," and "ultimate responsibility for policy . . . to achieve uniformity in fulfilling the objectives of the Act . . ." *Housing Authority of City of Omaha* v. *United States Housing Authority,* 468 F.2d 1, 7 (CA 8, 1972). As the opinion in *Omaha* stated, 468 F.2d at 7-8:

> "Although the congressional mandate given to HUD is that maximum responsibility in the administration of the program should be given to the local authority, we find nothing within the legislative history which precludes HUD's overall supervision and exercise of power where local authorities have failed to measure up to the objectives of the Act."*

* Opposing certiorari in *Omaha,* HUD said that the court of appeals "correctly determined that Section 1401 does not restrict HUD's 'responsibility and concomitant authority to protect and further the purposes and objectives of the Act . . .'" Brief for the Federal Respondents in Opposition to Certiorari, No. 72-793, p. 9.

In its brief in the Eighth Circuit, HUD said that the legislative history of the so-called "local autonomy" amendment demonstrated that Congressional concern "centered around budget control, audits, rents and eligibility requirements," that even in these areas "far less than full control was given to the local housing authorities," that the terms of the statute itself "demonstrate that the local autonomy amendment was not intended to preclude HUD from making rules of broad national policy," and that it was "clear that HUD possesses authority to regulate matters involving broad national policy." HUD's Brief in the Eighth Circuit, Nos. 72-1102 and 72-1185, pp. 25, 19, 21.

Consistent with its "ultimate responsibility," HUD's role in both the administration and financing of federal housing programs is pervasive. For example, at an earlier stage of this case the court of appeals said:

> "[T]here 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 [HUD] 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." *Gautreaux* v. *Romney, supra.,* 448 F.2d at 739.*

* The quotation does not fully reflect the scope and detail of the extensive federal role. For that one must examine HUD's Annual Contributions Contract with local housing agencies such as CHA, virtually every clause of which conditions the local agency's activity on approval by HUD.

Part One of the contract with CHA is 22 single-spaced typewritten pages and deals with a variety of topics. There are, in addition, numerous amendments. Part Two is a 56 page printed booklet (plus a 15 page index) containing ninety-seven different sections, each dealing with a separate subject. These contractual provisions are supplemented by voluminous regulations which HUD issues from time to time, of which the eight pages on site selection are

Housing Market Analysis, January 1970, p. 10.)* Unlike the situation in *Milliken,* therefore, where the relevant geographic area was the local school district, the relevant geographic area for purposes of relief here is the Chicago housing market area. It is that area, encompassing Chicago and environs, to which the court of appeals directed the district court to address remedial planning in this case.**

Illustrative of HUD's employment of the housing market area in relation to the objective of deconcentrating housing opportunities for minorities is a HUD regulation setting

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* HUD further says:

"The housing market area usually extends beyond the city limits, regardless of the magnitude of the market under consideration . . . For practical purposes, the Standard Metropolitan Statistical Area may be delineated as the housing market area in those cases where an SMSA has been established." Department of Housing and Urban Development, Federal Housing Administration Techniques of Housing Market Analysis, January 1970, pp. 12-13.

Standard Metropolitan Statistical Areas "are prepared by the Office of Management and Budget to determine areas of economic and social integration, principally on the basis of the commuting patterns of residents." *United States* v. *Connecticut National Bank,* ..... U.S. ....., 41 L.Ed. 2d 1016, 1028 (1974).

** For the Chicago area HUD defines the housing market area to be coterminous with the SMSA.

"The Chicago, Illinois, Housing Market Area is defined as being coterminous with the six-county Chicago Standard Metropolitan Statistical Area (SMSA), which, as currently defined, consists of Cook, DuPage, Kane, Lake, McHenry, and Will counties, Illinois." Department of Housing and Urban Development, Analysis of Chicago, Illinois Standard Metropolitan Statistical Area Housing Market, June 1966, p. 1.

