IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1047

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

Petitioner,

v.

DOROTHY GAUTREAUX, ET. AL.

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

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICI CURIAE

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INTEREST OF AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963 following a conference of lawyers called at the White House by the President. The Committee's principal mission is to involve private

*Both the Petitioner and the Respondents have consented to the filing of this brief. Copies of letters from their counsel to this effect have been filed with the Clerk of this Court pursuant to Rule 42(2).

lawyers throughout the country in the struggle to assure all citizens of their civil rights through the legal process, in particular by affording legal services otherwise unavailable to Black and other minority Americans pursuing claims for equal treatment under law. The Lawyers' Committee is a nonprofit, private corporation whose Board of Trustees includes thirteen past presidents of the American Bar Association, three former Attorneys General, and two former Solicitors General.

The National Association for the Advancement of Colored People (NAACP) is a nonprofit membership association representing the interests of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. In this respect, the NAACP has often appeared before this Court as an amicus in cases involving school desegregation, employment, voting rights, jury selection, capital punishment, and other cases involving fundamental human rights.

The NAACP and the Lawyers' Committee, and their local committees, affiliates, branches, and volunteer lawyers, have long been actively engaged in providing legal representation to those seeking free and nondiscriminatory access to decent housing. Their litigation has concerned issues similar to those in the instant case. *See, e.g., Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 157, A.2d (1975). Along with other interested organizations, the Lawyers' Committee on December 9, 1969 submitted a brief amicus curiae in the District Court in the companion case to this one. (*See* Record [*Gautreaux v. Chicago Housing Authority* file], Vol. I, Item No. 50).

The experience of amici in these cases has amply demonstrated to us the validity of the two central findings reiterated in numerous academic and official studies of housing patterns in the United States: first, that racial residential segregation is neither accidental nor desired by Black Americans, but is the product of discrimination against them; and second, that governmental policies – including, since 1937, the numerous, diversified, and omnipresent activities in the housing market of the Petitioner HUD and its predecessor agencies–are responsible in significant measure for the exacerbation and perpetuation of such racial discrimination and resulting racial residential segregation. *E.g.*, K. & A. Taeuber, *Negroes in Cities* (1965); II U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort* (1974); *cf. Statement of HUD Secretary Romney*, S. Rep. No. 200, 92d Cong., 2d Sess. 121 *et seq.* (1970). Indeed, the segregative effects of the federal government's policies have been the more severe because their formulation and implementation coincided with the period of greatest expansion of housing and of suburban development in the United States, and because such policies served as a model for racially discriminatory actions of other governmental agencies and private parties.[1]

In the instant case, Petitioner seeks to have this Court confine, within the boundary lines of individual political subdivisions, the equitable powers of federal courts to

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[1] *See* Record (*Gautreaux v. Chicago Housing Authority* file), Vol. II, Item No. 76 (Stipulation dated June 29, 1968), Exhibit 3: "The Chicago Housing Authority, at the time of its organization, adopted a policy that had been established by the [federal] PWA Housing Division – namely, that the Authority would not permit a housing project to change the racial make-up of the neighborhood in which it was located . . . ."

remedy governmental discrimination which was never so limited in execution or effect. Any absolute limitation of this sort would cripple our efforts, and those of others, to open to minority Americans housing opportunities which until now have been closed to them because of their race. The NAACP and the Lawyers' Committee accordingly have a vital interest in the disposition of this matter. Because we believe that Petitioner has misapprehended the effect of the ruling below and because, in any event, the posture of this case is unsuited for disposition of the ultimate remedial questions before this Court, we submit this Brief as friends of the Court urging that the writ of certiorari heretofore granted be dismissed for lack of standing or as having been improvidently granted.[2]

STATEMENT OF FACTS

The parties have set forth the intricate procedural history and related factual setting of this matter in their respective briefs. For the purposes of this *amici* submission, however, we summarize the salient facts below.

This case (and the companion suit with which it was consolidated in 1971) was instituted in 1966. Plaintiffs are Negro residents of, or applicants for admission to, public housing constructed or operated by the Chicago Housing Authority [hereinafter "CHA"] and approved and financed by the United States through Petitioner

[2]As we suggest *infra* pp. 25-27, we believe that Respondents should prevail before this Court should the matter be considered on its merits, because the remand ordered by the Court of Appeals is not in any way inconsistent with nor does it foreclose application of the substantive ruling in Milliken v. Bradley, 418 U.S. 717 (1974), as Petitioner seems to believe. To the contrary, the Seventh Circuit's remand specifically requires District Court consideration of *Milliken.*

