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To Be Argued by:
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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
DEC 14 1999
KAREN GREVE MILTON, ACTING CLERK
SECOND CIRCUIT

PAULINE DAVIS; CYNTHIA WILLIAMS; BLANCA IRIS HERNANDEZ, on behalf of themselves and all others similarly situated; GINA CAMPBELL, on behalf of themselves and all others similary situated; JEANETTE VARGAS, on behalf of themselves and all others similarly situated; CORNELIA SIMMONS; KIM RIVERA,

Plaintiffs-Appellees.

-v-

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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PRELIMINARY STATEMENT

As recently as the 1980s, white families comprised more than 60 percent of all families at twenty public housing projects in New York City because of deliberate and prolonged racial steering by the New York City Housing Authority ("NYCHA" or "the Authority"). Those housing projects, whose white populations still far exceed levels that would have obtained in the absence of discrimination, continue to manifest the vestiges of past segregation.

In 1995, NYCHA proposed a radical change to its Tenant Selection and Assignment Plan ("TSAP") that was expected to — and, now that it has gone into effect at all but the segregated projects, has in fact — more than doubled the white admission rate. If permitted to operate at the segregated projects as well, that change would boost the number of white families at those projects by almost 20 percent, or between 711 and 855 families in total, after ten years.

As the district court found, this change would reverse or significantly delay the desegregation of NYCHA's projects. On appeal, NYCHA now contends that its projects are no longer tainted by past segregation because the district court improperly used a 30-percent benchmark for assessing the vestiges of past segregation. But as we demonstrate below, under traditionally

accepted judicial guidelines for determining whether the vestiges of segregation persist, a standard far lower than 30 percent would have applied. By adopting a benchmark that reflected the parties' agreement on what projects are affected by past segregation, the court treated NYCHA more generously than the case law provides. Ironically, if this Court were to conclude that the parties did not agree on a 30-percent benchmark, then judicial decisions would compel the application of a more stringent standard.

NYCHA also claims that the impact of its new tenanting plan would be de mimimis because the impact may not be assessed by looking at the segregated projects as a group. When measured on an annual basis at each project, NYCHA asserts, increases in the white population would amount to a small number of percentage points. But in assessing whether the segregative impact of the plan is significant, the court can and should consider the segregated projects as a group because NYCHA treated them as such when it placed them in a so-called "Special Needs Program" for the purpose of segregating them. Further, even if examined solely at the project level, the impact of the WFP on desegregation is significant and comparable to effects that have been enjoined by courts in other cases.

For reasons fully set forth below, NYCHA's new tenanting plan would significantly perpetuate past segregation at twenty housing projects. The district court correctly held that the plan may not take effect at those projects until the vestiges of segregation have been eliminated.

STATEMENT OF THE CASE

A. History of Discrimination

An appreciation of the circumstances that gave rise to this case is essential to understanding why the WFP will significantly perpetuate segregation. For over thirty years, NYCHA enforced a variety of policies that were intended to segregate, and had the effect of segregating, certain public housing projects. Broadly speaking, four racially discriminatory practices were in use.

First, the Authority adopted codes known as "phases" to designate the race of applicants. Phase codes appeared next to the names of certain housing projects on lists used for assigning applicants to projects. (See, e.g., A-414-18, A-370-74.) During the early 1980s, the term "Phase II" denoted white applicants (A-767). A "Phase II" code appearing next to a project name meant that the project could be offered only to a white applicant (A-770). In November 1986, when the Authority revised its Phase codes (A-375), the term "Phase I" meant that a project could be

offered only to white applicants (A-283). Admissions personnel were instructed not to reveal the availability of Phase II (and later Phase I) projects to African-American and Hispanic applicants (A-1115). Non-white applicants who requested assignment to a project marked by one of these Phase codes were told, falsely, that no vacancies were expected (A-284). White applicants, in contrast, were told the truth.

Second, NYCHA enforced racial goals and quotas at certain housing projects when they first opened for operation (at "rent-up") and on an ongoing basis thereafter. Projects affected by these goals and quotas were placed in "Special Needs Programs" (A-762) or "Programs to Maintain or Achieve Ethnic Balance" (A-757; see A-750). During rent-up, racial targets at projects in the "Special Needs Program" were achieved by "forwarding applications, earmarked to comply with the ethnic/racial goals, to the field rental teams" (A-443).