forth criteria HUD employs in evaluating housing proposals. 37 Fed. Reg. 203 (January 7, 1972). For example, the regulation provides that the need for lower income housing is to be assessed in relation to the housing market area. *Id.* at 206. Particularly relevant here is the criterion, Minority Housing Opportunities, the objective of which is to "open up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination." The criterion calls for determining whether a proposed project "will be located [s]o that, within the housing market area, it will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are already substantially racially mixed . . .," (*Ibid.*) In adopting the regulation HUD rejected suggestions "that the term 'housing market area' . . . should be defined to coincide with the boundaries of local political jurisdictions." The reason given for the rejection was that "housing market areas often are independent of arbitrary political boundaries . . ." *Id.* at 202.*

Another HUD regulation applicable to programs involved here provides that sites for newly constructed federally supported housing (under 42 U.S.C. §1437f) shall not be located in areas of minority concentration unless sufficient comparable housing opportunities for minority families exist outside such areas or there are overriding housing needs "which cannot otherwise feasibly be met

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* It was also suggested that certain parts of housing market areas should be allotted funds by HUD without regard to HUD's funding criteria, a suggestion HUD rejected because it could result in approving housing projects "which would be less than the best that could be created for the people of each housing market area." 37 Fed. Reg. 203.

in that housing market area." 39 Fed. Reg. 45169, 45173 (December 30, 1974).*

Thus, HUD's official position, as evidenced by its regulations, is that the problem of minority concentration must be seen from the perspective of the entire housing market area. That position is predicated upon HUD's view, stated to the district court, that the impact of concentrating the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community, and that only metropolitan-wide solutions will suffice to deal with that problem. (See Statement, *supra,* p. 4.) In that connection, as previously noted, among other steps HUD joined the respondents in representing to the district judge that a metropolitan remedy was the desirable form of relief in this case, and approved a contract providing for remedial housing for the plaintiff class in suburban areas, reading the governing statute as applying to the housing market area. (*Id.* at pp. 4-6.)

HUD has also explained certain provisions of state law as reflecting the realization that many cities must utilize areas outside their borders to meet their low-rent housing needs, and that slum elimination and providing housing for low income families are matters of metropolitan scope. Under Illinois law, for example, the normal area of operation of a city public housing agency extends three miles into any unincorporated area beyond the city boundary, while the normal area of operation of a county

* A HUD regulation applicable to federally subsidized housing programs not involved here says that its purpose is to "promote a condition in which individuals of similar income levels in the same housing market area have available to them a like range of choices in housing regardless of the individuals' race, color, religion or national origin." 37 Fed. Reg. 75 (January 5, 1972).

public housing agency embraces the entire county, including any cities within it (subject in both cases to exceptions where other public housing agencies already exist). Ill. Rev.Stat., ch. 67½, §§3, 17(b). In addition, Illinois public housing agencies may exercise their powers jointly within the area of operation of any one of them, and may operate outside their own areas of operation by contract with other public housing agencies or state public bodies. Ill.Rev.Stat., ch. 67½, §27c. Of provisions such as these HUD's General Counsel has said:

> "The provisions in State housing authorities laws which authorize a city housing authority to operate in an area 5 or 10 miles beyond the city's limits and which authorize it 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." (Plaintiffs' Exhibit 13, pp. 3-4.)

* * *

In sum, segregation by HUD here occurred within federal housing programs, federally supervised to achieve national housing objectives, among which is providing housing opportunities for low-income minority families, particularly central city families, outside existing areas of minority concentration. To assess the availability of such housing opportunities HUD's regulations and its statements and actions in this case look to the relevant housing

market area, not to the boundaries of local political jurisdictions or housing agencies, because it is acknowledged that the effects of the concentration of the poor and minorities in the central city extend throughout the market area. For remedial purposes, therefore, since HUD is an independently liable wrongdoer whose wrong consisted of the denial of housing opportunities outside areas of existing minority concentration, it is appropriate that the remedial plan encompass the area HUD defines as relevant to such denials, throughout which the effects admittedly spread. As to HUD, such a decree would not involve "inter-district" relief in the *Milliken* sense.*

B. There is Evidence Here of Constitutional Violations by HUD in the Suburban as Well as the Central City Portion of the Housing Market Area.