HUD and its predecessors. Both suits attacked the local and federal defendants' historic policies and practices of locating most public housing in the City of Chicago within areas of existing minority concentration, so as to maintain and aggravate racial residential segregation. Plaintiffs seek the opportunity to reside in public housing which has not been deliberately restricted to predominantly Black residential areas.[3]

Following extensive discovery in the action against the CHA (proceedings in the HUD case having been stayed), the District Court granted summary judgment in favor of the plaintiffs. The Court found that the four Chicago housing projects located in white neighborhoods had quotas to limit the admission of Negro tenants, and that CHA used a method of site selection clearance which resulted in the veto of "substantial numbers of sites [in white neighborhoods] on racial grounds."[4] The District Court rejected the possible remedy of terminating federal financial assistance to the CHA[5] because "it is not clear whether even a temporary denial of federal funds would not impede the development of public housing and thus damage the very persons this suit was brought to protect."[6] Instead, the Court directed the parties to propose appropriate injunctive relief constituting "a comprehensive plan to prohibit the future use and to remedy the past effects of CHA's unconstitutional site selection and tenant assignment procedures."[7]

[3]Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582, 583 (N.D. Ill. 1967) (denying motion to dismiss).

[4]Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, 909, 913 (N.D. Ill. 1969).

[5]*See* 42 U.S.C. §2000d (Section 601, Civil Rights Act of 1964).

[6]296 F. Supp., at 915.

[7]*Id.*, at 914.

On July 1, 1969, the District Court entered its initial remedial order against CHA. The decree established a new tenant assignment procedure for CHA projects as well as guidelines for location of future public housing. The City of Chicago was divided into a "Limited Public Housing Area" and a "General Public Housing Area" based upon existing racial residential concentrations; CHA was enjoined from locating any additional public housing in the (more heavily Black) "Limited Public Housing Area" of the city. Thereafter, at least 75% of all new public housing was to be located within the "General Public Housing Area" of the city.[8] CHA was further authorized to locate one-third of this amount (25% of all new units after the initial 700):

> . . . in the General Public Housing Area of the County of Cook in the State of Illinois, outside of the City of Chicago, provided that (whether or not constructed by CHA) the same are made available for occupancy by CHA to, and are occupied by, residents of the City of Chicago who have applied for housing to CHA. . . .[9]

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[8]Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736, 738-40 (N.D. Ill. 1969). At the time the 1969 order was entered, local housing authorities submitted estimates of public housing need to HUD and received "reservations" from the agency for specific numbers of public housing units, prior to undertaking the processes of site location and design; 700 units of a prior reservation to CHA remained. The District Court's order thus required that the balance of that reservation be located within predominantly white areas of Chicago, and that three-quarters of all public housing units built pursuant to future reservations from HUD be located in predominantly white areas. *Cf.* p. 10, *infra.* In 1969 CHA received a reservation for 1500 additional units from HUD, after making a request for 5000 units. Record, Transcript of Proceedings, September 28, 1972, at 188.

[9]*Id.*, at 739. To locate public housing for Chicago residents outside the city limits under the order, CHA not only had to enter

[footnote continued]

The order also contained provisions describing the type of public housing units CHA could build (to avoid undue concentration of public housing in any location), prohibiting CHA from using the pre-clearance site selection procedure which had in the past resulted in discriminatory location of housing, and—to ensure that a remedy was actually provided[10]– requiring CHA to use its best efforts "to increase the supply of Dwelling Units as rapidly as possible. . . ."[11] No appeal was taken from the District Court's summary judgment or from its remedial order.

Proceedings in the companion litigation against HUD were then resumed. Plaintiffs pressed their claim for relief requiring the federal agency to assist in remedying the proven discrimination, while Petitioner HUD sought dismissal of the case. On September, 1, 1970, the District Court granted the government's request; but on appeal, summary judgment in favor of plaintiffs against HUD was directed.[12] The Court of Appeals found that

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into a cooperative relationship with the Cook County Housing Authority (which it did), but also had to secure agreement from the governing body of any local political subdivision in Cook County within whose boundaries such housing was proposed to be located. *See* Brief for Petitioner, pp. 7, 29-30, 31-34. These agreements were never secured and under the 1969 order CHA has located no public housing outside the city limits of Chicago.

[10] "The Court . . . [has] determined that the several provisions of this judgment order are necessary to prohibit the future use and to remedy the past effects of the defendant Chicago Housing Authority's unconstitutional site selection and tenant assignment procedures, to the end that plaintiffs and the class of persons represented by them, Negro tenants of and applicants for public housing in Chicago, shall have the full equitable relief to which they are entitled," 304 F. Supp., at 737. *See* text at note 5 *supra.*

[11]304 F. Supp., at 739, 741.

