
In the
United States Court of Appeals
For the Seventh Circuit

Nos. 72-1409 and 1410

DOROTHY GAUTREAUX, et al., <i>Plaintiffs-Appellees,</i> vs. CITY OF CHICAGO and RICHARD J. DALEY, Mayor, etc., <i>Defendants-Appellants,</i> vs. FRED B. ROTI, et al., Members of the City Council of the City of Chicago, <i>Defendants-Appellants.</i>	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. — No. 66 C 1459 No. 66 C 1460 — Honorable Richard B. Austin, Judge.
--	--

**SUGGESTION FOR REHEARING EN BANC AND
PETITION FOR REHEARING.**

RICHARD L. CURRY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for the City of Chicago, et al.

EARL L. NEAL,
Special Assistant Corporation Counsel,
WILLIAM R. QUINLAN,
DANIEL PASCALE,
Assistant Corporation Counsel,
Of Counsel.

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 72-1409 and 1410

DOROTHY GAUTREAUX, et al., <i>Plaintiffs-Appellees,</i> vs. CITY OF CHICAGO and RICHARD J. DALEY, Mayor, etc., <i>Defendants-Appellants,</i> vs. FRED B. ROTI, et al., Members of the City Council of the City of Chicago, <i>Defendants-Appellants.</i>	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 66 C 1459 No. 66 C 1460 Honorable Richard B. Austin, Judge.
--	--

SUGGESTION FOR REHEARING EN BANC.

Now come the City of Chicago, et al., by their attorney, Richard L. Curry, Corporation Counsel of the City of Chicago, and pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure respectfully suggest that the petition for rehearing filed together herewith should appropriately be considered by this Court en banc.

This proceeding involves a question of exceptional importance. The lengthy period for which these cases have been on the active docket of the district court and of this Court, the number of reported opinions and orders arising out of this litigation, and the frequency of citation attest to the importance of the cause. When the parties now prevailing in this Court asked that an earlier judgment be reheard en banc, they observed that the problem to which the district court order is addressed is, in the

words of one of the sitting judges, "crucial and monumental", *Gautreaux v. Romney*, 457 F. 2d 125, 138 (7th Cir. 1972; Sprecher, j., dissenting).

Too, the case is "extraordinary in scale . . . because the issues are intricate enough to invoke the pooled wisdom of the circuit" (*Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U. S. 247 (1952) (Frankfurter, j., concurring)). Nowhere else has a legislative body, not previously a party to the litigation, and never judicially determined to have committed a constitutional violation, been found to be subject to the jurisdiction of a district court. In so finding, this Court is divided over three separate views of liability. Moreover, both the concurring and dissenting judges seem to sense that this appeal may not end this litigation once and for all. Earlier opinions of this Court seemed to envision something other than the sweeping interference now condoned, cf. *Gautreaux v. Romney*, 448 F. 2d 731 (7th Cir., 1971); 457 F. 2d 125 (7th Cir., 1972). Also, the public impact of the district court's orders, once deemed a considerable factor affecting the scope of available relief (457 F. 2d 125), now appears to be a matter of little significance.

Accordingly, in the interest of providing a consistent theory of this case—an exceptional case in terms both of precedent in an uncharted area of the law and of effect on literally millions of people not before the Court, it is respectfully suggested that the judges of this Circuit rehear this cause en banc.

Respectfully submitted,

RICHARD L. CURRY,

Corporation Counsel of the City of Chicago,

511 City Hall, Chicago, Illinois 60602,

Attorney for the City of Chicago, et al.

EARL L. NEAL,

Special Assistant Corporation Counsel,

WILLIAM R. QUINLAN,

DANIEL PASCALE,

Assistant Corporation Counsel,

Of Counsel.

INDEX.

TABLE OF AUTHORITIES.

