

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOROTHY GAUTREAUX, ET AL.,

Plaintiffs-Appellants,

v.

CHICAGO HOUSING AUTHORITY and
JAMES T. LYNN, SECRETARY OF
HOUSING AND URBAN DEVELOPMENT, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

FEDERAL APPELLEE'S PETITION
FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

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Nos. 74-1048 and 74-1049

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Cross-Appellees,

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The appellee Secretary of Housing and Urban Development petitions for rehearing and suggests rehearing en banc pursuant to Rules 35 and 40, F.R.A.P., on the grounds that the decision of the panel in this case entered August 26, 1974, conflicts with previous decisions of different panels of this Court in this case, conflicts as well with Milliken

v. Bradley, 42 U.S.L.W. 5249 (U.S., July 25, 1974), and presents an exceptionally important question.

ISSUE PRESENTED

In providing a remedy for racial discrimination previously held to have existed in the Chicago public housing program, the district court ordered the Secretary of Housing and Urban Development to use his best efforts to cooperate with the Chicago Housing Authority ("CHA") in its efforts to increase the supply of dwelling units in conformity with federal statutes and regulations and the judgment entered in the companion case against CHA. The court declined to adopt or give further consideration to the plaintiffs' proposal for a metropolitan-wide remedial decree. On appeal, a panel of this Court, Judge Tone dissenting, held that the district court had abused his discretion in failing to order a metropolitan-wide remedial decree despite the fact that the constitutional violation had been limited to the geographical confines of the City of Chicago. The question presented is whether, in so ruling, the panel decision erroneously extended equitable relief beyond the area of violation.

The pertinent facts are set forth in the panel's decision and in the previous decisions of this Court in this case.

I

THE PANEL'S DECISION CONFLICTS WITH
THE PREVIOUS DECISIONS OF DIFFERENT
PANELS OF THIS COURT IN THE SAME CASE.

When this Court originally held that HUD had violated the rights of the plaintiff class, it pointedly stated:

[O]ur holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency. It may well be that the District Judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple "best efforts" clause will be necessary to remedy the wrongs which have been found to have been committed.

Gautreaux v. Romney, 448 F. 2d 731, 740 (1971) ("Gautreaux II"). This statement was expressly reaffirmed when this Court reversed the district court for a second time in Gautreaux III. Gautreaux v. Romney, 457 F. 2d 124, 126 (C.A. 7, 1972). On remand from these decisions, the district court entered the "best efforts" decree from which plaintiffs' present appeal is taken. No new wrongs have been found to have been committed since the prior two decisions. In these circumstances, the panel's August 26th decision is inconsistent with Gautreaux II and III inasmuch as it holds the court below abused its discretion by accepting this Court's twice stated suggestion that a "best efforts" decree would be appropriate.

Moreover, the panel's August 26th decision also conflicts with Gautreaux III in another respect. On that appeal, this Court held that the district court had abused its discretion by conditionally enjoining HUD from releasing funds under the Model Cities program, which was not tainted by discrimination, as a remedy for the wrongs found to exist in the separate public housing program. In other words, this Court in Gautreaux III rejected an expansion of the remedial decree into untainted programs. In the present case, however, it requires the district court to expand the remedial decree into geographic areas untainted by discrimination. In so doing, the Court has departed from its past adherence to the principle that the remedy be tailored to the scope of the wrong.

Instead, to paraphrase the dissenting opinion of Judge Pell in Gautreaux IV, "this case has now been transformed from one involving unconstitutional implementation of the Federal Low-Rent Housing Act [within Chicago] into a case of claimed unconstitutional deprivation of low-cost housing" throughout the three-county Chicago metropolitan area. Gautreaux v. City of Chicago, 480 F. 2d 210 (C.A. 7, 1973), certiorari denied, 414 U.S. 1144 (1974). Thus, the August 26th decision subjects the suburbs to a decree that "will increase the supply of dwelling units as rapidly as possible" by "the adoption of a comprehensive metropolitan area plan" (slip op., 15), even though these suburbs have never been found to have discriminated.

It is true that the August 26th decision states
(slip op., 11):

* * * there is evidence of suburban discrimination. Plaintiffs' Exhibit 11 indicates that of twelve suburban public housing projects, ten were located in or adjacent to overwhelmingly black census tracts.

This statement, however, is not sufficient to justify a remedial decree against the suburbs for three independent reasons.

First, the suburbs, of course, are not parties to this litigation. They should not be condemned as discriminators without having had an opportunity to defend themselves.