Another, wholly independent reason confirms the lack of conflict between *Milliken* and the decision of the Court of Appeals in this case. *Milliken* was bottomed upon the absence of evidence of segregation outside Detroit—there was "no claim" and "no evidence hinting" of anything but unitary systems in the suburban areas. 418 U.S. at 748-49. Here by contrast, as the Court of Appeals has said, "there is evidence of suburban discrimination." 503 F.2d at 937. Plaintiffs' Exhibit 11 shows that over the last twenty years a dozen federally supported housing projects have been developed in the suburban portion of the Chicago housing market area and that ten of these are located in (or, in one case in which census tract boundaries were changed, adjacent to) census tracts whose racial composition is

* It is perfectly possible, although not desirable and, we believe, not required by *Milliken,* for a metropolitan remedial decree to require action only by HUD. See the discussion in Section C, *infra.*

overwhelmingly black. A predictable result is that the occupancy of all but one of the projects is likewise virtually all black—of 949 apartments, 938 are occupied by blacks, 7 by other minorities, and 4 by whites.

The Chicago pattern is thus duplicated in the suburbs. Moreover, the pattern is no more adventitious in the suburbs than in the city; the record shows that such segregation in federally supported housing projects was the consequence of both federal and local policy. (Transcript of Proceedings, p. 148, November 28, 1972.)*

* In Congressional testimony then Secretary of HUD, George Romney, said that historically support or condonation of social and institutional separation of the races had become fixed in public law and public policy at every level and branch of government. "Thus," he concluded, "it was adopted as a matter of course by the Federal Government when it entered the housing field in the 1930's." He added that the federal government, through past and present policies, had contributed to the creation of segregated housing patterns, and pointed out that although the policies were changed beginning in the 1960's, the changes had had little practical effect on the pattern of residential segregation. Senate Report No. 92-900, 92nd Cong., 2d Sess., 121-22 (1970), quoted at *Oliver* v. *Kalamazoo Board of Education,* 368 F.Supp. 145, 184 (W.D. Mich. 1973). Evidence to the same effect was presented in this case. See, Transcript of Proceedings, pp. 121-187, November 28, 1972.

The petition refers to the court of appeals conclusion respecting the extra-city impact of segregation within the city as "supposition" and "speculative" (pp. 8, 15 n.17), yet the record not only contains HUD's assertion that the impact of central city segregation extends into the surrounding community, but evidence that segregated housing patterns within the central city and its surrounding community are intimately related, historically (Transcript of Proceedings, November 28, 1972, pp. 156-60), as well as currently. (*Id.*, November 27, 1972, pp. 92-93.) Given the definition of housing market areas as geographic units within which nonfarm dwelling units are in mutual competition, that impact is of course perfectly understandable.

Under this Court's opinion in *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 203 (1973), these facts respecting outlying portions of the housing market area, taken together with the de jure segregation by HUD within the Chicago portion of the market area, clearly establish a presumption of unlawful segregative conduct by HUD throughout the housing market area. Concurring in part and dissenting in part, Mr. Justice Powell would have held in *Keyes* that, although school board decisions obviously are not the sole cause of segregated school conditions, where segregated schools continue to exist over a period of years and to a substantial degree the Court would be justified in finding a prima facie case of a constitutional violation even without a showing of de jure segregation. 413 U.S. at 227-28. Under either of these tests, the evidence in this case supports a finding of a prima facie case of constitutional violations by HUD throughout the Chicago housing market area.*

For this separate reason the decision of the court of appeals does not conflict with *Milliken.*

C. Factors Decisive in Milliken are Not Present Here.

The discussion in Sections A and B has proceeded on the assumption that the Government's reading of *Milliken* is correct and that regardless of equitable considerations

* As Mr. Justice Powell pointed out in *Keyes,* in imposing on metropolitan southern school districts an affirmative duty . . . to eliminate segregation in the schools, the Court required these districts to alleviate conditions "which in large part did *not* result from historic, state-imposed de jure segregation." 413 U.S. at 222. Here we are dealing with conditions which, in part at least, concededly *have* resulted from historic, federally imposed de jure segregation.