	PAGE
Banks v. Perk, 341 F. Supp. 1175 (N. D. Ohio 1972); aff'd in part, rev'd in part (6 Cir. January 8, 1973, No. 72-1876)	5
Bradley v. School Board of Richmond, Virginia, 462 F. 2d 1058 (4th Cir. 1972), aff'd (per curiam) U. S.; 41 L. Wk. 4685	6
Crow v. Brown, 332 F. Supp. 382 (N. D. Ga. 1971)	6
English v. Town of Huntington, 448 F. 2d 319 (2nd Cir. 1971)	5
James v. Valtierra, 402 U. S. 137; 28 L. Ed. 2d 678 (1971)	4
Jefferson v. Hackney, 406 U. S. 535, 32 L. Ed. 2d 285 (1972)	4
Kennedy Park Homes Ass'n. v. City of Lackawanna, 318 F. Supp. 669 (W. D. N. Y. 1970), aff'd 436 F. 2d 108 (2nd Cir. 1970)	5
San Antonio School District v. Rodriguez, U. S., 36 L. Ed. 2d 16 (1973)	4, 7
Sisters of Providence v. City of Evanston, 335 F. Supp. 396 (N. D. Ill. 1971)	6
Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1; 28 L. Ed. 2d 554 (1971)	3, 7
Illinois Revised Statutes 1971, Chapter 67½, Paragraph 9	7

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 72-1409 and 1410

DOROTHY GAUTREAUX, et al., <i>Plaintiffs-Appellees,</i> vs. CITY OF CHICAGO and RICHARD J. DALEY, Mayor, etc., <i>Defendants-Appellants,</i> vs. FRED B. ROTI, et al., Members of the City Council of the City of Chicago, <i>Defendants-Appellants.</i>	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 66 C 1459 No. 66 C 1460 Honorable Richard B. Austin, Judge.
--	--

PETITION FOR REHEARING.

Defendants, City of Chicago, et al., by Richard L. Curry, Corporation Counsel of the City of Chicago, their attorney, respectfully petition this Court to grant a rehearing of its judgment filed May 18, 1973, for the following reasons:

The Supplemental Complaint initiating this "remedial" proceeding joined for the first time, some six years after commencement of the litigation, the City of Chicago and its Aldermen. The relief sought and granted included the judicial removal of the City Council's authority, under state statute, to approve the

location of public housing even though the Council had never been directly involved in this litigation. The essentials of due process of law include the idea that one accused of wrong-doing be accorded the right to defend himself, to confront his accusers and, at a minimum, to be heard. Since the City and its Aldermen had never been accorded a hearing, it became necessary to find a way to connect the recently-joined defendants with the prior, *ex parte*, finding of wrong-doing. The Court's opinion here makes this connection by simply asserting "The City Council by its earlier discriminatory action and later by its inaction has made itself a party to the discrimination 'as a joint participant'. . . ." (Slip opinion, p. 9.) This, of course, is a conclusion which assumes the validity of any pre-joinder finding of discriminatory action. Given a legitimate finding of discriminatory action, subsequent inaction might be plausibly the subject of remedial action. But "inaction" that is not connected to some valid finding of violation is meaningless unless the "inaction" violates some independent duty, one where fair hearing is not necessary.

The most succinct answer to this claim is provided by the concurring opinion. In disagreeing with Judge Sprecher, Chief Judge Swygert noted that

"The trial judge made no finding of joint participation. He can hardly be blamed; the plaintiffs made no mention of active joint participation at trial, and the record contains little, if any, support for a finding of discrimination by the City Council. Nor may reliance be placed on the findings made by the trial judge before the Council was made a party to this suit by supplemental complaint. The Council was not in privity with CHA and I do not understand plaintiffs so to contend. See Rule 65(d), F. R. C. P. Finally, the plaintiffs do not raise a theory of joint participation on this appeal." (Slip opinion, p. 11.)

