

CERTIFICATE OF INTEREST

Appellate Court No. 98-1807

Short Caption: GAUTREAUX v. CHICAGO HOUSING AUTHORITY

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

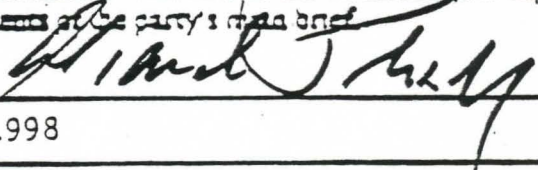
- (1) The full name of every party or amicus the attorney represents in the case:
Dorothy Gautreaux (deceased), Odell Jones (deceased),
Dorothea R. Crenshaw, Eva Rodgers, James Rodgers, and
Robert M. Fairfax, and a class of similarly-situated individuals.
- (2) If such party or amicus is a corporation:
- i) Its parent corporation, if any, and
N/A
- ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:
N/A
- (3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:
BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST

U.S.C.A.—7th Circuit
RECEIVED

JUL 29 1998 FI

CLERK

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

Attorney's Signature: 

Date: April 9, 1998

Attorney's Printed Name: Alexander Polikoff

Address: 17 East Monroe Street - #212

Chicago, IL 60603

Phone Number: 312/641-5570; fax: 312/641-5454

CERTIFICATE OF INTEREST

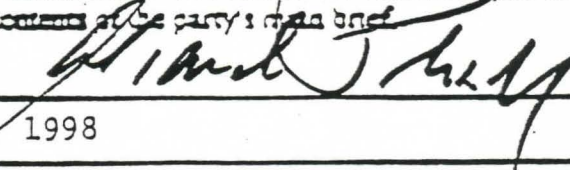
Appellate Court No. 98-1807

Short Caption: GAUTREAUX v. CHICAGO HOUSING AUTHORITY

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

- (1) The full name of every party or amicus the attorney represents in the case:
Dorothy Gautreaux (deceased), Odell Jones (deceased),
Dorothea R. Crenshaw, Eva Rodgers, James Rodgers, and
Robert M. Fairfax, and a class of similarly-situated individuals.
- (2) If such party or amicus is a corporation:
- i) Its parent corporation, if any, and
N/A
- ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:
N/A
- (3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:
BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

Attorney's Signature: 

Date: April 9, 1998

Attorney's Printed Name: Alexander Polikoff

Address: 17 East Monroe Street - #212

Chicago, IL 60603

Phone Number: 312/641-5570; fax: 312/641-5454

CERTIFICATE OF INTEREST

Appellate Court No: 98-2311

Short Caption: GAUTREAUX v. CHICAGO HOUSING AUTHORITY

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

(1) The full name of every party or amicus the attorney represents in the case: Dorothy Gautreaux(deceased)
Odell Jones(deceased), Dorothea R. Crenshaw, Eva Rodgers, James Rodgers, Robert M.

Fairfax, Bernadette Adams, Donnie Allen, Lydia Andrews, Mattie Bailey, Nicole

Bennett, Pilar Boozer, Samantha Cathion, and a class of similarly-situated

(2) If such party or amicus is a corporation: _____ individuals.

i) Its parent corporation, if any; and

N/A

ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:

N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in from of the table of contents of the party's main brief.

Attorney's Signature: Julie Elena Brown

Date: June 8, 1998

Attorney's Printed Name: Julie Elena Brown

Address: 17 East Monroe - #212

Chicago, IL 60603

Phone Number: 312/641-5570; fax: 312/641-5454

U.S.C.A.-7th Circuit
RECEIVED
JUN 8 1998
GINO AGNELLO
CLERK

CERTIFICATE OF INTEREST

Appellate Court No: 98-2311

GAUTREAUX v. CHICAGO HOUSING AUTHORITY

Short Caption: _____

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

(1) The full name of every party or amicus the attorney represents in the case: Dorothy Gautreaux(deceased)
Odell Jones(deceased), Dorothea R. Crenshaw, Eva Rodgers, James Rodgers, Robert M.

Fairfax, Bernadette Adams, Dornie Allen, Lydia Andrews, Mattie Bailey, Nicole

Bennett, Pilar Boozer, Samantha Cathion, and a class of similarly-situated

(2) If such party or amicus is a corporation: _____ individuals.

i) Its parent corporation, if any, and

N/A

ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:

N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in from of the table of contents of the party's main brief.

Attorney's Signature: _____

Date: _____

June 8, 1998

Attorney's Printed Name: _____

Julie Elena Brown

Address: _____

17 East Monroe - #212

Chicago, IL 60603

Phone Number: _____

312/641-5570; fax: 312/641-5454

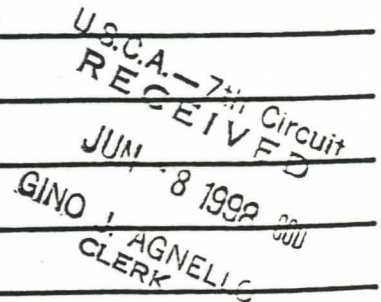


TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATES OF INTEREST, No. 98-1807	
CERTIFICATES OF INTEREST, No. 98-2311	
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	3
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	7
SUMMARY OF ARGUMENT	24
ARGUMENT	26
I. THE ORDERS APPEALED FROM ARE NEITHER FINAL ORDERS NOR APPEALABLE INTERLOCUTORY ORDERS; THIS COURT THEREFORE HAS NO JURISDICTION	26
A. The Orders Appealed from are not Final Judgments	26
B. The Orders Appealed from May not Be Made the Subject of Interlocutory Appeal	28
(1) Both CHA and the District Court Treated the CHA Motion which Led to the February Order as One to Clarify, not Modify, the Judgment Order	28
(2) The February Order Does not Alter the Parties' Legal Relationship	29
(3) The May Order Likewise Does not Alter the Parties' Legal Relationship	31
II. THE FEBRUARY ORDER CORRECTLY INTERPRETS THE JUDGMENT ORDER	32
A. Standard of Review	32

B.	The Plain Language of the Judgment Order Encompasses New Public Housing Funded by HOPE VI	33
C.	Prior Judicial Orders and the Parties' Own Conduct Show that the District Court's Interpretation is Correct	35
D.	The Judgment Order and HOPE VI are Compatible	38
III.	THE FEBRUARY ORDER'S CORRECT INTERPRETATION OF THE JUDGMENT ORDER NEITHER VIOLATES FEDERALISM PRINCIPLES NOR RAISES SEPARATION OF POWERS CONCERNS	42
A.	The February Order's Interpretation of a Remedial Desegregation Order Against a Local Government Body Adheres to the Tailoring Principle	43
B.	The February Order's Interpretation of a Remedial Desegregation Order Against a Local Government Body Comports with the Separation of Powers Principle	46
IV.	THE MAY ORDER IS A PROPER EXERCISE OF THE DISTRICT COURT'S EXTREMELY BROAD AUTHORITY TO SUPERVISE AN EQUITABLE RECEIVERSHIP	50
	CONCLUSION	52
	RULE 32 CERTIFICATE	53

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>ACORN v. Illinois State Bd. of Elections,</u> 75 F.3d 304 (7th Cir. 1996)	2, 26-28
<u>Ahern v. Board of Education, 133 F.3d 975</u> (7th Cir. 1998)	34
<u>Alliance to End Repression v. City of Chicago,</u> 742 F.2d 1007 (7th Cir. 1984)	48-49
<u>Cabrini-Green LAC v. CHA, No. 96 C 6949 (N.D. Ill.</u> Jan. 21, 1997)	40
<u>Continental Illinois Corp. v. Comm'r of IRS, 998 F.2d</u> 513 (7th Cir. 1993)	36
<u>Evans v. Buchanan, 582 F.2d 750 (3rd Cir. 1978)</u>	44
<u>Ferrell v. Pierce, 743 F.2d 454 (7th Cir. 1984)</u>	32
<u>Freeman v. Pitts, 503 U.S. 467 (1992)</u>	48
<u>Gautreaux v. CHA, 296 F. Supp. 907 (N.D. Ill. 1969)</u>	5, 7
<u>Gautreaux v. CHA, 304 F. Supp. 736</u> (N.D. Ill. 1969)	5, 7-8, 33, 47
<u>Gautreaux v. CHA, 384 F. Supp. 37 (N.D. Ill. 1974)</u>	8
<u>Gautreaux v. Landrieu, 498 F.Supp. 1072</u> (N.D. Ill. 1980)	8
<u>Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972)</u>	45
<u>Goluba v. Sch. Dist. of Ripon, 45 F.3d 1035</u> (7th Cir. 1995)	32, 34
<u>Harris v. Rivera, 20 F.3d 507 (1st Cir. 1994)</u>	34
<u>Hills v. Gautreaux, 425 U.S. 284 (1976)</u>	43-44, 47
<u>Liddell v. State of Missouri, 731 F.2d 1294</u> (8th Cir. 1984)	44
<u>Major v. Orthopedic Equipment Co.,</u> 561 F.2d 1112 (4 th Cir. 1977)	26
<u>Matter of Cassidy, 892 F.2d 637 (7th Cir. 1990)</u>	29, 36

<u>Mikel v. Gourley</u> , 951 F.2d 166 (8th Cir. 1991)	30-31
<u>Milliken v. Bradley</u> , 433 U.S. 267 (1977)	44
<u>Missouri v. Jenkins</u> , 495 U.S. 33 (1990)	44
<u>Mobil Oil Corp. v. Higgenbotham</u> , 436 U.S. 618 (1978)	49
<u>Motorola, Inc. v. Computer Displays Int'l. Inc.</u> , 739 F.2d 1149 (7th Cir. 1984)	28, 29, 30
<u>Parents for Quality Education v. State of Indiana</u> , 977 F.2d 1207 (7th Cir. 1992)	48
<u>Resolution Trust Corp. v. Ruggiero</u> , 994 F.2d 1221 (7th Cir. 1993)	26
<u>Rufo v. Inmates of Suffolk County Jail</u> , 502 U.S. 367 (1992)	32
<u>Rumpke of Indiana, Inc. v. Cummins Engine Co.</u> , 107 F.3d 1235 (7th Cir. 1997)	34
<u>Schering v. Illinois Antibiotics Co.</u> , 62 F.3d 903 (7th Cir. 1995)	32
<u>S.E.C. v. Hardy</u> , 803 F.2d 1034 (9th Cir. 1986)	50
<u>S.E.C. v. Investment Corp. of America</u> , 369 F.2d. 383 (7 th Cir. 1966)	29
<u>Stewart v. Taylor</u> , 104 F.3d 965 (7th Cir. 1997)	2
<u>Swann v. Charlotte-Mecklenburg Board of Educ.</u> , 402 U.S. 1 (1971)	50
<u>Swint v. Chambers County Commission</u> , 514 U.S. 35 (1995)	2
<u>United States v. Bloom</u> , No. 98-1361 (7th Cir. July 13, 1998)	2
<u>United States v. Fordice</u> , 505 U.S. 717 (1992)	48
<u>United States v. Rodgers</u> , 461 U.S. 677 (1983)	50
<u>Wilder v. Bernstein</u> , 49 F.3d 69 (2nd Cir. 1995)	34
<u>Youakim v. McDonald</u> , 71 F.3d 1274 (7th Cir. 1995)	32, 37
<u>Young v. Pierce</u> , 685 F. Supp. 975 (E.D. Tex. 1988) ...	43, 44

STATUTES

42 U.S.C. §1437l	6, 14
42 U.S.C. §1437p(b)(2)	40

OTHER AUTHORITIES

HOPE VI Guidebook	14-15, 39
63 Fed. Reg. 15577-15584	22

STATEMENT OF JURISDICTION

Because Appellants' jurisdictional statement is not complete and correct, Appellees provide this statement of jurisdiction.