Milliken stands as an impassable obstacle to inter-district remedies in every case that does not involve inter-district segregative acts or effects. But we believe *Milliken* is properly to be read as dealing with questions of equitable remedies, not substantive constitutional law. As Mr. Justice Stewart's concurring opinion stated,

> "[T]he 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." 418 U.S. at 753.

The general statements quoted in the petition as constituting the "holding" of *Milliken* are therefore to be understood in relation to the facts of that case.* It is

* "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia,* 19 U.S. 264, 399-400 (1821). (Opinion of Mr. Chief Justice Marshall.)

"In equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests have constitutional roots." *Lemon* v. *Kurtzman,* 411 U.S. 192, 201 (1973). (Opinion of Mr. Chief Justice Burger.)

The *Milliken* opinions did not of course purport to deal with situations other than school desegregation. Thus, a key sentence in the opinion written by Mr. Chief Justice Burger begins, "Before the boundaries of separate and autonomous *school districts* may be set aside. . . ." 418 U.S. at 744, emphasis supplied.

hardly likely that the opinion of Mr. Chief Justice Burger would have emphasized the "deeply rooted" tradition of local control over schools, the "logistical and other serious problems attending large-scale transportation of students," the "array of other problems in financing and operating this new [consolidated] school system," and the likelihood that the inter-district remedy contemplated in *Milliken* would require a "complete restructuring of the laws of Michigan relating to school districts" and could "disrupt and alter the structure of public education in Michigan," 418 U.S. at 741-43, if those factors were irrelevant to a judgment that could have been rested solely upon a pre-emptive foreclosure of inter-district remedies in every situation in which inter-district effects were lacking.

But none of those factors is to be found in this case. First, instead of a long tradition of local control over schools we have here "overall supervision" and "ultimate responsibility" respecting federally created, federally funded programs given by Congress to a federal agency to achieve national housing objectives that include increasing housing opportunities for low income minority families outside existing areas of minority concentration in central cities.

Second, instead of serious problems attending large-scale transportation of students and an array of problems in financing a new, consolidated school system, relief here could be limited to HUD's exercise of powers already conferred upon it by Congress to provide remedial housing within the housing market area. Thus, under 42 U.S.C. §1437f(b)(2) HUD may contract directly with private developers or owners for the construction or substantial rehabilitation of housing for lower-income families. Under 42 U.S.C. §1437f(b)(1), in areas where

no public housing agency has been organized or where HUD determines that a public housing agency is unable to implement the provisions of the section, HUD may similarly contract directly with private owners of existing dwellings to provide housing for lower-income families. In either situation, action by HUD alone — without the participation of any state-created housing agency — would provide remedial housing for the plaintiff class.

Finally, instead of a complete restructuring of state schools laws no restructuring of state housing laws would be involved at all if metropolitan relief were to be confined to HUD. If in the discretion of the district judge some "restructuring" would provide faster and more effective relief, a limited suspension of a single state statute would permit CHA to provide housing throughout the market area, something state law already authorizes it to do with the consent of, or jointly with, others. All that would be required under such a form of relief would be an order setting aside for the limited remedial purposes of this case the state statute which presently precludes CHA from so acting. Ill.Rev.Stat. ch. 67½, §27(c). No other local housing agencies would be required to do anything at all; in particular, no affirmative obligations would be imposed on local housing agencies other than CHA. (Such a form of relief would be closely analogous to an order entered previously in this case, 342 F.Supp. 827, aff'd 480 F.2d 210, cert. denied 414 U.S. 1144, similarly freeing CHA from the fetters of a state statute — which required CHA to obtain Chicago City Council approval before acquiring real property — found to be obstructing full and effective relief.)*

* This does not mean that relief should be confined to HUD, or to HUD and CHA, but only that those options

The petition claims that "considerations of practicality" similar to those found in *Milliken* would apply to fashioning metropolitan relief in this case. But in this respect the petition's assertions are simply not sound. The suggestion that the order of the court of appeals presages "massive federal intervention in areas of peculiarly local responsibility," and that "HUD's control over local public housing is far more limited than that of the State over local public schools" (petition, p. 12), is belied both by the pervasive "ultimate supervision and authority" role HUD has long played in the administration of federal housing programs and by Illinois' withdrawal of supervisory authority in favor of HUD with respect to federally supported projects. It also overlooks HUD's powers, referred to above, to provide housing "directly" without the intervention or participation of local public housing agencies. Similarly, the petition's concern about possible difficulties to be encountered in supplying municipal ser-