After rent-up, racial goals in the "Special Needs Program" were monitored by staff of the Community Affairs Department, whose responsibilities included "implementation of racial, ethnic and economic integration in opening and operating projects" (A-377). Community Affairs staff reported on the composition of the waiting list by race or "Phase" code (e.g., A-398, 399-405, 621).

Projects with the wrong number of persons of one race or another were described as in "ethnic imbalance" (e.g., A-398). To remedy "ethnic imbalances," the Community Affairs office asked admissions personnel to skim the waiting lists for more white applicants (A-1119). Those applications would be tagged with color-coded cards designating an appropriate project (A-295-97, 331-33). When the applicants appeared for eligibility interviews, admissions personnel followed the instructions on the cards and assigned them to the designated projects (A-333), regardless of whether vacancies were expected there (A-340).

Third, NYCHA adopted residency preferences known as "neighborhood preferences." As the Housing Authority candidly admitted to the district court, "[i]n neighborhoods where one race predominated, these preferences had a racially discriminatory effect" (A-716). Neighborhood preferences were a principal means of assuring that racial quotas were met for particular projects at the time of rent-up (A-441).

Fourth, NYCHA operated a separate Staten Island Applications Office (the "SIAO"). Until the Authority closed that office in December 1990 (A-710), the SIAO conducted its own interviews and made its own project assignments independently of NYCHA's main admissions office (A-260-61). During interviews at the SIAO,

white applicants were steered to the identifiably white projects on Staten Island; African-American and Hispanic applicants were steered to the identifiably non-white projects (A-1120).

Compounding this discrimination, the five identifiably white Staten Island projects, and only those projects, were never listed on admission guides as expecting vacancies (A-711; A-642). At the main NYCHA office in Manhattan, assignments could not be made to the identifiably white projects on Staten Island because they were always reported as expecting no vacancies (A-711, A-261). Admissions to the white Staten Island projects were therefore controlled exclusively by the SIAO. Before the district court, NYCHA frankly acknowledged that "[t]his failure created a breeding ground for racial steering" (A-711). Indeed, during the seven-year period from 1984 to 1990, when the five identifiably white projects on Staten Island were never listed as expecting vacancies, almost 70 percent of all move-ins at those projects were white (A-642).

These discriminatory practices began in the late 1950s (A-672; see A-1112). With the exception of the use of phase codes, which ended at all projects in May 1988 (A-422), NYCHA's remaining racially biased practices continued until 1990, after this litigation began (A-716). Discriminatory assignments on

Staten Island continued through May 1991 (A-183).

Because NYCHA withheld information about these policies and falsely denied their existence, these practices were shrouded in secrecy. When the news media first reported the existence of NYCHA's racial balancing program in 1960, NYCHA falsely announced that the program had been terminated (A-1113). When public officials inquired about continuing charges of racial steering — as one member of the New York State Senate did in 1982 (A-438) — NYCHA falsely responded that no such policies existed (A-440).

To sustain its secrecy, NYCHA maintained two separate sets of admission procedures. The first, a formal, publicly available document, omitted all mention of NYCHA's racially biased procedures (A-426-29). The second, a secret outline of "Tenant Selection Practices That Are Not Included Within The Scope Of Written Procedures" (A-430-32), was not available to the public.

As late as 1986, senior NYCHA officials argued against reducing their own rental procedures to writing, warning that "such factors as opening project criteria, Community Board and postal zone restrictions, ethnic and economic considerations, political and Tenant Association referrals and other subjective intangibles significantly impacting on the 'tenant selection' process, could if put in writing create some legal jeopardy for the Authority"

(A-761).

Admissions personnel were instructed to conceal NYCHA's biased policies from applicants. When African-American and Hispanic applicants were steered away from "Phase II" (or later "Phase I") housing projects, they were not told that the reason was because of their race (A-284). Likewise, applicants were not shown the lists of projects containing "Phase" codes and indicating apartment availability (A-778). Asked "why not," one NYCHA staff member explained, "Because it is for the interviewers. It was not for the public." (Id.)