Second, the district court found (App. 46), "[i]t has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein." It is unclear whether the August 26th majority opinion intended to hold this finding clearly erroneous, but as Judge Tone's dissent indicates (slip op., 16), the district court's finding is correct. CHA certainly is not responsible for the location of the suburban housing projects. Nor can HUD be held to have discriminated in the suburbs from the mere fact that ten of the twelve projects are in or near predominately black census tracts. Inter alia, there is no showing of what the racial balance of the

sites had been when the projects were constructed -- nor, for that matter, at the present time. (Two sites are not even adjacent to black areas. How many of the remaining ten are in racially balanced areas is not indicated.) In any event, the majority opinion seems almost to imply that if all of the census tracts of a particular suburb are black or adjacent to black areas, that suburb must be barred entirely from participating in the public housing program. But compare, Gautreaux II, 448 F. 2d at 740. Such a rule, to say the least, would raise very substantial equal protection questions.

Third, if there is discrimination in the suburbs, the victims of that discrimination have ample administrative and judicial means of redress. The plaintiffs in this case are tenants in and applicants for CHA's projects. They cannot assert the claims of the suburban tenants. Indeed, the interests of the two classes will directly conflict under a metropolitan plan. If and when new public housing units become available in the suburbs, every unit occupied by CHA tenants will reduce proportionally the units available to public housing tenants and applicants now residing in the suburbs.

In sum, if it intended to overturn the district court's finding that no discrimination in the suburbs has been alleged or proved, the August 26th majority opinion erred. Absent a finding of discrimination in

the suburbs, the August 26th opinion conflicts with Gautreaux II and III, as well as with the dissenting opinion in Gautreaux IV. Accordingly, rehearing en banc is "necessary to secure or maintain uniformity of this Court's decision" in this litigation. F.R.A.P. 35(a).

II

THE PANEL'S DECISION CONFLICTS WITH
THE SUPREME COURT'S DECISION IN
MILLIKEN v. BRADLEY AND PRESENTS AN
EXCEPTIONALLY IMPORTANT QUESTION.

The panel's decision also conflicts with the Supreme Court's decision a month earlier in Milliken v. Bradley, 42 U.S.L.W. 5249 (U.S., July 25, 1974) and thus presents an exceptionally important question. F.R.A.P. 35(a)(2). In Bradley, the Supreme Court held (42 U.S.L.W. at 5258):

The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. * * * Without an inter-district violation and inter-district

effect, there is no constitutional wrong calling for an inter-district remedy. (Emphasis added).

Although Bradley involved school discrimination, this holding is equally applicable to public housing site-selection discrimination because in both types of cases the controlling principle is that the remedy must be tailored to the violation. See Gautreaux v. Romney, 457 F. 2d 124 (C.A. 7, 1972). The panel's decision mistakenly limits the force of Bradley by construing it to mean only that "the relief sought there would be an impractical and unreasonable over-response to a violation limited to one school district." Slip opinion, p. 9. In our view the Bradley decision did not turn upon an assessment of the practicalities or difficulties of the equitable relief the district court ordered, for as Mr. Justice White pointed out for the dissenters (42 U.S.L.W. at 5265):

Obviously, whatever difficulties there might be, they are surmountable; for the Court itself concedes that had there been sufficient evidence of an interdistrict violation, the District Court could have fashioned a single remedy for the districts implicated rather than a different remedy for each district in which the violation had occurred or had an impact.

To both the majority and dissenting justices then, the key factual failing of the Bradley record to support an inter-district remedy was the paucity of evidence of an inter-district violation. Indeed, Mr. Justice Stewart's

concurrence, relied upon heavily by the panel in this case, emphasizes that since no inter-district violation was proven (42 U.S.L.W. at 5261):

The formulation of an inter-district remedy was thus simply not responsive to the factual record before the District Court and was an abuse of that court's equitable powers.

As in Bradley, there was no showing of an inter-district violation here. As noted earlier, the district court explicitly found that "[i]t has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs", a finding that was plainly correct. If a metropolitan-wide remedy was improper in Bradley it was improper here. And it surely was not an abuse of discretion for the district court to refrain from ordering metropolitan-wide relief.

CONCLUSION

For the foregoing reasons the petition for rehearing and suggestion for rehearing en banc should be granted.

Respectfully submitted,

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SEPTEMBER 1974.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 1974, I served the foregoing petition upon counsel for all other parties by causing copies thereof to be mailed, air mail, postage prepaid, to:

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