Judge Swygert is correct: plaintiffs explicitly informed the district court that they

"need not establish and they do not intend to try to establish that there is a racially discriminatory motivation lying

behind the obstacle of City Council's veto power or, indeed, that there may not be benign reasons for the City Council not having acted on any individual sites. . . . The Court has the power to enter the declaratory judgment we seek without proof of that kind of motivation and without proof that there may not be valid state reasons, benign state reasons, for nonaction." (Transcript, pp. 13-14.)

Apart from the classic unfairness resulting from the Court's willingness to waive trial in behalf of the City, the very lack of a disposition without an adversary hearing establishing both a violation and proper liability indicates a disregard of the truth-finding function of the adversary process. The Court's opinion states that "The rights and violations are firmly established and are far beyond appeal or dispute." (Slip opinion, p. 5.) However, the only right established and violated is the right not to have "pre-clearance" of housing sites by CHA assuming, *arguendo*, that racially-motivated pre-clearance has been proven. Furthermore, the result of this conclusion is that the opinion fails to consider any of the questions raised concerning the adequacy of the naked statistical argument upon which the entire cause was based. The City's brief argued that in arranging the statistics, relevant categories of housing were excluded. Neither was it shown, for example, that the housing sites now complained of were, at the time of original construction, not in areas with a substantial white population. The significance of such a finding is underlined by the Chief Justice's observation in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 31-32, 28 L. Ed. 2d 554, 575 (1971), that

"Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."

The fact is, that even on their face, the statistics do not prove discrimination; they prove only that more blacks live in public

housing than do whites. In another case relying on such a "naked statistical argument", one in which it was shown both that a larger percentage of blacks received aid to dependent children and that that program was funded at a lower level than other programs without a disproportionate number of blacks, the Supreme Court held that

"given the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult programs posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment." *Jefferson v. Hackney*, 406 U. S. 535, 32 L. Ed. 2d 285, 297 (1972).

It is arguable that had such considerations been placed before the district court in the original hearing of this cause, the outcome might possibly have been different. But more relevant at this time is the fact that they were not considered, and they thus underline the danger of binding non-parties with findings they could not challenge.

Implicit also in the *ex parte* finding of discrimination is the assumption that public housing, if it were principally occupied by white tenants, would be constructed in white neighborhoods. It is, however, an assumption supported neither by the affidavits filed below nor by the superficial statistical analysis offered by plaintiffs. The only clear fact emerging is that a public welfare program is maintained notwithstanding the fact that it is largely enjoyed by blacks. It is an exercise in Orwellian logic to conclude that this demonstrates invidious discrimination. Here, as in *San Antonio Independent School District v. Rodriguez*, . . . U. S. . . ., 36 L. Ed. 2d 16 (1973), a municipality, at cost to itself, see *James v. Valtierra*, 402 U. S. 137, 141 n. 4 (1971),

has provided a welfare program involving a disproportionate percentage of blacks, see *English v. Town of Huntington*, 448 F. 2d 319, 324 (2d Cir. 1971). Unlike those cases, however, the Court here finds, on substantially similar facts, invidious discrimination, a result that, again, might have been avoided had a truly adversary proceeding been used to test the decisive, but unstated, assumptions of racial prejudice. The Court's opinion, as a result, indulges in a pristine example of denying due process of law in establishing jurisdiction over the new defendants.

Unfortunately, the means adopted by the concurring opinion to establish jurisdiction are no more adequate. The opinion purports to find a constitutional duty—one existing independently of a constitutional violation—imposed upon municipalities "to alleviate racial imbalance in housing." (Slip opinion, p. 11.) A breach of this duty, the opinion holds, is in itself a violation of equal protection; whenever a determination has been made that "racial imbalance" exists—whether or not the municipality has been a party to the determination—the municipality violates the Equal Protection Clause unless it voluntarily takes steps to obey any decree entered in those proceedings to which it was not a party. If it does not obey the decree, it is classified as an "offending party" burdened with demonstrating a "compelling governmental interest" that excuses disobedience. Such a theory of liability "requires no connection of the Council with CHA and no finding of active discrimination on the part of the Council." (Slip opinion, p. 11.)