[12]Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971).

> . . . the Secretary exercised the above described powers in a manner which perpetuated a racially discriminatory housing system in Chicago, ... 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."[13]

These HUD actions, said the Court of Appeals, "constituted racially discriminatory conduct in their own right."[14]

When the case returned to the trial court, it was consolidated with the CHA litigation and plaintiffs moved for further relief, asking that all defendants be required to submit a comprehensive plan "to remedy the past effects of unconstitutional site selection in the Chicago public housing system. . . ." Record, Vol. II, Item No. 3.[15] The motion alleged that some 30,000 units

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[13] *Id.*, at 739.

[14] *Id.* There is thus no warrant for Petitioner's suggestion (Brief, p. 20 n.16) that there has been "no finding of active misconduct by HUD." The Court of Appeals expressly noted that HUD had failed to undertake appropriate action to enforce nondiscrimination by CHA, as required by the 1964 Civil Rights Act. *Id.*, at 737-38. *Cf.* Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), 356 F. Supp. 92 (D.D.C.), *modified in part and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973).

[15] In the interim, litigation to enforce the 1969 decree against CHA continued. In 1970, plaintiffs' counsel brought to the attention of the District Court the fact that, despite the injunction to use its "best efforts" to increase the supply of dwelling units in Chicago, and despite the specific requirement that 700 units of public housing be built in the "General Public Housing Area," and despite HUD's approval of CHA site recommendations for 1500 additional units of public housing, CHA had as yet failed to recommend any new sites to the Chicago City Council. Following

[footnote continued]

of public housing had been improperly located in segregated Negro neighborhoods as a result of defendants' discriminatory policies, and that an appropriate measure of relief was therefore the location of an additional

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an extensive series of conferences between Court and counsel – at which CHA announced that it did not wish to submit new sites until after the April 1971 mayoralty election in Chicago – the District Court modified its "best efforts" order by establishing a specific timetable requiring CHA to submit site recommendations to the City Council. CHA appealed the denial of its motion to vacate the timetable order, which was stayed pending its appeal, but the Seventh Circuit affirmed the District Court's judgment. Gautreaux v. Chicago Housing Authority, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

Thereafter, although CHA submitted recommendations, very few sites in the "General Public Housing Area" received City Council approval. Upon motion, the District Court enjoined HUD from distributing federal Model Cities program funds to the City of Chicago until 700 public housing units in white areas had been approved by the Mayor and Council. On appeal, entry of this decree was held to be an abuse of discretion because HUD's discriminatory activities had occurred in the context of public housing, and not Model Cities, programs. Gautreaux v. Romney, 332 F. Supp. 366 (N.D. Ill. 1971), *rev'd* 457 F.2d 124 (7th Cir. 1972).

Following that appellate ruling, the District Court dealt directly with the City Council's unexplained and unjustified failure to process CHA site recommendations in white areas by superseding, for the purposes of this case, the Illinois statutory requirement that CHA's site selections be approved by the Chicago City Council. This order was affirmed and this Court denied review. Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd sub nom.* Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974).

As of June 30, 1975 – six years after the entry of the first remedial order – only nine units of public housing located in other than predominantly Black areas of Chicago have been constructed. (CHA Report No. 17, p. 2). The District Court has referred the matter to a Master in an effort to determine responsibility for this lack of progress. Gautreaux v. Chicago Housing Authority, 384 F. Supp. 37 (N.D. Ill. 1974), mandamus denied, 511 F.2d 82 (7th Cir. 1975).

30,000 public housing units in integrated neighborhoods.[16] However, it recited, the "General Public Housing Area" remaining with the city limits of Chicago was insufficient to support such a number of additional public housing units located in accordance with the 1969 decree. Hence, plaintiffs suggested that relief involving construction of additional public housing without the City of Chicago should be granted, and noted that all parties had previously expressed agreement upon the desirability of a "metropolitan" remedy. Following further proceedings, plaintiffs on September 24, 1972 submitted a proposed Judgment Order embodying a form of "metropolitan" relief[17] and hearings were held September 28-29 and November 27-28, 1972.

On September 28, 1972, the CHA Director testified that CHA was applying for a new reservation of 3500 units from HUD but that, in his opinion, 75% of the units could not be located in what remained of the "General Public Housing Area" in Chicago, as defined by the Court's 1969 decree.[18] On November 27, 1972, an expert demographer tendered by plaintiffs described the rapidly shifting racial composition of Chicago's popula-

[16] Chicago's 1973-1980 public housing needs have been estimated at 67,000 new units. Northeastern Illinois Planning Commission, *Moderate and Low-Income Housing, A Ten Year Estimate of Regional Needs* 12 (1973).