The district court has jurisdiction over this civil action, which arises under the Fourteenth Amendment of the Constitution and 42 U.S.C. §§1981 and 1983, pursuant to 28 U.S.C. §§1331 and 1334.

The orders appealed from were entered by the District Court on February 23, 1998 (the "February Order," AA-18) and May 19, 1998 (the "May Order," AA-23).¹ Notices of appeal were filed on March 26, 1998 and May 20, 1998.

Each of the orders appealed from merely reaffirms previous injunctive orders. The February Order confirms that the 1969 judgment order provisions respecting "Dwelling Units" apply to new Dwelling Units funded under the HOPE VI statute. The May Order confirms that the 1987 Receivership Order requirement that CHA cooperate with the Receiver applies to applications for Hope VI funding for Dwelling Units. Neither the February nor the May Order alters pre-existing injunctive requirements, or "set[s] forth the steps . . . to comply" with the earlier injunctions.

¹ "AA" refers to the separately bound Appellees' Appendix accompanying this brief. Except for reported cases and other published materials, most documents referred to in this brief, or the relevant excerpts therefrom, are included in Appellees' Appendix or in the separately bound Receiver's Appendix ("RA"), and all are in the record on appeal. Documents not cited to AA or RA are cited directly to the record on appeal or to CHA's Brief or Supplemental Appendix.

ACORN v. Illinois State Board of Elections, 75 F.3d 304, 306 (7th Cir. 1996). The orders appealed from are therefore neither final judgments appealable under 28 U.S.C. §1291, nor appealable interlocutory orders under 28 U.S.C. §1292. Accordingly, the Court lacks jurisdiction and the appeals should be dismissed.

Two additional points must be noted. First, pendent appellate jurisdiction, CHA's only stated ground for the Court's jurisdiction over the May Order, has been seriously questioned, Swint v. Chambers County Commission, 514 U.S. 35, 43-51 (1995); this Court has declined to exercise such jurisdiction since Swint. See United States v. Bloom, No. 98-1361 (7th Cir., July 13, 1998). Second, while the HOPE VI application that was the subject of the May Order was filed on June 29, 1998, the May Order appears to fall within the exception to the mootness doctrine for issues "capable of repetition, yet evading review." See Stewart v. Taylor, 104 F.3d 965, 969 (7th Cir. 1997).

Because determination of the jurisdictional issues may be aided by a full statement of the facts, a more complete jurisdictional discussion and argument is included below as Part I of the Argument.

ISSUES PRESENTED FOR REVIEW

1. Does this Court have jurisdiction over orders which merely reaffirm previous injunctive orders and do not alter pre-existing injunctive requirements, do not set forth steps to comply with them, and do not change the legal relationship of the parties?

2. Does the district court's February Order correctly interpret the 1969 judgment order to cover HOPE VI-funded new public housing "Dwelling Units" in the same manner as it applies to Dwelling Units funded by other sources, where the plain language of the judgment order, a series of subsequent orders, and the conduct and views of the parties all support such interpretation, where the provisions of the judgment order are compatible with those of the HOPE VI statute, and where such HOPE VI-funded Dwelling Units can aid in remedying still unremedied Fourteenth Amendment violations by a local government body?

3. Does the district court's February Order, which merely reaffirms a remedial order respecting still unremedied local government conduct in violation of the Fourteenth Amendment, (A) comport with the federalism principle of tailoring a remedy to the nature and extent of the constitutional violation by limiting its scope to HOPE VI-funded new, non-elderly public housing, the very programmatic activity within which the original constitutional wrong occurred, and (B) comport with separation of powers principles because it does not conflict with or "rewrite" any HOPE VI requirements and is directed solely at the constitutional violator, a local government body?

4. In the exercise of a district court's extremely broad authority to supervise an equitable receivership, did the district court have the power to enter the May Order, which merely reaffirms the Receivership Order's existing cooperation requirement respecting the development of HOPE VI-funded new, non-elderly public housing?

STATEMENT OF THE CASE

These appeals arise from a disagreement between the plaintiffs and the defendant, Chicago Housing Authority, as to whether a new source of federal funding to develop public housing is subject to the remedial desegregation orders entered in this case.

Following a finding of liability, Gautreaux v. CHA, 296 F.Supp. 907 (N.D. Ill. 1969), a judgment order was entered in 1969 to remedy CHA's intentional racial discrimination in violation of the Fourteenth Amendment. Gautreaux v. CHA, 304 F.Supp. 736 (N.D. Ill. 1969) (AA-2.) Among other things, the order obligates CHA to develop public housing "dwelling units" in the future under locational prescriptions designed to afford plaintiff class families, over time, non-segregated housing opportunities. (Id. 737-39.)

For almost two decades CHA failed to perform its judgment order obligations. After denying several prior motions for a Receivership, in 1987 the district court appointed a Receiver to assume CHA's development responsibilities, including as to "future" programs, and, among other things, directed CHA to cooperate with the Receiver in the performance of the latter's court-ordered duties. ("Receivership Order," AA-10.)

The present consolidated appeals are from two post-judgment orders entered in 1998. The first, the "February Order" (AA-18), determines that the 1969 judgment order's locational prescriptions apply to the development of new, non-elderly public

housing "Dwelling Units" funded under a federal statute known as "HOPE VI," just as they do to such units funded by other sources. HOPE VI is an urban redevelopment statute under which grants are made to enable public housing authorities to carry out a variety of activities, one of which is the development of conventional public housing. (42 U.S.C. 1437l (note), AA-127.) The February Order does not determine that the judgment order applies to all HOPE VI funds or activities, but only to the development of such housing. (AA-22.)

The second order appealed from, the "May Order," was entered when, following entry of the February Order, CHA's Executive Director said he would "'fight' and oppose the Receiver in all respects," and added that "if anyone wants to stop the CHA, they are going to have to sue." (AA-199, 200.) The May Order determines that the Receivership Order, including its requirement that CHA cooperate with the Receiver, applies to CHA's proposed application for a 1998 HOPE VI award, and obligates CHA to cooperate with the Receiver in its preparation. (AA-24.)

Stays of both orders were denied by the district court (AA-25, 27), and by this Court. (Order of May 29, 1998.)

CHA's public housing system remains heavily segregated with the original, wrongfully sited units (Plaintiffs' Response to CHA's Emergency Motion to Clarify Injunction, December 19, 1997, pp. 11-12), and most of the families who comprise the plaintiff class have yet to receive relief. (Memorandum Opinion and Order, August 26, 1997, p. 3.)

STATEMENT OF FACTS

Entry of Judgment Order.

In a class action filed in 1966, black tenants in and applicants for Chicago Housing Authority (CHA) public housing charged CHA with violating their rights under the Fourteenth Amendment of the Constitution by adopting tenant assignment procedures and intentionally choosing sites for non-elderly public housing "for the purpose of maintaining existing patterns of residential separation of races in Chicago." Gautreaux v. CHA, 296 F.Supp. 907, 908 (N.D. Ill. 1969).

In 1969, based on "thousands of pages of depositions, affidavits and exhibits," Judge Austin ruled that CHA had "imposed a Negro quota" (id. 909) and persistently applied "a deliberate policy to confine public housing to all Negro or immediately adjacent changing areas" (id. 910), all in pursuit of a "deliberate policy to separate the races . . ." (Id. 914.) Later in 1969, Judge Austin entered a remedial judgment order. Gautreaux v. CHA, 304 F. Supp. 736 (N.D. Ill. 1969) (AA-2.) Neither ruling was appealed.

Among other things, the judgment order defined "Public Housing Areas" as "Limited" (30% or more black population) and "General" (less than 30% black population). (Id. 737.) It defined "Dwelling Unit" as:

"[A]n apartment or single family residence which is to be initially made available to and occupied by a low income, non-elderly family, subsequent to the date hereof, directly or indirectly by or through CHA, whether in a structure owned in whole or in part by CHA (whether or not newly

constructed) or to be otherwise made available for occupancy by or through CHA to such a family. 'Dwelling Units' include 'Leased Dwelling Units' as hereinafter defined." (Id.)

The judgment order then prescribed a ratio (initially 3 to 1, later changed to 1 to 1) for supplying future Dwelling Units in both General and Limited Areas that would, over time, afford plaintiff class families locational options other than the segregated ones to which CHA had relegated them. (Id. 737-39, Article III of the judgment order.) The order also enjoined CHA from initiating or carrying out "any plan" for Dwelling Units not in conformity with it (id. 738), and directed CHA to use its best efforts to increase the supply of Dwelling Units as rapidly as possible. (Id. 741.) The court retained jurisdiction to modify or supplement the order to achieve results consistent with it. (Id.)

CHA's Failure to Perform Judgment Order Duties.