B. Segregation of Certain Public Housing Projects

Taken collectively, these policies had a profound impact on the racial composition of certain housing projects. In 1982, the United States Department of Housing and Urban Development ("HUD") conducted an audit of NYCHA's public housing program pursuant to Title VI of the Civil Rights Act of 1964. HUD found that fourteen NYCHA housing projects were more than 70 percent white (A-383) and had sustained those elevated levels because "[t]he Authority's policy of neighborhood preference and then borough choice has kept the projects racially and ethnically unchanged for the past 4 years (the period examined)" (A-388). Thirty projects at the time were more than 50 percent white (see A-504-

10). By contrast, the eligible applicant pool during this period was only approximately 12 percent white (A-1117).

The impact of NYCHA's racially discriminatory policies is depicted in the table on the following page, which lists the 21 housing projects that were subject to the district court's injunction in 1998.[1] For each project, the table reports the percentage of white families in residence at the time of the HUD audit in 1982.[2] As the table indicates, eight of the 21 projects were more than 80 percent white during the 1980s, including four projects located on Staten Island. Seven projects were more than 70 percent white; five were more than 60 percent white; and one (Straus) was 57 percent white.

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[1] The Glenwood project ceased to be covered by the court's injunction when the population of white families dropped to 29.1 percent in December 1998 (A-1649).

[2] In the case of the New Lane project on Staten Island, which opened for operation in 1984, the figure reported is for 1984 (A-496).

Table 1

Racial Composition of Disproportionate Projects During Early 1980s

Project Name	Percentage White
Bay View	75.3%
Berry	89.7%
Cassidy-Lafayette	82.8%
Forest Hills	70.3%
Glenwood	79.5%
Haber	83.9%
Holmes Towers	63.9%
Independence	69.4%
Isaacs	71.0%
Middletown Plaza	69.5%
New Lane	85.6%
Nostrand	83.5%
Pelham Parkway	77.1%
Pomonok	76.5%
Robbins Plaza (341 E. 70th St.)	82.1%
Sheepshead Bay	80.7%
South Beach	79.3%
Straus	57.0%
Taylor-Wythe	60.2%
Todt Hill	80.2%
Williams	69.2%

(See A-504-10.)

C. The 1992 Consent Decree

The existence of NYCHA's phase codes became known in January 1990 as the result of a motion for civil contempt against NYCHA in related litigation. (See A-1114-15.) This action commenced

on January 31, 1990 (see A-150). After discovery in this case and a parallel investigation by the Civil Rights Division of the United States Department of Justice (see A-1110-12) revealed that phase codes were the proverbial tip of the iceberg,[3] the parties entered into settlement discussions that led to the execution of a Consent Decree (A17-134). The Consent Decree has three primary components: permanent injunctive relief; adoption of a TSAP; and remedial relief for certain victims of discrimination.

1. The permanent injunctions

The permanent injunctions prohibit the practices that led to the segregation of NYCHA's projects (Consent Decree ¶ 4, A-26-28). For example, the Consent Decree bars NYCHA from using racial quotas and goals (¶ 4(d)) and neighborhood or geographic preferences (¶ 4(h)), and from falsely informing African-American and Hispanic applicants that vacancies are not expected (¶ 4(d)) (A-27). A savings clause (¶ 4(j), A-28) provides that nothing in the injunction "shall be deemed to prohibit the provision of remedial relief under this Consent Decree or remedial relief to any identified victims of past discrimination on the basis of race, color, or national origin who do not receive relief under

[3] For summaries of the evidence of discrimination presented in support of the Consent Decree, see A-153-95, A-1110-24.

this Consent Decree."

2. The TSAP

The TSAP, which is attached to the Decree as an exhibit (A-67-101) and incorporated by reference (¶ 5, A-28), must be implemented "to prevent any unlawful discrimination on the basis of race, color, or national origin" in compliance with Title VI, the Fair Housing Act, and HUD regulations. (¶ 5, A-28.) Two facets of the TSAP are material to this appeal: the normal procedure for renting apartments; and the procedure for filling vacancies when the normal procedure fails to provide an adequate number of applicants for a project.

a. The normal rental procedure

Under the normal procedure (A-76-96), eligible applicants are "certified" to a project waiting list, where they are expected to wait six to nine months for assignment to a vacancy (A-79-80). Vacancies that arise at each project are assigned to certified applicants based on housing priority and income. Housing priorities are "based upon the need for housing as expressed in the application" (A-70).