[17] Plaintiffs' proposed decree was modeled upon the 1969 remedial order. It defined a "Limited" and "General" public housing area in terms of the Chicago Urbanized Area rather than the city limits, and established floors and percentages for future site location within those areas. It suggested a mechanism whereby the District Court might vest CHA with authority to locate units outside the City of Chicago if voluntary agreement of local agencies could not be secured.

[18] Record, Transcript of Proceedings, September 28, 1972, at 65.

tion, and estimated that the "General Public Housing Area" as defined in the 1969 decree was being rapidly eliminated and would disappear entirely by about the year 2000.[19] Finally, plaintiffs presented a former U.S. Civil Rights Commission official who described the pervasive role of HUD and its predecessor agencies in creating and perpetuating racial residential segregation in private, as well as public, housing.[20] (This testimony, however, was stricken by the trial court.)[21] On September 11, 1973, the District Court entered its Memorandum Opinion and Order, in which it refused even to consider some form of "metropolitan" relief because

> 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 claim could never be proved against the principal offender herein.[22]

On appeal, the Court below (per Mr. Justice Clark, sitting by designation) held that "metropolitan" relief was necessary and equitable under the facts of the case, and was not inconsistent with this Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974). The initial opinion of the panel directed a remand

[19] Record, Transcript of Proceedings, November 27, 1972, at 85-86.

[20] *Id.*, at 134 *et seq.*

[21] *Id.*, at 185-86. The parties disagree on whether other evidence before the District Court is indicative of area-wide violations by HUD. *See, e.g.*, Brief for Petitioner, at pp. 21, 23-24.

[22] Gautreaux v. Romney, 363 F. Supp. 690, 691 (N.D. Ill. 1973).

> . . . 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.[23]

However, upon petition for rehearing, the Court of Appeals significantly narrowed its holding. It reaffirmed its "view that the trial judge should not have refused to 'consider the propriety of metropolitan area relief' "[24] but 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*. In the meantime, intra-city relief should proceed apace without further delay.[25]

On May 12, 1975, this Court granted HUD's petition for a writ of certiorari to review the Court of Appeals' judgment and remand.[26]

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[23] Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 939 (7th Cir. 1974).

[24] *Id.*, at 939.

[25] *Id.*, at 940 (emphasis added).

[26] 44 L.Ed.2d 448 (1975).

ARGUMENT

INTRODUCTION

Decision of the question presented for review in this case will have broad and important implications for the future conduct of governmental housing programs and related activities which have, in this and other instances, been instrumental in the past in creating or exacerbating racial residential segregation. After careful consideration of the positions taken by the respective parties and study of the record in this matter, however, amici have concluded that the issues raised by Petitioner are not appropriately presented on this record; we very respectfully suggest that this Court should dismiss the writ of certiorari so that the matter may be returned to the trial court for the taking of evidence and further proceedings as directed by the Seventh Circuit's order on Petitioner's request for rehearing below.

Such a course of action is appropriate here for two reasons: first, the Petitioner in this matter is so little directly concerned with most of the various detailed aspects of a potential remedial decree about which it speculates and complains, that it should not be accorded standing to raise those issues; second, the "scope" of any supposed "inter-district" remedy which may ultimately be fashioned in this case is so completely undefined on this record that issues relating to its sufficiency or justifiability are simply not ripe for decision by this Court. Further proceedings in the trial court will not only complete the record, but will also provide ample opportunity for the parties who might be directly affected to be heard and to themselves seek such appellate review as they deem appropriate, following the shaping of an equitable decree by the District Court.

I.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AND REVIEW OF THIS MATTER POSTPONED UNTIL AFTER FURTHER PROCEEDINGS IN THE TRIAL COURT

A. Petitioner Does Not Have Standing To Attack The Judgment Of The Court Of Appeals On the Grounds Raised In Its Petition And Brief

Because this is a case involving racial discrimination by the Petitioner HUD, and because the plaintiffs have continously pressed for HUD's participation in a remedy designed to alleviate the effects of that discrimination, there is at first blush little reason to doubt HUD's right to attack, in this Court, a judgment which sends the case back to the District Court for reconsideration of the kind of remedy which should be ordered. However, Petitioner attacks not so much the Court of Appeals' judgment of remand as it does certain consequences to others which Petitioner speculates may occur as the result of that remand. Petitioner's standing to seek this Court's opinion about the potential orders which may be entered by the District Court on remand must therefore be carefully considered, for "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute *or of particular issues.*" *Warth v. Seldin,* 45 L.Ed.2d 343, 354 (1975) (emphasis added).