* (Continued)
are available to the district judge. Deference to the Congressional mandate of local responsibility would seem to dictate that state-created housing agencies in the market area participate in the remedial planning process to the extent they desire to do so. In addition, *Milliken* suggests that no metropolitan remedial steps be taken before a full opportunity has been afforded such agencies to assert any agency interests they believe may be affected by such steps, whether or not they choose to participate in the planning. And where necessary to provide full relief we believe that consistently with *Milliken* other state agencies exercising housing powers in the Chicago housing market area may be required to assist in remedying CHA's wrongs. *Franklin* v. *Quitman County Board of Education,* 288 F.Supp. 509, 519 (1968). Responsive to these considerations the district judge has now permitted a supplemental complaint to be filed which joins the appropriate state agencies.

vices to proposed federally supported housing (petition, pp. 12-13) overlooks the provisions of federal housing programs that authorize the use of existing housing, which is of course already provided with such services, 42 U.S.C. §§1421b, 1437f(b)(1), and the utilization of private developers of new housing who are responsible for making their own arrangements for municipal services. 42 U.S.C. §1437f(b)(2). Wherever desirable a remedial decree could rely heavily, even exclusively, on these existing housing and private developer provisions.*

It would be the antithesis of the practical flexibility in shaping remedies that is the hallmark of equity to lay down a rule that never, under any circumstances, could an inter-district remedy be justified absent a wrong that had inter-district effects. As suggested by Mr. Justice Powell, concurring in part and dissenting in part in *Keyes,* desegregation remedies must remain flexible and other values and interests than desegregation alone must be considered. 413 U.S. at 238. That sound principle cuts two ways. Where, as Mr. Justice Powell pointed out, desegregation may be accomplished only through massive busing which impinges upon other values and interests, desegregation remedies may have to be more limited than would be desirable from the perspective of desegregation alone. Here, on the other hand, no

* The petition's *in terrorem* assertion (p. 13) that "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 to provide the necessary municipal services," is thus quite incorrect. It is well to remember in this connection that it is HUD and a small handful of state-created housing agencies, not cities, villages and townships, who provide housing under federal housing programs in the Chicago housing market area.

significant and conflicting values and interests would be adversely affected by a desegregation decree limited to the relevant housing market area and not involving the consolidation of local governmental units. Under these circumstances there is no justification for confining a desegregation decree to a limited portion of the market area when to do so, as the court of appeals has found, would drastically limit the effectiveness of the decree.

Respecting the "variety of other public and private interests" that may bear upon the framing and implementation of a remedial decree in this case (Mr. Justice Powell in *Keyes,* 413 U.S. at 239), none appear in opposition to the metropolitan approach mandated by the court of appeals and many support it. In the latter category are national housing objectives already discussed, HUD's oft-expressed views favoring metropolitan remedies for housing segregation both generally and respecting the specific contours of this case, and HUD's selection of the housing market area as the relevant geographic unit with respect to the problem of minority concentration in central cities. Any conflicting state or private interests will of course be afforded an opportunity to be heard on remand, but none are apparent. The State of Illinois certainly has no interest in precluding HUD from continuing to administer its programs with respect to the problem of racial concentration on a housing market area basis. And since Illinois has by statute withdrawn from supervision over projects financed in whole or in part by the federal government where such projects are federally supervised or controlled, considerations of federal-state comity are largely or completely absent. Local community views will undoubtedly continue to be taken into account by HUD, but

by statute these are not binding upon HUD even apart from the necessity of providing full relief in this case. 42 U.S.C. §1439(c).* There are of course no private interests here comparable to those of parents and children discussed by Mr. Justice Powell in *Keyes,* 413 U.S. at 246-48, in the busing context.