b. Outreach programs

When the normal procedures fail to produce enough applications for a project, the TSAP authorizes the use of so-called

"Outreach Programs" (A-96-99). One outreach program, known as "Project Outreach," permits housing managers to "borrow applications from a nearby project" (A-96-97). Because this "borrowing" mechanism is outside the normal rental procedure, and because borrowing from nearby projects affected by past segregation could result in an infusion of large numbers of white families,[4] the TSAP contains the following limitation: "However, if the borrowing project's tenant body is more than 30% white, [NYCHA] shall not select a project whose tenant body is also more than 30% white." As noted below, the district court concluded that this Borrowing Provision reflected the parties' agreement that projects whose tenant body is more than 30 percent white are affected by the vestiges of past segregation.

3. Remedial relief for victims of discrimination

The Consent Decree provides for priority placement for up to 1,990 victims of discrimination between 1985 and 1990[5] at one of

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[4] This consequence is possible because the TSAP treats tenants seeking transfers as applicants. (See A-91, defining "Waiting List.") Tenants who want to transfer to a borrowing project, and who apply for such transfers, are thereby available for "borrowing."

[5] Because abuses at the SIAO continued through May 1991 (A-183), this period was extended to May 31, 1991 for claimants who applied for housing at the SIAO or who selected Staten Island as a borough of choice on their application (¶ 1(l), A-24).

31 so-called "Affected Developments" (¶ 10, A-33). Three out of four vacancies at these projects are reserved for victims of discrimination (¶ 24, A-42). For victims from 1983 onward, the Decree also makes 200 Section 8 housing vouchers available for use in the private housing market (¶ 11, A-33).

D. Objections to and Approval of the Consent Decree

The district court (Leval, J.) overruled objections to the settlement and approved the Consent Decree on December 30, 1992, finding that "[p]laintiffs' evidence supports their allegations that during specified periods of time the Housing Authority selected and assigned applicants for public housing, and tenants requesting transfers, to certain housing projects using methods that resulted in unlawful discrimination against Blacks and Hispanics." Davis v. New York City Housing Authority, 1992 WL 420923 (S.D.N.Y. Dec. 31, 1992) (Davis I) (A-1088, 1091). The court made additional findings regarding the existence of discrimination by NYCHA on Staten Island (A-1097).

E. Adoption of the Working Family Preference

In July 1995, NYCHA proposed to make a radical change to the TSAP that would eliminate "housing need" as the basis for a priority. (See A-830.) Described as a "working family preference" ("WFP") – a misnomer, for the WFP also applies to non-working

senior citizens and all other non-working persons receiving payments related to inability to work (A-831) – the WFP gives priority for half of all vacancies to families who can pay the most, rather than to families who need housing the most (A-830-31, A-858-59). As the district court described the WFP:

> The essential difference between the original TSAP and the WFP is the WFP's elimination of the "applicant's need for housing" as a priority. Instead, the WFP gives preference to families based on income. Thus, under the original TSAP, priority was afforded to families who needed housing the most. Under the WFP, in contrast, priority is afforded to families who can pay the most, regardless of their housing need.

(A-1940.)

Although racially neutral on its face, the WFP had two significant effects on African-American and Hispanic families.

1. **Re-ordering the waiting list**

The first impact of the WFP applied to applicants for housing on NYCHA's central office waiting list, which is ordered according to housing priority. Only the top 15 percent of applicants on the waiting list have a priority sufficiently high to be called in for an eligibility interview (A-1068). Because African-American and Hispanic families generally have greater housing need than white families, the waiting list under the

original TSAP was stratified by race, with white families concentrated more at the bottom than the top.[6] (Id.)

When NYCHA adopted the WFP, it re-ordered the waiting list, lifting many white families with little housing need into the top 15th percentile, and lowering many African-American and Hispanic families with great housing need into the bottom 85th percentile. This change increased the percentage of white families in the top 15th percentile by roughly four standard deviations (A-1068), and boosted the expected white admission rate from 4.2 percent to 9.9 percent (A-724).