In support of this proposition, the opinion cites a series of district court opinions and one circuit court of appeals decision all of which involved situations in which the appropriate municipality or official was in fact a party to proceedings in which, on relevant evidence, findings were made of discriminatory behavior: *Banks v. Perk*, 341 F. Supp. 1175 (N. D. Ohio 1972) (denial of building permits for public housing on racial grounds); *Kennedy Park Homes Ass'n v. City of Lackawanna*,

318 F. Supp. 669 (W. D. N. Y. 1970) (racially motivated rezoning to block private low-income housing); *Sisters of Providence v. City of Evanston*, 335 F. Supp. 396 (N. D. Ill. 1971) (claim stated by allegation that city refused to rezone for black project where it would have rezoned for white project); *Crow v. Brown*, 332 F. Supp. 382 (N. D. Ga. 1971) (building permits denied upon discovery that apartments would be occupied by low income black tenants).

The cases relied upon, admits the concurring opinion,

"differ factually in that the acts and omissions of the enjoined governmental entity were the direct cause of racially imbalanced housing condition. As I have noted, the same cannot be said of the City Council on the record as it stands. If this is a distinction, however, it is one far too subtle to make a difference. The CHA is guilty of creating the imbalance; the City Council is guilty of maintaining it without justification and in derogation of a court decree aimed at rectifying the problem." (Slip opinion, p. 12 n. 4.)

Thus the argument of the concurrence is lifted by its own bootstraps: first it imposes a duty without a hearing and without findings of discrimination; it supports the duty with cases in which the municipality *was* a party and *found* to have committed acts of active discrimination; acknowledging the differences, the opinion then states that they are irrelevant since there is, notwithstanding, a duty! Thus, there is a duty because there is a duty.

Far from being "well established", therefore, the duty imposed is a novel creation of this Court, one not found in the Constitution, in statute, or in case law.

On the contrary, to the extent that there is case law, it holds precisely that there is *no* such duty. In *Bradley v. School Board of City of Richmond, Virginia*, 462 F. 2d 1058 (4th Cir. 1972), contiguous school districts not found to have resorted to "joint interaction . . . for the purpose of keeping one unit relatively

white by confining black to another", *ibid.*, 1065, were held to be not subject to consolidation for the purpose of relief. The Fourth Circuit, sitting *en banc*, also ruled that "there is no right to racial balance within even a single school district, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. at 24, 91 S. Ct. 1267, but only a right to attend a unitary school system." *Ibid.*, 1069.

That there is no such constitutional duty to "alleviate racial imbalance in public housing" is further demonstrated by analyzing the concurring opinion's application of the "compelling governmental interest" standard of review. Under an equal protection analysis, the "presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently 'suspect'", *San Antonio School District v. Rodriguez*, . . . U. S. . . . , 36 L. Ed. 2d 16, 59 (Stewart, j., concurring). "The function of the Equal Protection Clause . . . is simply to measure the validity of *classifications* created by state laws", *ibid.*, 58.¹ A compelling governmental interest, then, is not required, for equal protection purposes, unless it is to explain an otherwise suspect classification created by a statute. Put another way, there can be no duty, unless it is first established that the statute (Illinois Revised Statutes 1971, Ch. 67½, Par. 9)² creates a suspect classifica-

1. The Supreme Court in *Rodriguez* also noted that a classification by wealth (as here) was not a suspect classification unless the exercise of fundamental right was infringed. However, the Supreme Court has also expressly held that the assurance of decent, sanitary and adequate housing is not such a fundamental right and is not a judicial but a legislative function. *Lindsey v. Normet*, 405 U. S. 56, 74; cf. *San Antonio School District v. Rodriguez*, . . . U. S. . . . , 36 L. Ed. 2d 16, 42.