CHA did not perform its judgment order duties. In 1974, Judge Austin said, "[T]he effect and import of my orders have been avoided and frustrated for over five years." Gautreaux v. CHA, 384 F.Supp. 37, 38 (N.D. Ill. 1974). In 1980, after determining that despite continuous litigation CHA had made "negligible progress" in providing remedial housing, Judge Crowley nevertheless denied "[w]ith great reservation," and without prejudice, plaintiffs' request to appoint a receiver to take over the development of CHA's new public housing. Gautreaux v. Landrieu, 498 F.Supp. 1072, 1075 (N.D. Ill. 1980). In 1983

Judge Aspen did appoint a receiver, but "based on [CHA] promises of compliance" he vacated his order in 1984 to afford CHA "still another opportunity to get its own house in order." (Order of July 8, 1987, AA-113.)

Appointment of Receiver.

On August 14, 1987, having determined that CHA had not kept its promises, Judge Aspen concluded that he had "no reasonable alternative but to exercise [the court's] inherent power to effectuate its own orders" by appointing a receiver. (Receivership Order, AA-10.)

On May 14, 1987, Judge Aspen had granted plaintiffs' motion to appoint a receiver, but "delayed implementation of that order for a sixty-day period in order to allow the parties an opportunity to work out an alternative remedy acceptable to the Court." (AA-111.) CHA moved to reconsider and requested an evidentiary hearing. Judge Aspen noted that "although we find ample documentation in the record as it exists today to fully warrant appointment of a receiver, the Court has granted CHA's request that an evidentiary hearing be held on the motion for reconsideration," adding that "whenever CHA so requests, we will promptly schedule the evidentiary hearing." (*Id.*)

In his July 8, 1987 opinion, rejecting the CHA's request for broad discovery relating to disputes CHA claimed to be having with HUD, Judge Aspen concluded, "CHA, as it has demonstrated, lacks the ability and competence to comply with the orders of this Court" (AA-114), and wrote further:

"Enough is enough. It is fundamentally clear that in light of CHA's track record, not only in CHA's present form but also in its multitude of previous incarnations, this case is well beyond the point where bureaucratic squabbles between local and federal agencies will be tolerated as an excuse for noncompliance . . . " (AA-113.)

Shortly thereafter, CHA withdrew its opposition to the Receivership. After a selection panel reviewed a number of candidates and recommended three finalists (AA-112), The Habitat Company and its chairman, Daniel E. Levin, were selected by Judge Aspen and were appointed, jointly, as Receiver by an order dated August 14, 1987. ("Receivership Order," AA-10.)

Terms of Receivership Order.

The Receivership Order authorizes and directs the Receiver to assume "all powers of CHA . . . necessary and incident" to CHA's existing non-elderly public housing development programs, and "all CHA non-elderly public housing development programs which may in the future be authorized by HUD during the pendency of [the action]." (AA-11.) "All powers" is specifically defined to include "submission to HUD of applications for funding, development programs and other documents." (AA-12.) The order also directs CHA to "cooperate with" and "assist" the Receiver in the performance of its court-ordered duties:

"CHA . . . shall provide full cooperation and assistance to, and shall not interfere with, the Receiver in the performance of the Receiver's responsibilities hereunder, including without limitation providing full access to all [relevant] information. . . " (AA-15.)

Receiver's Performance.

Following entry of the Receivership Order the Receiver carried out non-elderly public housing development in two contexts.

Incremental Dwelling Units; Demonstration Program and Joint Venture. First, in a large number of Chicago neighborhoods the Receiver developed new or "incremental" Dwelling Units that increased CHA's aggregate stock of public housing. (Such units are to be distinguished from "replacement" units that replace existing units being demolished.) As of December 31, 1997 the Receiver had developed or had under construction approximately 1,600 such units. (Hickman Aff. par. 72, Ex. 28, p. 1, AA-186, 190.)

In 1990 CHA requested authority to undertake a "demonstration program" to show that it had acquired the institutional capacity to develop public housing in conformance with the judgment order. By agreed order, funding for 350 public housing units was diverted from the Receiver to CHA for that purpose. (Id. par. 77, AA-187-88.) When at the end of the two year demonstration period CHA had not succeeded in developing any demonstration program units, the demonstration program was by agreement extended for another two-year period. (Id. par. 78, AA-188.) Toward the end of the extended period CHA had still developed no units. (Id. par. 79, AA-188.)

CHA's executive director then approached the Receiver and suggested entering into a joint venture with Chicago Metropolitan Housing Development Corp. ("CMHDC"), an entity created by CHA, to

develop the demonstration program units and to assist CHA in obtaining development expertise. (Id.) The Receiver agreed and, with court approval, the authority to develop the demonstration program units was transferred to a Joint Venture created for the purpose between the Receiver and CMHDC; management and control of the Joint Venture was placed with the Receiver. (Id. pars. 79-80, AA-188.)

The "reason behind the Joint Venture was for CMHDC to develop expertise under the wing of the Receiver, so it could become the development arm of the CHA." (HUD Memorandum, July 29, 1997, AA-163.) CHA failed to fulfill its Joint Venture obligations (Hickman Aff. par. 80, AA-188), but as of December 31, 1997, under the direction of the Receiver, most of the demonstration program units had been completed or were under construction or in pre-construction phases of development. (Id. par. 72, Ex. 28, pp. 4-5, AA-186, 191-92.)

Replacement Dwelling Units. Second, beginning in 1993 the Receiver, alone or through the Joint Venture, was authorized by a series of court orders to develop "replacement" Dwelling Units, usually in "revitalizing" neighborhoods. Replacement units do not increase CHA's aggregate stock of public housing dwellings, but are new units that replace older units being demolished. "Revitalizing" areas are "Limited Areas" as to which the court has made a determination upon a "sufficient showing of 'revitalizing' circumstances such that a responsible forecast of economic integration, with a longer term possibility of racial desegregation, could be made" (Order of August 14, 1995,

AA-94.) Thus, Dwelling Units may be provided in revitalizing areas without being matched one for one with units in General Areas.

As of December 31, 1997, the Receiver or the Joint Venture had been given authority to develop about 1,644 units of replacement housing in neighborhoods around CHA's Lawndale, Washington Park, Henry Horner and Cabrini-Green developments; 187 of these units around Lawndale, Washington Park and Henry Horner are currently under construction and 219 have been completed. (Hickman Aff. par. 72, Ex. 28, pp. 7-8, AA-186, 193-94.)

In 1993 the first replacement housing order authorized the Joint Venture to develop 18 replacement public housing units in the North Lawndale neighborhood, 187 around CHA's Washington Park Development in the North Kenwood-Oakland neighborhood, and 190 units around CHA's Cabrini-Green Development. (Order of December 10, 1993, AA-85; see discussion at AA-39-42.) (The Cabrini-Green replacement housing is part of a Cabrini-Green "HOPE VI" project which is discussed below.)

In 1995 the second replacement housing order (effectuated in two steps) designated a "Horner Revitalizing Area" around CHA's Henry Horner Development and authorized the Receiver to develop 466 replacement units within it. (Orders of March 9, and August 14, 1995, AA-91, 93.)

In 1996 the third replacement housing order designated a "North Kenwood-Oakland Revitalizing Area" around CHA's Washington Park Development and authorized the Receiver to develop up to 241 replacement units within it. (Order of June 3, 1996, AA-106.)

CHA did not object to any of these orders authorizing the Receiver or the Joint Venture to develop replacement units.²

HOPE VI Replacement Units. HOPE VI replacement units are a subset of replacement Dwelling Units. The HOPE VI statute, enacted by Congress in 1992, authorizes "grants to carry out an urban revitalization demonstration program involving major reconstruction of severely distressed or obsolete public housing." (42 U.S.C. §1437l (note), AA-127.) Among other things, funding may be used for replacement public housing. (Id.)

HOPE VI replacement housing is "conventional" public housing (AA-128), and "must be" developed in accordance with the statutes and regulations governing non-HOPE VI-funded public housing:

"Public housing development (including on-site reconstruction as well as construction of off-site housing) funded by HOPE VI must be conducted in accordance with 24 CFR part 941." (HOPE VI Guidebook at 1.D.1., AA-131.)

(Part 941, entitled "Public Housing Development," sets forth regulations applicable to development of housing by public housing authorities.)

According to HUD's HOPE VI "Guidebook" (HUD has not issued regulations - AA-131) one of the "key elements" in achieving the purposes of HOPE VI is, "Lessening concentrations of poverty by

² Following entry of the two orders on appeal, on June 19, 1998, a fourth district court order designated an "ABLA Revitalizing Area" around CHA's ABLA Development, to become effective upon advice that a 1998 HOPE VI award for the Area has been made. The order authorized the Receiver to develop such number of replacement units within it as are authorized by a further order of court. (Order of June 19, 1998, AA-82.)

placing public housing in nonpoverty neighborhoods, or by promoting mixed-income communities where public housing once stood alone. . . ." (Id. 130, emphasis in original.) HOPE VI replacement housing need not be located on or near the site of the housing it replaces. (Id. 131.)

The replacement housing authorized in Lawndale and in the Horner and North Kenwood-Oakland Revitalizing Areas is unrelated to HOPE VI; the replacement housing authorized at Cabrini-Green and in the ABLA Revitalizing Area is to replace housing to be demolished pursuant to HOPE VI plans. (AA-41-42, 91-96, 78.)

History of CHA HOPE VI Awards.

CHA has so far received three HOPE VI "implementation" awards for its Cabrini-Green, ABLA/Horner, and Taylor Developments, and a "planning grant" for its ABLA, Horner and Rockwell Gardens developments.

Cabrini-Green. CHA's first HOPE VI implementation award, in late 1993, was for the area around CHA's Cabrini-Green Development. (Hickman Aff. par. 18, AA-171.) In a series of letters to HUD beginning in 1993, and in its Revised Plan for Cabrini in 1995, CHA represented that Cabrini-Green HOPE VI replacement housing would be sited in accordance with Gautreaux requirements. The Revised Plan reads:

"All sites [for replacement units] will comply with . . . the locational requirements of the Gautreaux v. Chicago Housing Authority litigation, or waivers thereof will be sought." (AA-149-50; for the CHA letters see AA-136, 139 and 153.)

The Receiver was unaware of CHA's Cabrini application; upon learning of it after its submission to HUD, and believing that it was the responsibility of the Receiver to develop HOPE VI-funded replacement housing, the Receiver began discussions with CHA.