We respectfully submit that Petitioner lacks the necessary concrete adversary interests to warrant exercise of this Court's certiorari jurisdiction. The contours of the analysis are described in *Warth, supra*, 45 L.Ed.2d at 354-55:

> This inquiry involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. . . .
>
> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and that defendant within the meaning of Art. III. . . . The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. . . .
>
> . . . [T]his Court has recognized other limits on the class of persons who may invoke the court's decisional and remedial powers. . . . [E]ven when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. . . .

The "prudential considerations" of *Warth* apply to Petitioner here. *See* 45 L.Ed.2d, at 355-56, n. 12 and accompanying text. The question, therefore, is whether Petitioner can demonstrate sufficient "injury" to HUD to entitle it to litigate the issue it presents:

> Whether in light of *Milliken v. Bradley*, 418 U.S. 717, 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. [Brief for Petitioner, at p. 2.]

Petitioner points to no language of the Court of Appeals which compels an order on remand restricting HUD in any particular way.[27] Although Petitioner

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[27] Consider Petitioner's description of the trial court proceedings which led to the Seventh Circuit reversal:

> In the order underlying the present Petition, the district court directed HUD to use its "best efforts to

[footnote continued]

makes much of the fact that, in its view, the Court of Appeals has mandated an "inter-district" remedy without finding an "inter-district violation" or an "inter-district effect" (Brief for Petitioner, at pp. 15-28),[28] it nowhere

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> 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 . . . .
>
> [Petitioner has expressed no objection to this decree.]
>
> The district court 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 of Chicago in Cook, DuPage and Lake Counties, and refused to conduct additional proceedings designed to develop a plan of metropolitan area-wide relief . . . .

(Brief for Petitioner, at pp. 9, 10). The Court of Appeals, however, did *not* direct the District Court to enter the order proposed by the plaintiffs (see note 16 *supra*). It did *not* direct the lower court to require HUD to use its best efforts to provide dwelling units outside Chicago without regard to "all applicable federal statutes, HUD rules and regulations," etc. It *merely* directed the trial court to conduct further proceedings in light of its opinion and that of this Court in *Milliken v. Bradley, supra.*

[28] The Seventh Circuit's remand does not require a metropolitan housing remedy, but rather reconsideration in light of *Milliken v. Bradley, supra.* Any doubt on this score was resolved by the Court's Order on Rehearing, which deliberately omitted language describing the result which was to flow from the further proceedings. 503 F.2d, at 940. The Order (mandate) of the Court of Appeals, issued August 26, 1974, merely states that the District Court's judgment is reversed 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.

(No separate order was issued following consideration and disposition of HUD's petition for rehearing, although the opinion of the Court was amended as described above, p. 12, *supra.*)

[footnote continued]

indicates how the specific provisions of the decree affecting HUD will differ as a result of the Seventh Circuit's remand. Of course, it cannot, since no particular form of remedy has been directed pending reconsideration of the matter by the trial court.

Petitioner instead attacks the remand on two grounds. The first—that the record does not, in Petitioner's view, meet the *Milliken* standards for "inter-district" relief—is considered *infra,* pp. 19-25. The second is Petitioner's claim that an inter-district remedy which requires the construction of public housing outside Chicago, over the objection of local agencies or jurisdictions, will entail immense practical difficulties. But the practical problems discussed at great length in Petitioner's brief (pp. 28-40) all affect third parties, none of whom is before this Court.[29] No plan will be formulated or ordered until

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Petitioner thus errs in opening its argument by contending that the Seventh Circuit remanded this case "for 'the adoption of a comprehensive metropolitan area plan' (Pet. App. 59a)" as though that statement in the initial opinion of the panel were not modified by the terms of the Order denying HUD's petition for rehearing.

[29] Petitioner opens its argument on the merits as follows (Brief, pp. 15-16):

> The court of appeals, by remanding this case to the district court for "the adoption of a comprehensive metropolitan area plan" (Pet. App. 59a), has departed from the long-standing rule of federal equity practice that "the nature of the violation determines the scope of the remedy." *Swann v. Board of Education,* 402 U.S. 1, 16. See also *Brown v. Board of Education,* 349 U.S. 294, 300. *The state and local agencies that are made subject to the district court's remedial orders by that decision* (see p. 12, *supra*), with the exception of CHA itself, *have not been implicated* in any unlawful discrimination; *they have in effect been consolidated* for remedial purposes by the court of appeals apparently solely because the court believed that met-

[footnote continued]

after such parties have been joined and heard (*see* Brief for Petitioner, at p. 12).[30] Clearly, in this case nothing respecting "metropolitan" relief has yet occurred which so directly affects *Petitioner's* interests as to warrant this Court in reviewing the judgment below at Petitioner's request. Possible injury to third parties does not confer standing upon a litigant unless very unusual circumstances (not present here) make direct assertion of a claim by the injured parties improbable. *Warth v. Seldin, supra,* 45 L.Ed.2d, at 355-56.