2. The court's opinion suggests that a three-judge court (28 U. S. C. § 2281) was unnecessary since the statute is not of state-wide application. The statute is a comprehensive act, and does have state-wide application in that Paragraph 9 applies to any municipality with a population exceeding 500,000. Only

tion. Here, there has been no such determination, nor has there been a finding that the statute is defective as administered unless the concurring judge is willing to place reliance "on the findings made by the trial judge before the Council was made a party to this suit by supplemental complaint", something he was not willing to do for the purpose of finding the Council to be a "joint participant." Indeed, the plaintiffs' theory, which the concurrence adopts, itself makes the "compelling governmental interest" analysis irrelevant inasmuch as the theory is that, given the duty, even benign policies may not excuse obedience. In sum, it appears that the municipal duty "to alleviate racial imbalance in housing" relied upon by the concurrence—and the appellees—has no identifiable source; rather, it is a kind of "brooding omnipresence in the sky" upon which a court may hang its jurisdiction and issue decrees, quite apart from fair hearing and adjudication.

Moreover, the *Rodriguez* majority, in recognizing that welfare assistance involves the most basic economic needs of the poor, nevertheless determined that the prior cases have "provided no basis for departing from the settled mode of constitutional analysis of legislative classifications involving questions of economic and social policy. . . . The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," *ibid.*, 43.

The concurrence is further incomprehensible in its gratuitous observation that "the City Council retains considerable control over construction by CHA." With this inexplicable conclusion, the concurring opinion attempts to respond to the City's argument that it is being wrongfully and unjustly "deprived of its important discretion to locate public housing with due regard to

one city now meets that requirement. However, inasmuch as plaintiffs profess not to attack the statute on its face, the issue of a three-judge court has not been pursued.

factors such as population density, environmental control and the provision of public services." (Slip opinion, p. 13.) However, the order appealed from is explicit: the Illinois statute authorizing municipal approval of CHA site selection "shall not be applicable to CHA's action, including without limitation the acquisition of real property in the City of Chicago, taken for the purpose of providing Dwelling Units." (Paragraph 2, Order of April 10, 1972.) The order further directs CHA to compile a list "sufficient for the provision of an aggregate of 1500 Dwelling Units" (Paragraph 4B), and to then "begin all steps and procedures necessary or appropriate to acquire such sites and provide Dwelling Units thereon, including without limitation, . . . (b) the acquisition of such sites, regardless of any action taken or not taken by the Council with respect thereto, upon HUD's approval of such Development, and (c) the provision of Dwelling Units thereon as promptly as may be." (Paragraph 4E). In view of such language, it is simply wrong to assert that "the City Council retains considerable control over construction by CHA." In any case, it is not clear, given the imposition of a duty, why reasons that will not support a failure to approve sites will at some time in the future, and presumably after considerable labor and investment, become suddenly constitutional.

CONCLUSION.

The judgment filed May 18, 1973, to paraphrase the dissent, allows the due processes of the law to be abrogated in the service of what is conceived to be a commendable objective and to minimize the difficulties in attaining that objective.

And, as the dissent further noted, "this case has now been transformed from one involving unconstitutional implementation of the Federal Low-Rent Housing Act into a case of claimed unconstitutional deprivation of low-cost housing. However, absent constitutional mandate, the assurance of adequate housing is a legislative not a judicial function. *Lindsey v. Normet*, 405 U. S. 56, 74 (1972)."

It may well be, as the Court's opinion notes, that the original district court judgment in this case is no longer appealable, but surely it is still disputable. And to impose its precarious findings and sweeping, thoughtless remedy upon a non-party never found guilty of wrong-doing, never charged with wrong-doing and, indeed, conceded to have perhaps been motivated only by benign considerations, is a dangerous departure, one supported neither by precedent nor sound policy. All of the foregoing argues that the Court misapplied the law and that, therefore, the decision below should be reversed.

Respectfully submitted,

RICHARD L. CURRY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for the City of Chicago, et al.

EARL L. NEAL,
Special Assistant Corporation Counsel,

WILLIAM R. QUINLAN,

DANIEL PASCALE,
Assistant Corporation Counsel,
Of Counsel.