2. Slowing or reversing desegregation

When this case brought an end to NYCHA's discriminatory housing practices in 1990, housing projects that were segregated during the 1980s began to desegregate. For example, the New Lane project on Staten Island, which was 85.9 percent white in 1990 (A-1122), had by June 1996 fallen to 76.3 percent white (A-1057). By more than doubling the white admission rate, the WFP threatened to slow or reverse this process. Calculations performed with regard to the eleven majority-white housing projects

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[6] Under the original TSAP, white families comprised 7.2 percent of the top 15th percentile of the waiting list, as compared with 10.0 percent in the bottom 85th percentile (A-1068).

in June 1996 indicated that the WFP would reverse desegregation at four projects, halt desegregation at four projects, and slow desegregation significantly at three projects (A-1071).

F. The District Court's Preliminary Injunction

In July 1997, the district court (Sweet, J.) found that the WFP would perpetuate past segregation by NYCHA. Davis v. New York City Housing Authority, 1997 WL 407250 (S.D.N.Y. 1997) (Davis II) (A-1200-45). Judge Sweet held that "Judge Leval's findings [in Davis I] demonstrate the persistence of discriminatory practices and resulting segregation in New York City public housing as late as 1991" (A-1226). Adopting the conclusions of plaintiffs' expert witness, Judge Sweet also found that the WFP would perpetuate past segregation "because it will more than double white admission rates and because existing trends demonstrate that many of these additional white families will be concentrated in predominantly white developments" (A-1229-30). Finding that alternative methods of increasing the representation of upper income families would have a less racially discriminatory effect that the WFP proposed by NYCHA (A-1235-37), the court enjoined the WFP "as proposed" (A-1237).

On November 13, 1997, the district court rejected a proposal by NYCHA that would have authorized the partial use of the WFP at projects more than 30 percent white. Davis v. New York City

Housing Authority, 1997 WL 711360 (S.D.N.Y. Nov. 13, 1997) (Davis III) (A-1355-67). The court then modified its injunction by permitting NYCHA to "implement the working-family preference as proposed in any project where white families do not constitute more than 30 percent of the families at the project" (A-1367).

G. Remand by this Court

On January 22, 1999, this Court reversed and remanded the matter to Judge Sweet for further factual findings. Davis v. New York City Housing Authority, 166 F.3d 432 (2d Cir. 1999) (Davis IV) (A-1371-83). The Court directed Judge Sweet to specify on remand (1) the time period during which the impact of the WFP will occur; (2) the data demonstrating that "existing trends" demonstrate that additional white families will concentrate in predominantly white developments; (3) the subsidiary facts and numerical data on which the expert relied; (4) the names of the projects where segregation will be perpetuated; and (5) the number, fraction, or percentage of additional white families who will be admitted to each of the 21 projects. 166 F.3d at 436-37 (A-1378-79).

The proper standard on remand, this Court held, "is whether the proposed use of the working family preference will significantly perpetuate segregation at the relevant NYCHA develop-

ments." Id. at 438 (A-1382-83). This Court left the preliminary injunction in force while Judge Sweet considered these matters.

H. The District Court's Permanent Injunction

In a lengthy and detailed opinion addressing each of the questions discussed by this Court, the district court found that the WFP would significantly perpetuate segregation at each of the 20 housing projects subject to its injunction. Davis v. New York City Housing Authority, 60 F. Supp. 2d 220 (S.D.N.Y. 1999) (Davis V) (A-1931-80).

Judge Sweet first found that the Borrowing Provision in the TSAP reflects an agreement among the parties that projects more than 30 percent white are affected by past segregation. Id. at 231-32 (A-1953-55). The "30 percent figure set forth in the Borrowing Provision is not, as NYCHA urges, an arbitrary number, but a negotiated figure that implies that the parties and the Court believed that a project was disproportionately white if more than 30 percent of its families are white." Id. at 232 (A-1954). Noting that consent decrees must be construed in conformance with existing law, Judge Sweet held that an explicit race-based constraint like the Borrowing Provision would have been unlawful if projects more than 30 percent white did not reflect the vestiges of past segregation. Id. (A-1954-55).