In its normal administration of federal housing programs HUD has chosen to address its regulations and administrative activities respecting minority concentration to a housing market area larger than the areas of operation of participating state-created housing agencies. It would therefore be an arbitrary and unjustifiable hobbling of equitable powers to foreclose the district court from directing HUD to employ that same market area in performing its duty to "so far as possible eliminate the discriminatory effects of the past." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965).

Apart from equitable considerations, it seemed clear to this Court that the lower courts *in Milliken* held the view "that total desegregation of Detroit would not produce the racial balance which they perceived as desirable." 418 U.S. at 740. Mr. Chief Justice Burger's opinion went on to say that the lower courts had proceeded on the assumption that the Detroit schools could not be truly desegregated unless the racial composition of the

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* Under the conventional, turnkey and leased housing programs, state-created housing agencies, not cities, villages, counties or other units of local government, must demonstrate housing needs to HUD's satisfaction to secure financing. 42 U.S.C. §1415(7). Under the housing assistance program a local governmental unit's determination of housing needs is subject to review by HUD for consistency with generally available facts and data. 42 U.S.C. §5304(c).

student body "of each school" substantially reflected the racial composition of the population of the metropolitan area as a whole, and the opinion quoted the district court's view that desegregation required that "no school, grade or classroom" be substantially disproportionate to overall pupil racial composition. *Ibid.* The Court said that such an approach was inconsistent with *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971).

In this case no comparable view concerning racial balance, or the racial composition of housing projects (the analogy here to the racial composition of the student body of schools), has been expressed or employed. The remedy called for here, the provision of remedial housing, is most nearly analogous to the building of new school buildings. (Nothing like busing or the pairing of schools — techniques that mandate an involuntary rearrangement of existing pupil travel patterns — is involved. Remedial housing will be occupied by those, and only those, who voluntarily apply for it.) This Court has not hesitated to make it clear that it is an appropriate element of a school desegregation decree to see to it that future school buildings are so located that they do not perpetuate segregation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 20-21. Such provisions of school desegregation decrees have never been thought to involve impermissible racial balance notions. Here, where the focus of a plan to provide remedial housing for the plaintiff class is likely to be upon just such future location criteria, the Court is obviously not presented with a situation comparable to a decree that seeks to provide a particular racial mix in all schools, grades or classrooms.

Finally, the Court's opinion in *Milliken* emphasized the "crucial fact" that the theory of that case was altered in midstream from an intra- to an inter-district approach, observed that neither the parties nor the trial judge "were concerned with a foundation for inter-district relief," and said that "neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory." 418 U.S. at 752.

The situation here is quite different. As already discussed, a limited form of metropolitan relief was included in the decree against CHA (and implementation of it was assisted by HUD), while the companion case against HUD has focussed on metropolitan relief from the outset. After HUD's liability was established plaintiffs proposed an interim order that invited recommendations from HUD and CHA as to additional parties they might wish to join in connection with the consideration of a metropolitan remedy (Appendix p. 40 to plaintiffs' brief in the court of appeals), plaintiffs having already specified the additional parties they would add if leave were granted to file an amended or supplemental complaint. (Record Doc. 301, Appendix to Plaintiffs' Memorandum, p. i.)

This case is therefore in an essentially different procedural posture than *Milliken.* The theory of the case was not altered in midstream and the plaintiffs *were* concerned with a foundation for metropolitan relief and with amending their complaint to embrace a prayer for such relief and to add parties who might be thought to be affected by it.*

* * *

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* The procedural situation is almost identical to that considered by the court of appeals in *Gautreaux* v. *City of Chicago,* 480 F.2d 210 (1973), cert. denied, 414 U.S.

For the reasons discussed in this Section C also — the absence of the equitable factors that loomed large in *Milliken,* of any racial balance notion in the decision of the court of appeals, and of any procedural impropriety in approaching the question of metropolitan relief — *Milliken* does not control here.