(Hickman Aff. pars. 18, 19, AA-171.) By agreement with CHA the Receiver then assumed a "development management" role at Cabrini, involving land use planning, preparation and issuance of a request for proposals, working with architects and planners, and the like. (Id. pars. 28-31, AA-173-74.) In 1995 the Chairman of the CHA Board, Edwin Eisendrath, wrote to the Receiver:

"This will confirm our understanding and agreement that as Receiver under the court order in the Gautreaux case, you will perform the function of CHA's 'development manager' for the Cabrini Green development program, including the HOPE VI program, similar to the manner in which you are functioning in the Henry Horner Homes development program." (AA-154.)³

The Receiver believed that:

"[O]perating under the title of development manager pursuant to an agreement with the CHA . . . has permitted [the Receiver] to fulfill what he understands to be the obligation that he assumed when he became the Court's Receiver, and to do so in a manner that has been acceptable to the CHA and has avoided unnecessary disputes." (AA-53-54.)

³ The "Henry Horner Homes development program" refers to the 1995 orders designating the Horner area as "revitalizing" and authorizing the Receiver to develop replacement housing within it. These orders were entered in connection with the settlement of a separate tenants' lawsuit against CHA and HUD which involved demolition of existing Horner units and their replacement by 466 authorized replacement units. (AA-93, 97.) Since the Horner settlement contemplated demolition and some rehabilitation of existing public housing, neither of which is a Receiver responsibility, and such non-Receiver work had to be coordinated with the development of replacement housing which is the Receiver's charge, CHA and the Receiver arrived at a working arrangement under which their respective Horner activities were (and are still) being coordinated. (Id.; Levin Aff. par. 14, AA-210.)

As discussed below, CHA ultimately declined to execute a Cabrini development management agreement, and in September 1996 asked the Receiver to stop work at Cabrini because the City had assumed substantial responsibility and "CHA's role at this point is limited." (Id. par. 44, AA-178.) The Receiver responded that it intended to continue its work and would pursue clarification of its role with the City. (Id. par. 45, AA-179.) In 1997, at CHA's request, the Receiver submitted a development proposal to HUD respecting the first Cabrini HOPE VI replacement units. (Id. pars. 52-53, AA-181.)

HOPE VI Planning Grant Request. In 1995 CHA submitted a successful HOPE VI planning grant request to HUD for its ABLA, Horner and Rockwell Gardens Developments. Among other things CHA's request said:

- housing would be developed "in concert with the mandates of the Gautreaux decision. . . ."
- to the end of "building and improving upon programs developed in the past five years pursuant to the Gautreaux decision . . . we [CHA] have already begun planning the partnerships with the multiplicity of partners necessary"
- among such partners are "the Gautreaux Receiver and attorneys, as the court mandates still have an impact on all new public housing planning in Chicago."
- "the Development Team . . . is composed of CMHDC and Habitat as the non-profit partnership overseeing all development activity in concert with the . . . present requirements of the Gautreaux decisions" (AA-142-45.)

ABLA/Horner. In 1996 CHA submitted its second successful HOPE VI implementation application to HUD. Prepared with the

assistance of the Receiver (Hickman Aff. par. 54, AA-181-82), this application was for CHA's ABLA and Horner developments (both locations were included in a single application). The application, among other things, said:

"Implementation of the [HOPE VI] program can begin quickly under the development management of The Habitat Company since they are fully operational as Receiver for CHA's Scattered Site program."

"Habitat will be responsible for implementing the plan contained in this application. The financial arrangement will be similar to that approved by HUD for development as the Receiver."

"The contract with The Habitat Company as development manager will enhance the CHA ability to control costs and expand the supply of housing more quickly. Habitat is currently in the process of developing 466 Replacement Units at Horner and will provide continuity between the existing Replacement Program and the Gautreaux HOPE VI Program."

"These sites [for certain Horner replacement units] were the subject of a court approved waiver under the Gautreaux Desegregation case and have been determined to be 'Revitalizing Areas' under the provisions of that case."

"The units [certain HOPE VI replacement units] will avoid or lessen concentrations of very low-income families by requesting a Gautreaux Revitalizing Waiver" (AA-156-61.)

The development management agreement between CHA and the Receiver, referred to in the application, was later executed. (Hickman Aff. par. 55, AA-182.)

Taylor. CHA's third successful HOPE VI implementation application, also in 1996, was for CHA's Robert Taylor Homes development. The Receiver did not participate in this application because it was advised by CHA (erroneously) that no replacement housing was to be proposed. (Hickman Aff. par. 58-59, AA-182-83.)

Deterioration of CHA/Receiver Cooperation.

In 1996, Joseph Shuldiner, Executive Director of CHA, wrote to Henry Cisneros, then Secretary of HUD:

"As you know, whether as receiver for our scattered site units, or as development manager for the replacement units at Cabrini, Horner, and the Lakefront [Washington Park], the Habitat Company administers our new construction efforts." (AA-155.)

However, beginning in late 1996 CHA's cooperation with the Receiver began to deteriorate. Among other things, CHA declined to execute the development management agreement for Cabrini-Green and asked the Receiver to stop work there. Because activity at Cabrini had come to a virtual halt by reason of a separate tenant lawsuit against CHA, the Receiver chose not to bring this matter to the attention of the district court immediately. (Levin Aff. par. 21, AA-212; Hickman Aff. par. 47, AA-179.)

By May 1997 CHA's willingness to cooperate with the Receiver had so deteriorated in the ongoing replacement housing work at Horner (Cabrini was still stalled), that the Receiver requested the assistance of the district court. (Levin Aff. par. 23, AA-212.) In that context the Receiver advised the district court of CHA's lack of cooperation with HOPE VI development as well. (Id. par. 26, AA-213.)

(At about this time, without the participation of the Receiver, CHA submitted another HOPE VI implementation application for ABLA, but this application was rejected by HUD. Hickman Aff. par. 9, AA-167.)

The court urged CHA and the Receiver to try to work out their differences, offering to appoint a special master as mediator. For a time the parties negotiated, but the negotiations ended after CHA filed its Emergency Motion to Clarify the judgment order on September 30, 1997. (Id. pars. 28-38, AA-173-76.)

Proceedings Leading to February Order.

In the district court CHA treated its motion as one to clarify, not to modify, the judgment order (CHA Reply Memorandum in Support of Emergency Motion to Clarify Injunction, January 16, 1998, pp. 2-3), and made clear that it was not seeking to terminate the Gautreaux remedial process - "The Gautreaux remedy should stay in place." (AA-66.) It also acknowledged - "no question about it" - that HOPE VI replacement housing was covered by the judgment order's definition of "Dwelling Unit." (AA-67.)

HUD took the position that whether the judgment order covered HOPE VI replacement housing was a "non-issue" as far as it was concerned:

"THE COURT: . . . I take it that my ruling really is a non-issue as far as HUD is concerned?"

"MR. JENSEN [representing HUD]: I think that is true . . . We had very definite opinions, very much reflected in Mr. Shakman's brief of the Receiver, that indeed the Receiver has all the responsibility connected with the development, whether HOPE VI or otherwise." (AA-58.)

This statement to the court is consistent with an earlier memorandum from HUD's Assistant General Counsel for the Midwest,

written in July, 1997, stating, "We also believe that any funds under HOPE VI which go to replacement housing are currently a Receiver responsibility." (AA-163.)

In its February Order, after considering HOPE VI legislative and regulatory materials and concluding, "We see no incompatibility between the HOPE VI program and the judgment order," the district court ruled that the judgment order applies to HOPE VI replacement housing. (AA-21.)

Events Following February Order.

Following entry of the February Order the Receiver invited CHA and HUD to a meeting to discuss cooperation. At the meeting held on March 10, 1998, according to two uncontested affidavits of the Receiver (AA-195-96; RA-452),⁴ CHA's Executive Director Shuldiner expressed the following views, among others:

"CHA intended to proceed with its own program for development of new housing without the Receiver, and invited us to 'try to stop him.'"

"[Mr. Shuldiner] would 'fight' and would oppose the Receiver in all respects."

"[I]f anyone wants to stop the CHA, they are going to have to sue." (AA-197-200.)

On March 18, 1998 plaintiffs moved for further relief in the form of an order directing CHA to take specified steps vis-a-vis the Receiver pursuant to its duty of cooperation. CHA then moved to stay the February Order pending appeal; stay was ultimately

⁴ In the district court proceedings the Receiver filed a substantial number of affidavits, none of which have been contested by CHA. See Receiver's Appendix.

denied, both in the district court (AA-26), and in this Court. (Order of May 29, 1998.)

After the district court declined to stay its February Order, and with plaintiffs' further relief motion still pending, the Receiver moved for an order directing CHA to cooperate with it in preparing an application for a new HOPE VI competition. (On March 31, 1998, HUD had issued a notice of funding availability respecting another "round" of HOPE VI awards with an application deadline of June 29, 1998. 63 Fed. Reg. 15577. The Receiver had requested CHA to cooperate with it in applying for the HOPE VI funds, but CHA failed to respond. RA-485-86.) The Receiver's motion was granted on May 19, 1998 -- the May Order. The Order held that the cooperation provision of the Receivership Order applied to HOPE VI applications, and therefore obligated CHA to cooperate with the Receiver in preparing the 1998 HOPE VI application. (AA-24.) Stay of the May Order was denied by the district court (AA-28) and by this Court on May 29, 1998.

On May 21, 1998 the district court denied plaintiffs' motion for further relief as moot, saying that problems detailed in the motion concerning CHA's HOPE VI-related activity had been addressed by its May Order, and that to the extent the motion raised issues unrelated to the Receiver's role in HOPE VI, the court believed it best that the Receiver bring those issues to the court's attention if it so chose. (AA-30.)

On June 19, 1998, CHA, the Receiver and the plaintiffs filed a joint motion with the district court for an order designating an ABLA Revitalizing Area in connection with the application for

a HOPE VI grant being prepared jointly (pursuant to the May Order) by the Receiver, CHA and the City of Chicago, to be filed with HUD on June 29, 1998. (AA-77.) The resulting June 19, 1998, order designates an "ABLA Revitalizing Area" to be effective upon advice to the Court that a FY1998 HOPE VI grant has been made to the Receiver and CHA pursuant to their joint application, and authorizes the Receiver to develop new public housing units within the Revitalizing Area subject to terms and conditions to be specified by further order of court. (AA-82.)