The Petitioner, despite HUD's ongoing relationship with local agencies and political subdivisions, is not entitled to judicial recognition as the protector of their interests in litigation which does not directly affect HUD. *See County Court of Braxton County v. State ex rel. Dillon*, 208 U.S. 192 (1908) (county governing body members have no standing to attack, in Supreme Court, West Virginia statute whose effect will be to require county's default on bonds; only bondholders would have standing); *Diaz v. Patterson*, 263 U.S. 399 (1923) (fraudulent titleholder who unsuccessfully sued to establish his claim may not attack judgment of trial court on ground that court did not determine whether third

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ropolitan area-wide residential desegregation is a desirable goal of social policy. That judicial view of desirable social policy does not, standing alone, justify the award of inter-district relief. *Milliken v. Bradley*, 418 U.S. 717. [Emphasis added.]

[30] We do not interpret Judge Austin's Order permitting the filing of the Second Supplemental Complaint and adding additional parties defendant as an adjudication on the merits against these parties. Rather, it seems to us, the District Court has wisely determined to have all potentially affected parties before it when it reconsiders the question of metropolitan relief pursuant to the Seventh Circuit's remand. *Cf.* Milliken v. Bradley, *supra*, 418 U.S., at 752.

parties may have had better title than defendant); *ICC v. Chicago, R.I. & P.R. Co.*, 218 U.S. 88 (1910) (railroad may not attack ICC judgment reducing through rates on petition of shippers on ground that ICC left local rates unaltered, since effect of further action by ICC would not benefit, but further injure, railroads); *cf. Massachusetts v. Mellon*, 262 U.S. 447 (1923).

The only direct effect upon Petitioner of the Seventh Circuit's order is to lift from it an injunctive decree to which it did not object. (*See* note 27 *supra.*) After further proceedings take place, Petitioner may become subject to another injunctive decree, but there will be ample opportunity at that time to seek review of its provisions. There is, in sum, nothing about which Petitioner may properly complain since the Court of Appeals neither imposed any restrictions upon Petitioner nor denied relief which Petitioner sought. Thus, the "prudential considerations" identified in *Warth* counsel against according standing to HUD to litigate the "inter-district" issues it fears the District Court may address on remand. Since Petitioner lacks standing, the writ of certiorari should be dismissed. *Penfield Co. v. SEC*, 330 U.S. 585 (1947).

B. The Record In This Matter Is Insufficient To Permit Decision Of The Constitutional Claim Raised By Petitioner.

Petitioner seeks to have this Court answer a legal question which was never resolved by the trial court, which is posed in the abstract because it was never the focus of evidentiary presentation,[31] and which will

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[31] The District Court explicitly refused to consider the very evidence which Petitioner now asserts is essential. *See* text at notes 19, 20, *supra.*

be the subject of inquiry by the trial court pursuant to the judgment below. Because this record is inadequate to permit a reasoned disposition of the claim presented by Petitioner, the writ of certiorari should be dismissed as improvidently granted.

This record could hardly be more opaque with respect to the question presented by Petitioner to this Court:

> Whether, in light of *Milliken v. Bradley*, 418 U.S. 717, 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.

(Brief for Petitioners, at p. 2.) As we earlier pointed out,[32] the Court of Appeals' disposition of this matter did *not* require adoption of a "metropolitan area plan." Its judgment did not "ma[k]e subject to the district court's remedial orders" the additional parties joined upon motion of the plaintiffs (*compare* Brief for Petitioners, at p. 15). That judgment certainly did *not* direct that injunctive decrees be entered against these parties irrespective of their "implication in any unlawful discrimination [or its effects]" (*id.*) but instead instructed the trial court to decide whether relief against such parties was appropriate under the principles of this Court's decision in *Milliken v. Bradley*. And by no stretch of the imagination can the Court of Appeals' ruling be said to have "consolidated" either the fourteen new parties defendant or the "more than 300" political jurisdictions to which Petitioner subsequently refers in the course of the *in terrorem* argument which it constructs (Brief for Petitioner, at p. 36.)

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[32] *See* note 28 *supra*.