Judge Sweet then made findings regarding the operation of the WFP five years and ten years into the future. For each time frame, the district court considered two possibilities with regard to anticipated move-out rates.[7] For each of those assumptions, the district court made findings for each of the 21 housing projects subject to his original injunction regarding both the additional number of white move-ins occasioned by the WFP, and the impact on the percentage of white families residing at each project.

Assuming that move-out rates will reflect the historical trend for each race at each project, the district court found that the WFP would increase the total number of white families living at the 21 projects by 432 families. 60 F. Supp. 2d at 227 (Table 3) (A-1946). After ten years, the total increase in occupancy by white families would be 711, id. at 229 (Table 6) (A-1950), an increase of 18.6 percent. If move-out rates for each

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[7] As the district court explained, "[e]ach calculation was performed using two alternative assumptions. The first assumption posits that move-out probabilities for each race at each project will follow historical trends for that particular race and project. The second assumption which Dr. Cupingood employed in preparing his original affidavit posits that move-out probabilities for each race at each project will track overall historical turnover rates for that project." 60 F. Supp. 2d at 227 (A-1945).

race reflect the overall historical turnover rate for each project, then the number of white occupants after five years will increase by 504 families. After ten years, whites will increase by 855 families, an increase of 19.3 percent. Id. at 230 (A-1950-51).

The district court also assessed the impact of the WFP at each project individually. Assuming historical turnover trends, the court found that the white population at one project (Middletown Plaza) would increase from 87 to 109 (22 families) after ten years (A-1921). At 13 of the remaining 19 projects where the rate of desegregation would decrease, differences in the number of white tenants would be at least 25 families (A-1922, Column 4). At one project (Pomonok), the difference would be 114 families. (Id.).

To quantify the extent of impairment of desegregation at each project, the court determined the percentage reduction in desegregation caused by the WFP. For example, under the original TSAP, the white population the New Lane project on Staten Island would have fallen from 197 to 175 after five years. Under the WFP, in contrast, it would fall only from 197 to 192. Id. at 227 (Table 3) (A-1946). Judge Sweet found that the percentage impairment is 77.3 percent. Id. (Table 4) (A-1947). Making simi-

lar calculations for each project individually, the court found that "at most projects where the WFP would not cause actual increases in segregation, the impairment in desegregation is at least 25 percent." Id. at 228 (A-1947).

The district court also found that these increases would be statistically significant at all the affected projects. At 18 projects, the increases would be statistically significant within five years; at 20 projects, statistical significance would be reached within 10 years. Id. at 240 (A-1973-74).[8]

Finally, the court concluded that these reductions in desegregation are not only statistically but legally significant. The court noted that even "'small' percentage-point differences can result in significant perpetuation of segregation." Id. at 241 (A-1976). At the Pomonok project, for example, "the WFP would deprive non-white families of 66 apartments after five years . . . and 114 apartments after ten years . . . ." Id.

Two days after the district court rendered its decision, NYCHA sent a letter to the court (A-1979) asking "the Court's indulgence" in accepting an additional affidavit purporting to make new projections. The district court did not grant that

[8] One project (Williams) would have a statistically significant disparity after 12 years (A-1394).

request. The affidavit (A-1981-90) was not before the district court and is not properly before this Court.

STANDARD OF REVIEW

"'[A]ppellate review of the terms of [a permanent] injunction must focus upon whether there has been an abuse of . . . discretion,'" Etuk v. Slattery, 936 F.2d 1433, 1443 (2d Cir. 1991) (quoting Spring Mills, Inc. v. Ultracashmere House, Ltd., 724 F.2d 352, 355 (2d Cir. 1983)), which may consist of the application of an incorrect legal standard or reliance "on clearly erroneous findings of fact." Resolution Trust Corp. v. Elman, 949 F.2d 624, 626 (2d Cir. 1991).

With regard to the district court's subsidiary factual findings, the strict requirements of Fed. R. Civ. P. 52(a) govern. The district court's findings regarding the existence of discrimination, past segregation, and whether the WFP would cause the perpetuation of past segregation, are all pure findings of fact. See United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1218 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988) ("Yonkers I"). Those findings may not be upset absent "the definite and firm conviction that a mistake has been committed," United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), even if the findings pertain to so-called "ultimate facts." O'Connell Mach-

inery Co. v. M.V. Americana, 797 F.2d 1130, 1133 (2d Cir. 1986); see Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984). Rule 52(a) strictly governs even when the district court's findings do not rest on credibility determinations, "but are based instead on physical or documentary evidence or inferences from other facts." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

Under Rule 52(a), "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" Yonkers I, 837 F.2d at 1218 (quoting Anderson, 470 U.S. at 574); see Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866, 870 (2d Cir. 1994). So long as the district court's findings "adopt a permissible view of the evidence[,] the appellate court may not conduct a de novo review." Yonkers I, 837 F.2d at 1218.