Current Status of Desegregation Remedy.

As of a recent date (November 26, 1997) CHA's public housing system remained heavily segregated with the very units found by Judge Austin to have been wrongfully sited (Plaintiffs' Response to CHA's Emergency Motion to Clarify Injunction, December 19, 1997, pp. 11-12), and most of the families who comprise the plaintiff class have yet to receive relief. (Memorandum Opinion and Order, August 26, 1997, p. 3.)

SUMMARY OF ARGUMENT

I. The Court lacks jurisdiction to consider these appeals. Both the February and the May Orders merely reaffirm previous injunctive orders; neither alters pre-existing injunctive requirements, sets forth steps to comply with them, or changes the parties' legal relationship. Therefore neither is an appealable order.

II. Based on both the plain language of the judgment order and the district court's sound conclusion that the judgment order and HOPE VI are compatible, the February Order's determination that the judgment order applies to HOPE VI-funded new, non-elderly replacement housing is correct. The determination is further supported by a series of judicial orders and the conduct of the parties, and is entitled to deference given that the district judge has presided actively over the judgment order for 17 years.

III. The February Order's correct interpretation of the judgment order comports with: (A) the federalism principle of tailoring a remedy to the nature and extent of the constitutional violation, for the Order's scope is limited to HOPE VI-funded new non-elderly public housing, the very programmatic activity within which the original wrong occurred; and (B) separation of powers principles because it does not conflict with ("rewrite") any HOPE VI requirements. The February Order is a reasonable method of helping to remedy a still-unremedied constitutional wrong,

directed solely at the constitutional violator, a local government body, whose duty it is to take all steps necessary to eliminate the persisting effects of its wrongdoing.

IV. The May Order, which merely reaffirms the Receivership Order's cooperation requirement, is an appropriate exercise of the district court's extremely broad authority to supervise an equitable receivership.

ARGUMENT

I. THE ORDERS APPEALED FROM ARE NEITHER FINAL ORDERS NOR APPEALABLE INTERLOCUTORY ORDERS; THIS COURT THEREFORE HAS NO JURISDICTION.

A. The Orders Appealed from are not Final Judgments.

Post-judgment proceedings are treated as "free-standing litigation." ACORN v. Illinois State Board of Elections, 75 F.3d 304, 306 (7th Cir. 1996). Post-judgment orders are treated as final judgments only when they conclude a discrete collateral proceeding, such as a proceeding to award attorneys' fees, Resolution Trust Corp. v. Ruggiero, 994 F.2d 1221, 1224 (7th Cir. 1993), or when an order "set[s] forth the steps . . . to comply with [an] injunction" previously entered. ACORN, 75 F.3d at 306. An order clarifying an injunction is not a final judgment under 28 U.S.C. §1291. Major v. Orthopedic Equipment Co., 561 F.2d 1112, 1115 (4th Cir. 1977).

The February Order merely clarifies that the original judgment order applies to "Dwelling Units" funded by HOPE VI as it does to Dwelling Units funded in other ways; it sets forth no steps to be taken by, nor in any way particularizes the conduct required of, CHA. It does not change the obligations imposed on CHA by the judgment order. In denying CHA's motion for a stay pending appeal of the February Order, the district court said:

"The CHA's original motion to us was to clarify the injunction, and it insisted that it was not asking for a modification thereof. In fact, at oral argument, the CHA's attorney stated that 'We agree that the HOPE VI new construction . . . does fall within the definition of

dwelling unit, no question about it.' This was, of course, our eventual holding; an exemption for HOPE VI would have required a modification of the judgment order. We therefore doubt that the Seventh Circuit's jurisdiction may be predicated on 28 U.S.C. § 1292(a)(1). See ACORN v. Illinois State Bd. of Elections, 75 F.3d 304, 306 (7th Cir. 1996) ('[I]nterpretations of injunctions as distinct from modifications of them are not appealable. . . , [and this] injunction has not been changed.'). We also doubt that 28 U.S.C. § 1291 will suffice for appellate jurisdiction, as we think it is a stretch to say, as the CHA does (in its Seventh Circuit docketing statement with a citation to ACORN, supra), that our order 'sets forth the steps that the CHA must take to comply with the injunction.' (We note. . . that the Seventh Circuit will, of course, decide its jurisdiction for itself.)" (AA-26.)

Following entry of the February Order, litigation continued in the district court on related issues. The May Order, also being appealed, is one result of that continuing litigation.

The May Order determined that the cooperation obligation in the 1987 Receivership Order applies to new public housing to be developed as part of a CHA HOPE VI project, and obligates CHA to cooperate with the Receiver in preparing a HOPE VI application to the extent the application proposes development of such housing. The May Order thus merely clarifies the Receivership Order:

"Our order of August 14, 1987, appointing the Receiver, obligates the CHA to cooperate with the Receiver and to provide the Receiver with the information it needs. It is now clear, if it was not before, that this means that the CHA is to coordinate its 1998 HOPE VI application with the Receiver and to provide the Receiver with the information it has requested." (AA-24.)

The May Order also resulted in further district court proceedings, including an agreed order of June 19, 1998, respecting the 1998 HOPE VI application. (AA-82-84.)

Because neither the February Order nor the May Order changes CHA's pre-existing obligations, and because neither "set[s] forth the steps . . . to comply with [an] injunction" previously entered, neither is a final judgment. ACORN, 75 F.3d at 306.

B. The Orders Appealed from May not Be Made the Subject of Interlocutory Appeal.

Orders that merely clarify but do not modify an injunction may not be made the subject of an interlocutory appeal under 28 U.S.C. §1292(a)(1). ACORN, 75 F.3d at 306; Motorola, Inc. v. Computer Displays Int'l., Inc., 739 F.2d 1149, 1155 (7th Cir. 1984).

- (1) Both CHA and the District Court Treated the CHA Motion which Led to the February Order as One to Clarify, Not Modify, the Judgment Order.

When plaintiffs contended that CHA's motion was really seeking a modification of the judgment order and should be held to the standards applicable to such requests, CHA responded:

"The CHA has not asked the Court to remove HOPE VI-funded units from the coverage of the Injunction, and it has no burden of persuading the Court that the coverage of the Injunction should be changed. Despite plaintiffs' wish to have the Court treat the Motion as a motion to modify, (Response at 3 n.1, 17), the Motion seeks an interpretation - not a modification - of the Injunction. . . .

. . . Before any modification of the Injunction is considered, it must first be decided whether a modification is necessary. This will be determined, one way or the other, by the Court's ruling on the Motion." (CHA Reply Memorandum in Support of Emergency Motion to Clarify Injunction, January 16, 1998, pp. 2-3, emphasis added.)

CHA should not now be permitted to assume a contrary position. See Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position", quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895).) Nor should CHA be permitted to avoid the burden of meeting the standards for modifying an injunction by appealing to this Court.

Accepting CHA's characterization, the district court likewise treated the motion as one to clarify and did not hold CHA to the standards applicable to modifying an injunction. (AA-26.) Cf. S.E.C. v. Investment Corp. of America, 369 F.2d 383, 384 (7th Cir. 1966). ("In appearance, the relief sought was construction, and the district court declined to construe the injunction as ICA requested. Language consistent with a request for modification and a denial thereof was not employed.")

(2) The February Order Does not Alter the Parties' Legal Relationship.

This Court will of course look beyond labels. The standard for determining appealability is whether an order will --

"... substantially alter the legal relationship originally contemplated by the parties An erroneous interpretation can have the same effect, and be just as devastating to a party, as an order explicitly modifying or refusing to modify an injunction. A true interpretation, on the other hand, does not change the parties' original relationship, but merely restates that relationship in new terms." (Motorola, 739 F.2d at 1155)

Here, the February Order is a "true interpretation" because it merely reaffirms what was already plain - that the judgment order's term "Dwelling Unit" applies to all new public housing, however funded. The Order sets forth no steps to be taken by, nor in any way particularizes the conduct required of, CHA. Thus, it does not alter the parties' original relationship. Indeed, CHA itself (1) acknowledges that HOPE VI-funded new public housing units fall within the judgment order's definition of "Dwelling Unit" - "no question about it" (AA-67)⁵, and (2) consistently represented to HUD that HOPE VI replacement housing would conform to Gautreaux requirements. (See Part II.C below.)

CHA's contention that the district court should have turned aside from the plain language of the judgment order and should instead have "clarified" the order to exclude HOPE VI-funded Dwelling Units because of a supposed incompatibility between HOPE VI and the judgment order was properly rejected by the district court on the ground that there is no such incompatibility. (AA-21; see discussion of compatibility in Part II.D below.)

Thus, rather than altering the parties' legal relationship, the February Order merely confirms that the definition of "Dwelling Unit" means what it says and applies to public housing funded by a later-enacted federal program. The Eighth Circuit addressed a similar issue in Mikel v. Gourley, 951 F.2d 166 (8th Cir. 1991). Citing this Court's decision in Motorola for the applicable legal standard (id. at 169), the Court explained that

⁵ CHA makes the same acknowledgment before this Court. (CHA Br. 15.)

an interpretation applying an injunction to later-enacted regulations did not alter the relationship of the parties:

"Appellants argue that because of substantive changes since the 1977 injunction was issued, the district court's order was a modification. Appellants point to the fact that in 1977 telephone hearings were not authorized Additionally, the relocation of the Medicaid regulations . . . occurred after the 1977 permanent injunction. As a result of these substantive changes, according to appellants, the district court's order did substantially change the relationship of the parties.

We disagree. The district court's order merely clarified what the permanent injunction meant by 'claimant delay' in light of the current availability of telephone hearings. The district court did not change the legal relationship between the parties. . . . No new or additional obligations were placed on appellants which would substantially change the terms or force of the injunction. By simply interpreting the meaning of its permanent injunction, the district court merely restated the parties' relationship in new terms, and thus clarified its original injunction. We lack jurisdiction to review an order clarifying an injunction." 951 F.2d at 169 (emphasis added).

(3) **The May Order Likewise Does not Alter the Parties' Legal Relationship.**

The Receiver's motion to implement CHA's duty of cooperation sought enforcement of CHA's obligation under the Receivership Order to cooperate with the Receiver respecting the preparation of a HOPE VI application. Quoting the 1987 Receivership Order, the district court held that "HOPE VI is a 'non-elderly public housing development program[] . . . authorized during the pendency' of the Gautreaux litigation, and it therefore fits entirely within the Receiver's jurisdiction." (AA-24.) Since it too simply reaffirms a prior order and does not alter the legal

relationship of the parties, the May Order is likewise not subject to interlocutory appeal.