If the "finding" of an "inter-district" violation or effect (*Milliken v. Bradley, supra*) is critical, then the Court of Appeals was eminently correct in remanding the case so as to permit the parties to present evidence and the District Court to make such a finding if warranted by that evidence.[33] Since the case was heard in the District Court long before *Milliken* was decided, neither the court nor the parties (including HUD) anticipated the potential relevance of such a finding. *Cf.* 503 F.2d, at 934.[34] The Court of Appeals reversed and remanded not because it posited "inter-district" relief without the necessary finding, but because the District Court improperly refused even to consider such relief. *Id.*, at 939. Plainly, the issue described by Petitioner is not in this case because the Court of Appeals has done no more than afford an opportunity for the District Court to receive evidence and to make such findings as are warranted by the evidence.

Of even greater significance is the absence of specific remedial directions in the remand. Not only does the Court of Appeals' order fail ipso facto to subject agencies who were not parties to the suit to future remedial

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[33] *See* note 31 *supra*.

[34] *See* Massachusetts v. Painten, 389 U.S. 560, 561 (1968):

> At the time of respondents' trial in 1958, Massachusetts did not have an exclusionary rule for evidence obtained by an illegal search or seizure . . . and the parties did not focus upon the issue now before us.
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> . . .
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> After oral argument and study of the record, we have reached the conclusion that the record is not sufficiently clear and specific to permit decision of the important constitutional questions involved in this case. The writ is therefore dismissed as improvidently granted
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> . . . .

decrees, or to "consolidate" them, but it leaves wholly undefined the nature and scope of any "metropolitan" plan which might be ordered on remand. It is far from unreasonable to assume—especially in light of the District Court's cautious, step-by-step approach to remedy throughout the course of this litigation[35] – that the court may fashion "metropolitan" relief which is not "inter-district" in the *Milliken* sense. For instance, as the Brief of Respondents details, Petitioner HUD administers its housing programs by "market areas," of which the Chicago Housing Market Area is an example. Consistent with existing statutory law,[36] the District Court might on remand restrain HUD from financing housing programs throughout the entire Chicago Housing Market Area unless they meet the siting and tenant assignment requirements established in the 1969 intra-Chicago decree.

Such a remedy would be "metropolitan" or area-wide, but it would involve no decrees against new parties to the lawsuit, and it would not be "inter-district" in the *Milliken* sense. It would not take away from local jurisdictions any rights they have to determine whether to participate in federal housing programs (see Brief for Petitioner, at p. 36).[37] It would simply amplify the conditions (which local public housing programs already

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[35] *See* pp. 6-9, *supra.*

[36] 42 U.S.C. §5301 (c)(6): ". . . Federal assistance provided in this chapter is for the support of community development activities which are directed toward . . . the spatial deconcentration of housing opportunities for persons of lower income . . . ." *See also,* 42 U.S.C. §§1439(a)(3)-(4), 5304(a)(4)(c)(ii).

[37] The Housing and Community Development Act of 1974 authorizes HUD to bypass local governmental entities in some instances. *See* 42 U.S.C. §§1437f(b)(1)-(2).

must meet)[38] to be considered by a locality when making its decision. *Cf. Kelsey v. Weinberger*, 498 F.2d 701 (D.C. Cir. 1974). Such a decree would not "subject suburban governmental agencies . . . to substantial financial and administrative burdens" (*id.*, at p. 35) unless those agencies undertook to participate in federal housing programs. What such a decree *would* do is to require HUD to operate federal housing programs within the Chicago Housing Market Area in such a fashion as to alleviate the racial residential segregation which it helped to create.

A variety of other remedial approaches is appropriate under the judgment of remand entered by the Court of Appeals. For example, the District Court might direct HUD to act directly to provide additional housing units outside the City of Chicago pursuant to the "bypass" provisions of the Housing and Community Development Act of 1974.[39]

These remedial steps are a long way from the hypothetical decree which Petitioner assumes will be entered on remand (Brief for Petitioner, at pp. 35-40). Petitioner suggests that the Court of Appeals' ruling will necessarily deprive local jurisdictions of decision-making power with respect to undertaking public housing programs, over zoning and land use control, for provision of public services, etc., so as to constitute the District Court, "in

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[38] *See* Brief for Respondents in Opposition to Certiorari, at p. 13.

[39] 42 U.S.C. §1437f(b)(1) provides: ". . . In areas where . . . the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section." *See also,* 42 U.S.C. §1437(b)(2).

significant ways . . . the master metropolitan government" (*id.*, at 27). Such an assumption is unwarranted on this record.

Unquestionably, this Court's judgment about the appropriateness, under *Milliken v. Bradley*, of a decree which may be entered by the District Court pursuant to the Seventh Circuit's remand in this case will depend upon the exact nature of that decree. The questions of constitutional power and equitable discretion posed on the one hand by a decree against HUD alone, and on the other hand by a decree which purports to restrict the governmental powers of local jurisdictions in the manner suggested by Petitioner, will be markedly dissimilar.[40] But the record in this case, in its present form, is simply inadequate to permit the Court to determine exactly what sort of decree the trial court will in fact enter.