ARGUMENT

I

THE DISTRICT COURT'S FACTUAL FINDING THAT THE VESTIGES OF SEGREGATION PERSIST AT TWENTY NYCHA HOUSING PROJECTS IS NOT CLEARLY ERRONEOUS

A. The Housing Projects Subject To The Court's Injunction Were Segregated During the 1980s

All twenty housing projects currently affected by the district court's injunction were segregated as recently as the

1980s. During the HUD audit in 1982, eight of those housing projects were more than 80 percent white when whites comprised no more than 12 percent of the eligible applicant pool; one project (Berry) was 89.7 percent white. Six additional projects were more than 70 percent white; five were greater than 60 percent white; and one (Straus) was 57 percent white. See pp 9-10 supra.

That these twenty housing projects were segregated is scarcely open to doubt. In Yonkers I, this Court characterized as "an 'extreme condition of segregation'" census figures showing that "[m]inorities constituted 19% of Yonkers total population; yet the minority population of Southwest Yonkers exceeded 40%." 837 F.2d at 1219. The Court noted:

> Of the 10 census tracks within Southwest Yonkers itself, five had minority populations exceeding 50%. In contrast, outside of Southwest Yonkers, only 6% of the residents were minorities . . . .

Id. With the substitution of "whites" for "minorities" in these passages,[9] that description depicts a less severe version of the circumstances here. Whites constituted only 12 percent of

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[9] See Brown v. Board of Education of Topeka, 892 F.2d 851, 861-62 (10th Cir. 1989), cert. granted and judgment vacated, 503 U.S. 978 (1992), judgment reinstated on remand, 978 F.2d 585 (10th Cir. 1992), cert. denied, 509 U.S. 903 (1993) ("Moreover, this is true whether the students at the school in question are white or minority").

eligible NYCHA applicants (less than the 19 percent concentration of minorities in Yonkers); yet white families generally comprised 60 to 80 percent of tenants at the affected projects (far greater than the 40% minority concentration in Yonkers). This Court had "no difficulty in upholding the district court's finding that housing in Yonkers was segregated."

Similar findings were made in Jaimes v. Toledo Metropolitan Housing Authority, 715 F. Supp. 835, 838 (N.D. Ohio 1989). There the court found that public housing family units are "significantly out of racial balance" when "white representation is over 45% or under 15%." Id. at 838; see Jaimes v. Toledo Metropolitan Housing Authority, 758 F.2d 1086, 1090 n.8 (6th Cir. 1985) (projects "out of racial balance" when "minority representation is . . . under 55 percent in any given project"). All twenty projects subject to the court's injunction had white tenant populations significantly greater than 45 percent as recently as the 1980s.

NYCHA appears to labor under the misapprehension that its projects have been "deemed segregated" solely because they are currently more than 30 percent white.[10] (NYCHA Mem. at 13-16.)

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[10] In proceeding on that assumption, NYCHA confuses the question whether its projects were segregated in the first instance with the question whether vestiges of that segregation (continued...)

To the contrary, the court found that NYCHA's projects were segregated because the evidence – including admissions by NYCHA (A-710-13, 715-17) – demonstrates that egregious racial steering during the 1960s, 1970s, and 1980s caused the projects to become and remain between 60 and 90 percent white at a time when whites were no more than 12 percent of the eligible applicant pool, and because those extremely high concentrations of white families were the deliberate result of explicit, secret racially discriminatory policies taken with "full knowledge of the predictable effects of such adherence upon racial imbalance," United States v. City of Yonkers, 96 F.3d 600, 612 (2d Cir. 1996) (Yonkers II), that even NYCHA has now admitted "were wrong" and "had the effect of discriminating against Black and Hispanic applicants" (A-715).