II. THE FEBRUARY ORDER CORRECTLY INTERPRETS THE JUDGMENT ORDER.

A. Standard of Review.

Generally, the standard of review of a district court's interpretation of an injunction is de novo. Youakim v. McDonald, 71 F.3d 1274, 1282-83 (7th Cir. 1995). In Youakim, however, the district judge had virtually no previous experience with the injunction. Where the district judge entered the underlying order (as Judge Aspen did the 1987 Receivership Order), or where his interpretation is grounded in great familiarity with the order (Judge Aspen has presided actively over the 1969 judgment order for 17 years), the district judge's interpretation is entitled to deference. Cf., Schering v. Illinois Antibiotics Co., 62 F.3d 903, 908 (7th Cir. 1995); Goluba v. Sch. Dist. of Ripon, 45 F.3d 1035, 1038 n.5 (7th Cir. 1995) (deferential standard applies where judge has overseen decree for an extended period); Ferrell v. Pierce, 743 F.2d 454, 461 (7th Cir. 1984) (same). See also Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 394 (1992) (J. O'Connor, concurring) ("In reviewing the District Court's judgment, we accordingly owe substantial deference to 'the trial judge's years of experience with the problem at hand.' Hutto v. Finney, 437 U.S. 678, 688 (1978).")

B. The Plain Language of the Judgment Order
Encompasses New Public Housing Funded by
HOPE VI.

As CHA concedes, the judgment order's definition of "Dwelling Unit" encompasses new public housing funded by HOPE VI. (CHA Br. 15.) Indeed, that definition cannot be read other than as evincing a plain intent to reach any and every form of new non-elderly CHA public housing:

"[A]n apartment or single family residence which is to be initially made available to and occupied by a low income, non-elderly family, subsequent to the date hereof, directly or indirectly by or through CHA, whether in a structure owned in whole or in part by CHA (whether or not newly constructed) or to be otherwise made available for occupancy by or through CHA to such a family. 'Dwelling Units' include 'Leased Dwelling Units' as hereinafter defined." 304 F.Supp. at 737.

Other judgment order language is equally encompassing, for its locational prescriptions apply to "any plan" for Dwelling Units and "any approval or request or . . . assistance from any government agency with respect thereto. . . ." 304 F.Supp. at 738. Nor is there any language confining coverage to a particular means of providing Dwelling Units; no specific "funding stream" or program is mentioned. Moreover, the judgment order requires CHA to -

"affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures. . . ." 304 F.Supp. at 741.

Since the judgment order's plain language thus encompasses "any plan" for providing any and every form of new non-elderly

public housing, CHA's request to have the order "clarified" by restricting it to a particular program or funding stream was properly rejected by the district court.

When the language of a judicial order or decree is unambiguous, a district judge need not search behind the face of the order to ascertain its meaning. . . "A judgment unambiguous on its face is construed as a writing without resort to extrinsic evidence. . . ." Harris v. Rivera Cruz, 20 F.3d 507, 511 (1st Cir. 1994). See Ahern v. Board of Education, 133 F.3d 975, 981 (7th Cir. 1998) (where consent decree is clear on its face, it is neither necessary nor appropriate to consider extrinsic evidence); Rumpke of Indiana, Inc. v. Cummins Engine Co., 107 F.3d 1235, 1242 (7th Cir. 1997) (same); Goluba v. School Dist. of Ripon, 45 F. 3d 1035, 1038 (7th Cir. 1995) (explicit terms of consent decree control unless terms are facially ambiguous). See also Wilder v. Bernstein, 49 F.3d 69, 72-73 (2nd Cir. 1995) (rejecting argument that consent decree did not apply to program which did not exist at time of entry where decree's language was broad and unambiguous - "We do not find [various] arguments, considered separately or collectively, to be sufficiently compelling to override the Decree's express terms").

This case is a particularly appropriate one for adhering to the plain language of the judgment order because CHA's alternative interpretive theory - that the order only applies to dwelling units that "add to the aggregate supply of public housing" (CHA Br. 11) - runs head-on into its own repeated acquiescence in judicial orders to the contrary, and into its own

significant and extensive conduct inconsistent with its present theory, as we discuss in the following Subpart C.

**C. Prior Judicial Orders and the Parties' Own Conduct
Show that the District Court's Interpretation is
Correct.**

Despite its plain language, CHA contends that the judgment order is "ambiguous" in the context of HOPE VI. (CHA Br. 15.) Even if there were ambiguity - and there is none here - prior interpretations of the judgment order by the court and the parties in "living" with it would be a powerful interpretative aid testifying strongly against CHA's proposed constriction of the judgment order.

First, when CHA joined in the motion for entry of the 1987 Receivership Order it acquiesced, without objecting to its scope, in a court order giving the Receiver authority over all non-elderly public housing development programs "which may in the future be authorized by HUD" during the pendency of the action. (AA-10, 11.) Contrary to what it now argues about later-enacted housing programs, CHA then acknowledged that the judgment order covered "future" authorized programs (the purpose of appointing the Receiver being to carry out CHA's judgment order obligations).

Second, as set out in the Statement of Facts (Replacement Dwelling Units, p. 12, supra), on a number of occasions the district court entered orders, agreed to by CHA, applying the judgment order to replacement housing. Although only the June 19, 1998 order involves HOPE VI funding, these prior orders

involve both HOPE VI and non-HOPE VI replacement housing, none of which adds to CHA's aggregate supply of public housing. Thus, these applications of the judgment order are patently inconsistent with CHA's present theory that the judgment order applies only to Dwelling Units that add to the aggregate supply of public housing. It is notable that no one - not CHA, the plaintiffs, or HUD - objected to thus requesting the court to apply the judgment order to replacement housing, in both HOPE VI and non-HOPE VI contexts.

The interpretive significance of these orders and this conduct is obvious. In addition, however, because CHA successfully took the position in the district court that the judgment order applied to replacement housing, it should now be estopped from arguing the contrary. In Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990), this Court said:

"Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982). It is to be applied where 'intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum designed for suitors seeking justice,' Scarano v. Central R. Co., 203 F.2d 510, 513 (3d Cir. 1953), to prevent litigants from 'playing fast and loose with the courts.' Id. 'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.' Davis v. Wakelee, 156 U.S. 680, 689 . . . (1895)."

See also, Continental Illinois Corp. v. Comm'r of IRS, 998 F.2d 513, 518 (7th Cir. 1993) (applying judicial estoppel to inconsistent positions in the same lawsuit: "A party can argue inconsistent positions in the alternative, but once it has sold

one to the court it cannot turn around and repudiate it in order to have a second victory. . .")

Beyond CHA's support of prior court orders, there is much other evidence respecting whether the judgment order covers replacement housing. As described in the Statement of Facts (History of CHA HOPE VI Awards, p. 15, supra), this evidence includes CHA's multiple representations to HUD that Cabrini HOPE VI replacement housing would be sited in compliance with the judgment order, CHA's willingness to enter into agreements giving the Receiver development responsibility for replacement housing, and CHA's HOPE VI planning grant request to HUD saying replacement housing would be developed "in concert with the mandate of the Gautreaux decision." Indeed, as the district court said, "It seems that the CHA has been planning its HOPE VI expenditures on this basis [compliance with Gautreaux orders] all along." (Order of May 12, 1998, AA-26.)

Injunctions, like other disputed writings, must be construed in context. Youakim, 71 F.3d at 1283. The totality of the foregoing "context" is overwhelmingly supportive of the February Order. Of particular relevance is Youakim's admonition to pay "proper heed to the nature of plaintiffs' claim in the underlying litigation . . ." (Id. at 1285.) Here plaintiffs' claim was about the location of CHA's public housing; it had nothing to do with the particular funding stream for that housing, or - as the court's replacement housing orders show - whether the housing was incremental or replacement. However funded, and whether incremental or replacement, the development of new, non-elderly

public housing affords an opportunity to provide plaintiff class families with an additional measure of still needed relief.

Thus, the clarity of the judgment order's language, a series of subsequent court orders, and CHA's own conduct over a period of years and in different contexts -- all speak compellingly in support of reading the judgment order to include replacement housing - not to mention the total absence of any language in the order, or elsewhere in the history of the Gautreaux case, supportive of CHA's latter-day interpretive construct.

D. The Judgment Order and HOPE VI are Compatible.

CHA also contends that there is a "direct conflict" between the judgment order and HOPE VI (CHA Br. 11), phrased now as a difference in "remedies" (id. 19-21) or "harms" (id. 22-24) or "rules" (id. 28-30), and before the district court and again here as "incompatibility." (Id. 25-27.) As the district court correctly determined, however, there is "no incompatibility between the HOPE VI program and the judgment order." (AA-21.)

The court first noted that the HOPE VI statute does not require that all HOPE VI money be spent physically within targeted distressed areas. (AA-20-21.) It then observed that the statute provides funds for "replacement housing which will avoid or lessen concentration of very low-income families," pointing out that one way to achieve this objective is to build replacement units elsewhere than on the site of demolished buildings, "thereby lessening the concentration of public housing on the old site." (AA-21.) Next, it considered that the HOPE VI

Guidebook contemplates just such an approach, referring to construction of "off-site" public housing. (AA-21.) (Indeed, the Guidebook expressly describes, as one of the key elements in achieving HOPE VI purposes, lessening concentrations of poverty by, among other means, "placing public housing in non-poverty neighborhoods" AA-130.) The court also noted that a Senate Committee Report referred to replacing demolished units through, among other means, "scattered-site development." (AA-21)⁶

CHA's support for its "direct conflict" assertion is all smoke and mirrors. It does not matter of course that HOPE VI has a "broader" purpose than the judgment order (CHA Br. 20, 24) if - as the district court's analysis demonstrates - the two are not incompatible. CHA's implication that tenants must "approve" a HOPE VI plan (CHA Br. 9, 26) is simply not true; there is no approval right to be found either in the statute or the Guidebook. Indeed, in at least one HOPE VI context, the Guidebook states HUD's position that, while residents must be consulted, "they hold no veto power over the PHA's plan." (AA-133.)