Traditionally, where such uncertainty of interpreting the opinion or judgment below has become apparent, and

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[40] Thus, the issue presented by Petitioner is not ripe for review. Wheeler v. Barrera, 417 U.S. 402, 426-27 (1974):

> The second major issue is whether the Establishment Clause of the First Amendment prohibits Missouri from sending public school teachers paid with Title I funds into parochial schools to teach remedial courses. The Court of Appeals . . . [held] the matter was not ripe for review. We agree. As has been pointed out above, it is possible for the petitioners to comply with Title I without utilizing on-the-premises parochial school instruction. Moreover, even if, on remand, the state and local agencies do exercise their discretion in favor of such instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated . . . .
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> . . . A federal court does not sit to render a decision on hypothetical facts . . . .

where that uncertainty can be clarified by further proceedings in the same, or even another, matter, this Court has declined to pass upon constitutional questions in the abstract and has dismissed writs of certiorari as improvidently granted. *E.g., Parker v. County of Los Angeles*, 338 U.S. 327 (1949); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *CIO v. McAdory*, 325 U.S. 472 (1945); *cf. Wheeler v. Barrera*, note 39 *supra*. That, we suggest, is the most appropriate disposition in this matter as well.

II.

SHOULD THIS COURT REACH THE MERITS, THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE IT IS CONSISTENT WITH MILLIKEN V. BRADLEY

We have suggested above that the proper disposition of this case is to dismiss the writ of certiorari, both because Petitioner lacks standing to argue the issue it presents for review and because this record is an insufficient basis upon which to determine the constitutional question presented by Petitioner. Should the Court consider the case on the merits, however, we believe that Respondents are entitled to prevail.

The thesis of the Petitioner's argument is that the Seventh Circuit's ruling in this case conflicts with, or erroneously interprets, the opinion in *Milliken v. Bradley*, *supra*. Since (as we have explained above) the judgment of the Court of Appeals merely remands to the District Court for reconsideration of "metropolitan" relief in light, *inter alia*, of *Milliken*, there is no basis upon which to alter that judgment. Although the opinion of the Court of Appeals is strongly supportive of the concept of metropolitan relief, the remand order anticipates that the

District Court will receive additional evidence and make specific findings before undertaking a fresh determination on remedy. Thus, Petitioner will have an adequate opportunity on remand to disprove what it has termed mistaken assumptions or erroneous factual interpretations by the Court of Appeals.[41] Should the case then be reappealed by any party, we trust that the record would contain specific factual findings by the District Court on the subjects of inquiry necessitated by both the Seventh Circuit's opinion and *Milliken*.[42] Such a record would permit complete appellate review.

In contrast, reversal of the judgment below would amount to a holding by this Court that "metropolitan," "inter-district," or "area-wide" relief in a segregation case is *never* appropriate, whether "inter-district violations," "inter-district effects," or simply "area-wide" discrimination can be proved. We do not believe the Court went so far in *Milliken*, nor that the door to meaningful relief from unlawful housing segregation should be so firmly, and precipitously, shut in this case. Accordingly, we submit that if the case is considered on its merits, the judgment below must be affirmed.

[41] Neither the parties nor the District Court can be faulted for the present inadequate state of the record on the subject of "inter-district effects," since the evidentiary hearing which led to the District Court's order took place in September and November, 1972 – a year and a half before this Court rendered its opinion in *Milliken*. Pursuant to the Court of Appeals' remand, plaintiffs may offer additional evidence about HUD's area-wide violation and the appropriate remedy therefor, in addition to the evidence previously offered but refused by the District Court. HUD, or any added party, may attempt to rebut both the present evidence of record and any such additional evidence, or may propose such remedial alternatives as it deems fit. The District Court will then, for the first time in this litigation, make specific findings on the relevant issues.

[42] No longer bound by its unnecessarily narrow, pre-*Milliken* view of the case, the District Court will consider the nature and scope of the violations by HUD or any other parties, the range of remedies available against HUD and/or any other parties, and the appropriateness of those remedies to vindicate plaintiffs' rights to nondiscriminatory housing opportunities guaranteed by, *inter alia*, the Thirteenth Amendment, the 1964 and 1968 Civil Rights Acts, and the 1974 Housing and Community Development Act.

CONCLUSION

WHEREFORE, for the foregoing reasons, amici respectfully suggest that the writ of certiorari herein should be dismissed, or in the alternative that the judgment remanding the case for further proceedings should be affirmed.

Respectfully submitted,

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