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In the Supreme Court of the United States

OCTOBER TERM, 1974

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

DOROTHY GAUTREAUX, ET AL.

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

REPLY MEMORANDUM FOR PETITIONER

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This case is governed by *Milliken* v. *Bradley,* No. 73-434, decided July 25, 1974. The sole violation of law the Department of Housing and Urban Development (HUD) has been found to have engaged in is that, within the City of Chicago, it acquiesced in the Chicago Housing Authority (CHA) practice of discriminatory site selection for public housing; there is no evidence in this record that this acquiescence had any effect outside of Chicago (Pet. App. C, p. 38a). *Milliken* v. *Bradley* indicates that "absent an inter-district violation there is no basis for an inter-district remedy" (slip op. 32). The court of appeals in this case nevertheless directed the district court to include areas outside the City of Chicago in a comprehensive plan of relief (Pet. App. D, p. 59a). It did so on the apparent theory, rejected in *Milliken* v. *Bradley,* that the white population of the subrubs is an available resource to accomplish a desirable racial balance in public housing for residents of Chicago. Respondents' attempts to distinguish *Millikin* v. *Bradley* are unpersuasive.

1. Respondents suggest that this Court may properly ignore the inter-district character of the metropolitan area-wide plan the district court has been directed to develop because, they allege, "the proposed remedy is not 'inter-district' as regards HUD" (Br. Opp. 11). This argument necessarily assumes that the plan can properly be analyzed solely on the basis of its relation to one of the participants, and thus that the same plan might be proper as to HUD even if improper as to the local housing authorities who are necessary participants in the provision of adequate housing. Although HUD collects housing data, makes studies, and attempts to co-ordinate housing developments on an area-wide basis, it nevertheless implements its program through co-operation with local housing authorities, since it has no legal power to coerce them to participate in any co-ordinated metropolitan area-wide plan.[1] Similarly, the State in *Milliken* v. *Bradley* implemented its plans through local school districts, and, although it had ultimate authority to compel compliance with a metropolitan area-wide plan (Marshall, J., dissenting, slip op. at 13-18), such a plan was inappropriate inter-district relief as to the State as much as to the local school districts. *A fortiori,* here, where HUD implements its plans through local housing agencies, and has no power to compel their compliance with any general plan, a metropolitan area-wide plan is inter-district relief as to HUD as much as it is to CHA and the suburban housing agencies.

[1]The respondents suggest (Br. Opp. 24-25) that as a theoretical possibility HUD could be ordered to implement an area-wide plan by contracting directly with private developers; they are careful to emphasize that they believe this would be undesirable (Br. Opp. 20 n., 25-26 n.). Such contracts can be made only if private developers agree to participate. In any event, the implication that local communities are not involved when HUD contracts directly with private developers is incorrect. Although HUD needs no co-operation agreement with the local jurisdiction in those circumstances, the developer cannot prepare an acceptable proposal without qualifying under local zoning regulations and for the provision of needed services by local authorities.

In this case, the court has found a violation within Chicago which it proposes to remedy by bringing in suburban agencies in order to increase the white fraction of the racial pool available for judicial planning. Absent coerced consolidation of separate housing authorities by judicial decree, the suburbs, which have not been shown to be involved in any violation, would be free, as Congress intended, to accept or reject participation in a metropolitan area-wide plan (Pet. 9-10, nn. 10-11).[2] That coercion cannot be effective if directed solely against HUD; HUD's basic role under the 1974 Act is to assist the local political jurisdiction in carrying out its housing plan. Thus, what is involved here is inter-district relief without an inter-district violation, which is contrary in principle to this Court's decision in *Milliken* v. *Bradley*.

2. The evidence does not support inter-district relief. The district court found that it has not been alleged or shown that CHA or HUD had discriminated or fostered discrimination outside of Chicago (Pet. App. C, p. 38a). The court of appeals nevertheless suggested two ways in which the inter-district violation prerequisite under *Milliken* v. *Bradley* for inter-district relief could be found in this record: either by the "evidence of suburban discrimination" in Plaintiffs' Exhibit 11 (Pet. App. D, p. 54a) or by the speculation that discrimination within Chicago "may well have fostered racial paranoia and encouraged the 'white flight' phenomenon" (Pet. App. E, p. 62a).

We have explained in our petition for a writ of certiorari (p. 14, n. 16) why Plaintiffs' Exhibit 11 does not support the court's interpretation of it. In any event, it is no more persuasive than the evidence of suburban discrimination rejected in *Milliken* v. *Bradley, supra*, slip op. at 28-32). The court's specula-

[2]See 42 U.S.C. 1401, 42 U.S.C. 1437 (88 Stat. 653), 42 U.S.C. 1415(7), 42 U.S.C. 5301 (88 Stat. 633).

tion concerning "white flight" is equally unavailing. Even if such conjecture without evidentiary support could ever be sufficient, this example will not do. For, if it is assumed that whites in Chicago desired segregation, the effect of public housing segregation within the city presumably would have been to slow "white flight," not to encourage it. In any event, the court of appeals' speculation here would have applied equally to the segregation involved in *Milliken* v. *Bradley*. If the court's reliance on it here were justified, it would similarly have compelled a finding of inter-district effect in *Milliken* v. *Bradley*. But it was inadequate there, and is equally inadequate here.

3. Review is not premature. This case is now at the same stage as was *Milliken* v. *Bradley* when this Court granted certiorari: A court of appeals has ordered a district court to develop a plan of affirmative relief that would effectively consolidate a variety of legally separate governmental entities to remedy a discrimination found in only one of them. Pursuant to that mandate, respondents have moved (slow to bring in 11 local housing authorites and 3 state agencies as parties defendant, and the district court has so ordered. Here, as in *Milliken,* the judicial formulation of an inappropriately broad plan is about to begin. Thus, here, as in *Milliken,* the case is ripe for review.

Respondents suggest that review at this stage in *Milliken* v. *Bradley* was appropriate only because of this Court's previous consideration of school desegregation issues, and that, in the absence of such experience with problems of housing desegregation, review is inappropriate here. But *Milliken* v. *Bradley* did not turn on this Court's expertise concerning the nature of the inter-district plan that would be developed there; it held instead

that *no* valid inter-district plan could be developed on the basis of the record in that case. This record, like that one, shows that any inter-district relief would be inappropriate. It is no more desirable here than it was there to await the development of a specific plan before making that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.