⁶ Contrary to CHA's assertion (CHA Br. 14), and despite the judgment order's clarity, the district court went beyond "staring hard" at the judgment order language and considered other matters as well. The February Order discusses the history and context of the judgment order³, CHA's contention respecting the geographic focus of HOPE VI, and the HOPE VI statute, Guidebook and legislative history. (AA-18-22.) After considering these matters, the court concluded that there is "no incompatibility between the HOPE VI program and the Judgment Order" and that "Congress and HUD, through HOPE VI, have afforded the CHA an opportunity both to revitalize distressed public housing neighborhoods and to desegregate public housing." (AA-21.)

CHA's further assertion that HOPE VI permits tenants to "choose where they want to live . . ." (CHA Br. 24) is likewise simply not true. This supposed right, too, is not to be found either in statute or Guidebook. A separate statute, when read together with HOPE VI, makes displaced persons "eligible" for replacement housing of their choice "to the maximum extent practicable" (42 U.S.C. §1437p(b)(2)), but even this limited eligibility status has been held by the district court (Judge Coar) to be too vague to be enforceable. Cabrini-Green LAC v. CHA, No. 96 C 6949 (N.D. Ill. Jan. 21, 1997) (CHA Exh. B at 13.)

Finally, the right of tenants to be "consulted" and to "participate" in the preparation of a HOPE VI plan is, of course, not incompatible with Gautreaux requirements, as both CHA and the tenants acknowledged when they made their Cabrini agreement "subject to . . . Federal Court guidelines under Gautreaux." (Id. at 11.)

Upon inspection, in short, CHA's extended, tortured effort to portray the judgment order and HOPE VI as in "direct conflict" (CHA Br. 19-21, 22-24, 25-27, 28-30) quickly evanesces.⁷

⁷ It is difficult to understand precisely what CHA is arguing in these ten pages. Perhaps there is an implication that the HOPE VI focus on revitalizing a designated area is incompatible with the judgment order's original focus (before the replacement housing orders, beginning in 1993) on scattered site development. If so, it is notable that the Senate Report to which CHA refers points out that one-third of HOPE VI replacement units must be provided through use of Section 8 certificates, and that the "balance . . . could be [provided] through . . . major reconstruction and scattered-site development . . ." (SA-18.) In other words, to the extent HOPE VI replacement housing is to be provided through new public housing rather than Section 8 certificates and rehabilitation of existing buildings, HOPE VI allows all of it to be provided through the scattered-site

CHA's own past conduct is once again witness against its present position. CHA repeatedly represented to HUD that it would site Cabrini-Green replacement housing in accordance with Gautreaux requirements (AA-136, 139, 149-150, 153), representations that cannot be squared with CHA's present "direct conflict" assertion. CHA's HOPE VI planning request, its revised Cabrini HOPE VI plan, and its HOPE VI application for ABLA/Horner, all promise Gautreaux compliance and are therefore likewise incompatible with CHA's present assertion, as is its agreement that the Receiver, appointed to effectuate Gautreaux relief, would be responsible for new housing development under both the Cabrini and ABLA/Horner HOPE VI plans (History of CHA HOPE VI Awards, p. 15, supra).⁸ Thus, just as CHA's own conduct shows that it believed the judgment order covers replacement housing, so CHA's repeated conduct also shows it believed that the judgment order and HOPE VI are perfectly compatible.

HUD's conduct, relevant because it is the agency responsible for administering HOPE VI, also supports compatibility. Raising no compatibility question, HUD awarded HOPE VI grants to CHA pursuant to applications that promised Gautreaux compliance, awards that HUD could not have made if it viewed the judgment order as incompatible with HOPE VI requirements. HUD's attorney

development technique which was the original focus of, and remains a current option under, the judgment order.

⁸ "The HOPE VI Process is similar to other public housing neighborhood revitalization development in which the Receiver has been engaged, such as at Henry Horner and Kenwood-Oakland. The portion of the HOPE VI Program in which the Receiver has been involved is essentially an additional HUD program for funding non-elderly public housing, and the development of such housing

told the district court that the Court's ruling as to whether or not the judgment order applied to HOPE VI replacement housing was a "non-issue." (AA-58.) And one of its counsel has written, "We . . . believe that any funds under HOPE VI which go to replacement housing are currently a Receiver responsibility." (AA-163.)

* * *

Thus, the language of the judgment order, its long history of judicial enforcement, and its evident compatibility with HOPE VI (a view also held, until recently, by CHA), all buttress the district court's correct interpretation of the judgment order.

III. THE FEBRUARY ORDER'S CORRECT INTERPRETATION OF THE JUDGMENT ORDER NEITHER VIOLATES FEDERALISM PRINCIPLES NOR RAISES SEPARATION OF POWERS CONCERNS.

CHA next contends that, assuming arguendo the district court's interpretation of the judgment order is correct (CHA Br. 14), the February Order must nonetheless be reversed because it violates the principle that federal courts must appropriately tailor remedies to fit the nature and extent of the constitutional violation (id. 21, 22), and raises "significant" separation of powers concerns. (Id. 27.) We show in this Part III that neither contention has merit.

is precisely what the Receiver has done since 1987." (Hickman Aff. par. 101, RA-271-72.)

A. The February Order's Interpretation of a Remedial Desegregation Order Against a Local Government Body Adheres to the Tailoring Principle.

The February Order's correct interpretation of the judgment order does not run afoul of the tailoring principle. In Hills v. Gautreaux, 425 U.S. 284 (1976), the Supreme Court determined that the district court was not precluded from ordering HUD to use the later-enacted, "untainted" Section 8 program to help remedy HUD's constitutional violations in the public housing program. 425 U.S. at 300-301, 305. Such a judicial order would be commensurate with HUD's constitutional violation because "'all reasonable methods [should] be available to formulate an effective remedy,' North Carolina State Board of Education v. Swann, 402 U.S. 43," and "every effort should be made by a federal court to employ those methods 'to achieve the greatest possible degree of (relief) taking into account the practicalities of the situation.' Davis v. School Comm'rs. of Mobile County, 402 U.S. 33, 37." 425 U.S. at 296-297. Hills makes it clear that the district court is not precluded from ordering a constitutional wrongdoer to employ a federal funding mechanism, enacted after the perpetration of the original Gautreaux wrong (and not "tainted" with it), to afford relief to plaintiff class families.

An essentially similar ruling is found in Young v. Pierce, 685 F.Supp. 975, 978 (E.D. Tex. 1988) ("It is true that the plaintiffs sustained their injuries by virtue of their relationship to the traditional PHA housing projects. But it is insufficient to order that the remedies be restricted to the

scene of these violations. Instead HUD should use all available powers to ameliorate the situation that it knowingly created.")

Even broader remedies have been approved in school desegregation cases. For example, in Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II), the Court authorized the remedial use of a wide range of educational programs, adding:

"[T]here is no merit to petitioners' claims that the relief ordered here violates the Tenth Amendment and general principles of federalism. The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. Cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 49 L.Ed. 2d 614, 96 S. Ct. 2666 (1976). Nor are principles of federalism abrogated by the decree." 433 U.S. at 291.

And in Missouri v. Jenkins, 495 U.S. 33 (1990), the Court upheld an order allowing the district court to authorize a school district to levy taxes adequate to fund its desegregation budget, and enjoining application of state laws that would limit or reduce the levy below that amount. There was no claim that the state tax law itself violated the Constitution.⁹

The nexus between remedy and violation is closer here than in Hills, Milliken II, Jenkins and Young, for here HOPE VI replacement housing is conventional public housing, the very housing program within which the original wrong was perpetrated.

⁹ CHA says there is no claim that HOPE VI violates the Constitution. (CHA Br. 25.) In Evans v. Buchanan, 582 F.2d 750, 769 (3rd Cir. 1978), the court said: "[W]e are not persuaded that Milliken II dictates that there be a finding that each remedial program be 'infected with the discriminatory bias of a segregated school system.' [citing Milliken II, 433 U.S. at 275.]. . . It would be a logical fallacy to require findings of discrimination for programs which do not yet exist." Accord, Liddell v. State of Mo., 731 F.2d 1294, 1315 (8th Cir. 1984).

The district court thus clearly did not offend the tailoring principle in determining that the judgment order covers new public housing funded by HOPE VI.

Apart from the incompatibility argument to which we have already responded (and which constitutes the bulk of CHA's federalism section (CHA Br. 22-24, 25-27), the only tailoring case CHA discusses (CHA Br. 22) is Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972). But CHA's reliance on that case is transparently inapposite. CHA describes Romney, incorrectly, as involving an effort to bar HUD from releasing funds to CHA until CHA came into compliance with the judgment order. (CHA Br. 22.) In fact, the very different situation in Romney is set out in this Court's opinion as follows:

"Intervenor-appellants well state the question before us to be: 'But here one party (HUD) had been ordered to stop financing a program, Model Cities, which is free from taint, in order to force a non-party (City of Chicago) to comply with an order in a case in which it was not a party, nor charged with anything, nor found to have done anything improper and of course, not ordered to do anything.'" 457 F.2d at 127.

The Court also noted that "CHA does not provide any housing, low rent or otherwise, with any funds distributed under the Model Cities Program." (Id. 126.)

The distinctions between Romney and this case are thus obvious and important. Here the district court's order is directed to the very defendant found to have violated the Constitution, not to a non-party. Here the remedial order is focused on a HOPE VI source of housing funding that directly affects and can help remedy the housing segregation caused by the

original violation, not upon a program that provides no housing at all. And here the district court's order is limited to that part of HOPE VI that employs the very public housing program within which the original violation occurred.

CHA points to no authority that precludes a federal court from applying an existing remedial order to a newly-enacted funding source that incorporates the very program that is the subject of the constitutional violation, and can help provide a remedy for the plaintiff class consistently with the purposes of the new funding.

B. The February Order's Interpretation of a Remedial Desegregation Order Against a Local Government Body Comports with the Separation of Powers Principle.

Finally, CHA advances several separation of powers concerns. The first is that the judgment order applied to HOPE VI "interferes with federal legislative power by 'rewriting rules that Congress has . . . enacted'." (CHA Br. 28.)

What HOPE VI rules does CHA contend the judgment order "rewrites"? There are two. One is "the exercise of tenant choice" (CHA Br. 29), but here CHA misstates the HOPE VI "rule," as we have already shown in our compatibility discussion above.