II. The Decision Below Will Not Hamper Implementation of Federal Programs.

The petition says that "uncertainty" caused by this case may discourage participation by suburban jurisdictions in federal programs. The "chilling effect" is ascribed to the fear that, because an implication of the decision below is that some federally assisted housing for central city residents may be located in suburban areas, suburbs may be deterred from participating in federal housing and community development programs. (Petition, pp. 9-10.) This contention reflects both a misunderstanding

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* (Continued)
1144 (1974). There plaintiffs determined that to implement effective relief it would be necessary to add additional parties and to hold an evidentiary hearing in which the proposed further relief, and its impact on the additional parties were it to be granted, could be explored in a hearing in which the additional parties would be accorded a full opportunity to be heard and to present evidence. A supplemental complaint was filed after the trial court granted leave to do so. The court of appeals held that the procedure was proper and this Court denied certiorari. *Gautreaux* v. *City of Chicago, supra.* The effort to follow the same procedure as to metropolitan relief was of course aborted by the district court's ruling against consideration of such relief. As noted above, a supplemental complaint adding new parties respecting the metropolitan remedial proceedings has now been filed in the district court.

of law and an implicit judgment that runs counter to Congressionally established policy.

As to the former, the petition implies that a "community [must] take steps to participate" in housing programs established by the Housing and Community Development Act of 1974 before those programs may be employed. (*Id.,* p. 10, n.11.) In fact under the 1974 law, housing funds are applied for and housing projects are operated by housing developers, public (*i.e.,* state-created agencies) or private. 42 U.S.C. §1437f. The failure of a suburban community to apply for quite separate community development funds, 42 U.S.C. §5301 et seq., would not preclude HUD from supplying housing funds to housing developers for federally supported housing designed to house central city residents in that community. In such a case the suburban community is entitled to a 30-day period within which it may furnish the Secretary of HUD with "comments or information," but the final determination as to whether housing is to be provided is to be made by HUD based on HUD's determination of housing need. 42 U.S.C. §1439(c). It would be a mistaken suburban community that decided not to participate in the community development block grant program because it believed it might thereby prevent housing developers from providing federally supported housing within its borders.

The petition's argument also conflicts with the policy of the 1974 Act which favors the dispersal of low-income housing outside central cities. The initial Congressional finding in that Act is that urban communities face critical problems in part because of "the concentration of persons of lower income in central cities," 42 U.S.C. §5301(a)(1), and among the law's primary objectives is "the spatial deconcentration of housing opportunities for persons of

lower income . . ." 42 U.S.C. §5301(c)(6). The Act also specifies that housing needs of lower-income persons are to include not only the needs of residents but the needs of those "expected to reside" in the community as well. 42 U.S.C. §5304(a)(4)(A). Referring to this provision the key legislative committee report says,

> "The committee wishes to emphasize that the bill requires communities, in assessing their housing needs, to look beyond the needs of their residents to those who can be expected to reside in the community as well." House of Representatives Report No. 93-1114, 93d Congress, 2d Session, p. 7.

To the extent the decision below looks toward the provision of housing opportunities for low-income central city residents outside the central city, it is thus entirely consistent with the policy of the law.*

III. Review Now Would be Premature.

The practice of this Court not to grant certiorari to review a nonfinal judgment, "such as one remanding the case to the district court for a new trial," Stern and Gressman, Supreme Court Practice 180 (4th ed. 1969), should be followed here. Lack of finality of course "alone furnish[es] sufficient ground for the denial [of

* The petition's argument would seem to translate as follows: if the ruling of the court of appeals stands suburbs may get the impression that they may have to house some central city low-income people and this impression will deter them from allowing federally supported housing within their borders and from applying for community development block grants. Therefore the Court must dispel this erroneous impression so that community development grants and housing subsidies can flow to suburbs that house only their present residents. Compare this with the quotation fom the President's Report on National Housing Goals, *supra,* p. 15.

certiorari]." *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). See also *Brotherhood of L.F.&E.* v. *Bangor & A.R.C.,* 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). The mistaken "considerations of practicality" advanced in the petition (pp. 12-13), already discussed above, evidence the wisdom of these principles and their applicability here. The petition's contentions simply prejudge those asserted considerations, and no record is available to this Court upon which to assess the judgment.*