The second is the absence of a rule "dictating where replacement housing must be built . . ." (CHA Br. 29.) CHA contrasts HOPE VI's flexibility in this regard with what it calls the "centralized planning" of the judgment order. (*Id.*) But the judgment order has been flexible enough to authorize replacement

housing in a considerable variety of locations, from Lawndale to North Kenwood-Oakland to Cabrini-Green to Henry Horner to ABLA, Limited Areas all. (The judgment order explicitly allows for "supplementing the terms of this order upon the presentation of relevant information . . . to achieve results consistent with this order" 304 F.Supp. at 741.) CHA's own multiple representations to HUD that it would site Cabrini-Green replacement housing in compliance with Gautreaux show that even CHA did not believe such compliance involved "rewriting" HOPE VI requirements. And HUD, whose responsibility it is to administer the HOPE VI program, has accepted these representations without objection, and made grants pursuant to applications that incorporate them. In short, it is quite apparent that the judgment order rewrites no HOPE VI rules respecting the location of replacement housing.

CHA's next "concern" is that HOPE VI "does not require CHA to make that choice" - i.e., to site HOPE VI replacement housing in compliance with Gautreaux, as CHA acknowledges it might do "[i]n theory" (CHA Br. 34), or to seek a revitalizing area designation or waiver as it has many times done. Requiring CHA to "make that choice" is said to be "interference" exceeding judicial power. (Id. 32.)

CHA forgets that like HUD in Hills v. Gautreaux, CHA "has been found to have³ violated the Constitution." 425 U.S. at 297. That being the case, unless and until CHA successfully moves to modify the remedial orders under which it must operate, "all reasonable methods [should] be available to formulate an

effective remedy.'" (Id., quoting North Carolina, supra, 402 U.S. at 46.) More recently the Court has said, even more strongly, "The duty and responsibility of a [defendant] . . . is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system." Freeman v. Pitts, 503 U.S. 467, 485 (1992). Until that duty has been fully discharged, CHA "remains in violation of the Fourteenth Amendment." Parents for Quality Education v. State of Ind., 977 F.2d 1207, 1210 (7th Cir. 1992), quoting United States v. Fordice, 505 U.S. 717 (1992).

Thus the proper separation of powers inquiry is not whether HOPE VI "requires that choice" but whether it allows CHA that choice - to the end of enabling CHA to perform Freeman's "all steps necessary" duty. Clearly it does, for as we have seen the judgment order is perfectly compatible with HOPE VI and, as the district court has determined, unsegregated housing opportunities can be provided with HOPE VI replacement housing consistent with HOPE VI purposes: "[W]e see no reason to extend [plaintiffs' wait for desegregation of public housing] any longer than necessary." (AA-26.)

CHA's "authority" for its separation of powers concerns consists of two cases. (CHA Br. 28.) In one, a consent decree "restrict[ed] the executive branch of the federal government in the performance of its constitutional responsibilities" Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1009-10 (7th Cir. 1984). Here no action of the federal government is restricted at all. Unlike a "remarkable judicial intervention in vital executive functions . . . precipitating a .

. . confrontation between the judicial and executive branches" (id. at 1009-1010, 1015, 1019), the February Order does not restrict HUD at all in the performance of its HOPE VI duties (as HUD's "non-issue" posture makes clear).

The other CHA-cited case, Mobil Oil, is equally wide of the mark. The language CHA renders inaccurately (CHA Br. 28) reads in full:

"There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." (Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).)

Where, as here, Congress has not specified locational requirements for HOPE VI replacement housing, the judgment order's prescriptions, even were they not as flexible as they are, would in Mobil's terms fill a gap, not rewrite a rule.

Lastly, CHA argues that the judgment order should not be interpreted to apply to HOPE VI because Congress has acted to prevent HOPE VI funds from being "funneled" to settle discrimination cases. (CHA Br. 30-31.) In fact, Congress's action demonstrates the exact opposite of what CHA would infer from it.

After HUD granted CHA's 1996 ABLA/Horner application a competitive advantage over other applications for HOPE VI funds, Congress said: "[N]one of such [HOPE VI] funds shall be used directly or indirectly by granting competitive advantage in awards to settle litigation . . ." (CHA Exh. A.9., emphasis added.) Congress did not say HUD or courts should exempt HOPE VI funds from desegregation or other remedial requirements; it chose

merely to prohibit giving competitive advantage to litigants whose HOPE VI funds would be used to settle litigation or pay judgments. The February Order does not of course give CHA any competitive advantage in HOPE VI awards. Cf. Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 17 (1971), where, with reference to a statute that referred explicitly to judicial power, the Supreme Court found "no suggestion of an intention to . . . withdraw from courts their historic equitable remedial powers." See also United States v. Rodgers, 461 U.S. 677, 708 (1983), noting the "important principle of statutory construction that Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion."

IV. THE MAY ORDER IS A PROPER EXERCISE OF THE DISTRICT COURT'S EXTREMELY BROAD AUTHORITY TO SUPERVISE AN EQUITABLE RECEIVERSHIP.

The May Order was entered on the motion of the Receiver. To avoid repetition we respectfully refer the Court to the Receiver's response to Part IV of CHA's brief, which plaintiffs adopt, noting only that a district court's power to supervise an equitable receivership is "extremely broad." S.E.C. v. Hardy, 803 F.2d 1034, 1037 (9th Cir. 1986).

We wish, however, to make two observations respecting CHA's argument. First, CHA's assertion that the May Order "transfer[s] 'all powers' of the CHA with regard to HOPE VI" to the Receiver (CHA Br. 35) is a patent misstatement of the district court's order. The May Order is plainly limited to the

development of new non-elderly public housing. As the district court said in denying a stay of the May Order:

"We first observe that the CHA's motion [for a stay pending appeal] rests at least in part on untenable overreadings of our May 19 order. That order did not 'turn over all of the CHA's powers and responsibility for the 1998 HOPE VI application to the Receiver.' CHA's Mot. Par. 13; see also id. Par. 14. It merely stated that the Receiver would have to be involved (i.e. that the Receiver and the CHA would have to cooperate) in preparing the application in light of the fact that the receivership order gave the Receiver 'all powers of CHA' with regard to the development and administration of 'all CHA non-elderly public housing development programs which may in the future be authorized by HUD during the pendency' of the Gautreaux litigation. (Of course, if the 1998 HOPE VI application will not request funds for the development of new housing, the Receiver would not need to be involved with it.)" (Order of May 22, 1998, AA-28.)

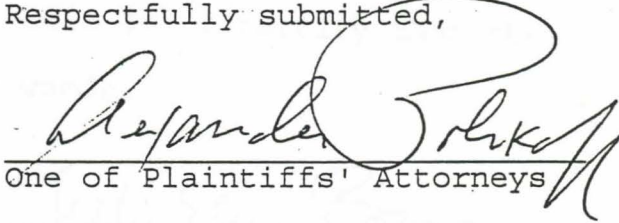
Second, it is not possible to square the district court's action with CHA's rhetoric of "imposing a receivership over a massive federally funded public housing redevelopment program..." (CHA Br. 36.) As the district court said:

"We do not believe that this [May] order may fairly be characterized as a new 'mandatory injunction,' CHA's Mot. Par. 13, since it does nothing more than reaffirm that the receivership order means what it already says. Also, the CHA's position that we committed an error by not making factual findings, see CHA's Mot. at pp. 5-7, has the situation in reverse: only if we modified or terminated the receivership order (and the CHA has repeatedly threatened to make a motion to that effect but has not yet made one) would factual findings be necessary." (Order of May 22, 1998, AA-28.)

CONCLUSION

For the reasons stated this Court should dismiss CHA's appeals. Should the Court determine not to dismiss the appeal from the February Order, it should affirm that Order. Should the Court determine not to dismiss the appeal from the May Order, it should likewise affirm that Order.

Respectfully submitted,


One of Plaintiffs' Attorneys

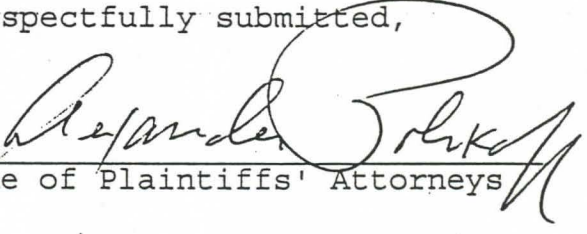
July 29, 1998

Alexander Polikoff
Julie Elena Brown
Business and Professional People
for the Public Interest
17 East Monroe Street - #212
Chicago, Illinois 60603
312/641-5570; fax: 312/641-5454

CONCLUSION

For the reasons stated this Court should dismiss CHA's appeals. Should the Court determine not to dismiss the appeal from the February Order, it should affirm that Order. Should the Court determine not to dismiss the appeal from the May Order, it should likewise affirm that Order.

Respectfully submitted,

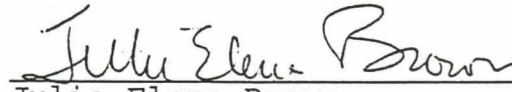

One of Plaintiffs' Attorneys

July 29, 1998

Alexander Polikoff
Julie Elena Brown
Business and Professional People
for the Public Interest
17 East Monroe Street - #212
Chicago, Illinois 60603
312/641-5570; fax: 312/641-5454

CERTIFICATE

Pursuant to Circuit Court Rule 32, I certify that the
attached brief contains 12,782 words.



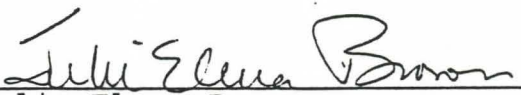
Julie Elena Brown

CERTIFICATE OF SERVICE

I, Julie Elena Brown, an attorney, hereby certify that on July 29, 1998, I caused a copy of the foregoing BRIEF OF PLAINTIFFS-APPELLEES, DOROTHY GAUTREAUX, ET AL., and accompanying APPELLEES' APPENDIX to be served by hand delivery on counsel listed below:

Susan Getzendanner
Nancy Eisenhauer
Skadden, Arps, Slate, Meagher & Flom (Illinois)
333 West Wacker Drive - #2100
Chicago, Illinois 60606

Michael L. Shakman
Barry A. Miller
Edward W. Feldman
Miller, Shakman, Hamilton, Kurtzon & Schlifke
208 South LaSalle Street - #1100
Chicago, Illinois 60604



Julie Elena Brown