It may be pointed out in this connection that *Milliken* arrived in this Court following two decades of school desegregation litigation during which the Court many times grappled with the flinty difficulties of implementing school desegregation decrees. See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 11-15 (1971), and *Green* v. *School Board of New Kent County,* 391 U.S. 430, 435-39 (1968), detailing the history of this Court's review of school desegregation cases and tracing the Court's gradual development of guidelines for lower courts fashioning equitable remedies in such cases. In its first encounter with school desegregation remedies, *Brown* v. *Board of Education,* 349 U.S. 294, 299 (1955), the Court said that "[b]ecause of their proximity to local conditions and the possible need for further hearings . . ." remedial techniques should be worked out,

* Moreover, as discussed in Section IA above, the essential *Milliken* issue of when and under what circumstances it is appropriate to impose affirmative obligations upon "innocent" state entities to aid in remedying the wrongs of a "guilty" one will not even be presented in this case should the district court confine a metropolitan remedial order to HUD or to HUD and CHA.

initially at least, by the district courts. Significantly, the Court did not begin to enunciate specific remedial guidelines until it was faced with detailed plans already considered at the lower court level. See, *e.g., Goss* v. *Board of Education,* 373 U.S. 683 (1963), as well as *Swann* and *Green.* Given that history and background the Court in *Milliken* was understandably in a position to express a judgment concerning practical implementation problems without having a specific remedial decree before it.

There is no comparable history of housing desegregation litigation in this Court, nor any litigation at all in which the complex federal statutory housing scheme is considered in relation to the obligation of the district court to "consider the use of all available techniques," *Davis* v. *Board of School Commissioners,* 402 U.S. 33, 37 (1971), to achieve desegregation. A record in which those matters have not yet been explored, especially where, as here, the range of remedial options open to the district court is considerable, is a "treacherous record for deciding issues of far-flung import." *Kennedy* v. *Silas Mason Co.,* 334 U.S. 249, 257 (1948).

CONCLUSION

This case should not be decided by the invocation of a term, "inter-district," and speculation as to what a remedial decree might look like. In *Milliken* the meaning and application of "inter-district" was clear. At issue, whatever precise form the decree might take, was the propriety of consolidating local school districts. Here, in the new and markedly different context of federal housing

programs, where we approach "the fundamental problem of residential segregation" (Mr. Justice Powell in *Keyes,* 413 U.S. at 249), the term "inter-district" obscures the issue if it is uncritically employed, as in the petition, to refer to a wide range of possible remedial arrangements. It is clear that the ultimate remedy selected by the trial court will be confined to an area that is not "inter-district" as to HUD and will not involve the consolidation of any local governmental units — need not, indeed, require local governmental units to do anything at all. This alone should dictate denial of the petition. If the application of the district court's equitable powers to shape a remedial decree were to create any tension with *Milliken* or other authority, that would be the appropriate time — upon an appropriate record — for this Court's review.

Respectfully submitted,

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March 1975

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 74-1047, OCTOBER TERM, 19 74

JAMES L MITCHELL, ACTING SECRETARY OF HOUSING AND URBAN DEVELOPMENT, (Petitioner or ~~Appellant~~)

vs.

DOROTHY GAUTREAUX, ET AL (Respondents ~~or Appellees~~)

The Clerk will enter my appearance as Counsel for the RESPONDENTS

Signature Alexander Polikoff

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NOTE: This appearance must be signed by an individual Member of the Bar of the Supreme Court of the United States.

The Clerk is requested to notify counsel of action of the Court by means of:

[X] Collect Telegram

[X] Airmail Letter

[ ] Regular Mail

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a particular individual to whom notification is to be sent, with the understanding that if other counsel should be informed he will perform that function.

In this case the person to be notified for is:

[ ] Petitioner(s)

[X] Respondent(s)

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No. 74-1047

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.,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I served three copies of Respondents' Brief in Opposition to Petition for Certiorari in the above-captioned case upon Robert H. Bork, Solicitor General of the United States, by mailing the same, airmail postage prepaid, addressed to the Solicitor General at the United States Department of Justice, Washington, D.C. 20530, this 25th day of March, 1975.

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Date: March 25, 1975