There can be no serious question that all twenty housing projects at issue here were, to borrow the Court's description in Yonkers I, in an "extreme condition of segregation" as recently as a decade ago. The district court's finding of past segregation is not clearly erroneous. Fed. R. Civ. P. 52(a).

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[10](...continued)
persist. See Brown v. Board of Education of Topeka, 892 F.2d at 861-62.

B. The Vestiges of Segregation Persist At Projects More than 30 Percent White

The district court found that the vestiges of NYCHA's past segregation still persist at projects that are more than 30 percent white. That finding of fact is likewise not clearly erroneous, either under accepted judicial standards for identifying the vestiges of past segregation, see Point B(1) infra, or under the benchmark adopted in the Consent Decree, see Point B(2) infra.

1. Under accepted judicial standards, the vestiges of segregation persist at the projects governed by the court's injunction

Affirmative steps must be taken to eliminate the vestiges of past housing segregation. Yonkers II, 96 F.3d at 619 (requiring housing officials to participate in remedy to eliminate vestiges of segregation); see Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Green v. School Board of New Kent Co., 391 U.S. 430, 437-38 (1968) (same for segregation of public schools). Judicial standards for assessing whether the vestiges of past segregation remain have evolved as part of the long line of jurisprudence on desegregation. In the area of greatest relevance, student assignment in public schools, the courts have examined, as a yardstick for determining whether past segregation

persists, whether white or non-white enrollment is greater or less than the system-wide average by 15 percentage points.

In Brown v. Board of Educ. of Topeka, 892 F.2d at 869, for example, the Tenth Circuit endorsed the "plus or minus 15%" standard in concluding that the vestiges of segregation had not been eliminated in student assignment in the Topeka schools. For similar applications of the 15 percent standard, see Penick v. Columbus Board of Ed., 583 F.2d 787, 799 (6th Cir. 1978), aff'd, 443 U.S. 449 (1979); United States v. Unified School Dist. No. 500, 974 F. Supp. 1367, 1374 (D. Kan. 1997); Dowell v. Board of Educ. Of Oklahoma City Public Schools, 778 F. Supp. 1144, 1172 (W.D. Okla. 1991), aff'd, 8 F.3d 1501 (10th Cir. 1993); Reed v. Rhodes, 472 F. Supp. 615, 617 (N.D. Ohio 1979).[11]

In this case, the system-wide white tenant population is 7.0 percent (A-1647); a 15 percentage point variance above the system-wide level is therefore 22 percent. Under accepted

[11] Some courts have adopted a 20 percentage point standard of variance. Manning v. School Bd. Of Hillsborough Co., 24 F. Supp. 2d 1277, 1291 (M.D. Fla. 1998); Stanley v. Darlington Co. School Dist., 879 F. Supp. 1341, 1404 (D.S.C. 1995), rev'd in part on other grounds, 84 F.3d 707 (4th Cir. 1996). Courts have sanctioned disparities greater than 15 or 20 percentage points only where greater desegregation is made impossible by external conditions. E.g., Morgan v. Nucci, 831 F.2d 313, 317 n.3, 320 (1st Cir. 1987). In this case, no external condition prevents the Disproportionate Projects from desegregating further.

judicial standards, Judge Sweet would have been entirely justified in concluding that the vestiges of segregation persist at NYCHA's projects until the white tenant population falls to approximately 22 percent. The court adopted a more conservative benchmark of 30 percent because the Consent Decree reflects that figure; but it need not have done so.

Moreover, even if Judge Sweet had used the "20 percent" variance test employed by some courts, see note 11 supra, and even if he had used as a baseline the concentration of whites in the eligible applicant pool (10.0 percent, according to NYCHA's expert, see A-965), then the court would have come to exactly the same standard as it did in adopting the 30 percent benchmark in the Consent Decree.[12]

Furthermore, if this Court were to conclude that the parties did not adopt a 30 percent benchmark in the Consent Decree, then the appropriate remedy would be to apply the accepted judicial guidelines — which are either more severe or equal to the standard adopted by Judge Sweet. The remedy would not, as NYCHA seems to suggest, be to apply no standard at all and thereby

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[12] A 20 percentage point variance above the 10 percent system-wide average of whites in the applicant pool is exactly equal to 30 percent.

ignore the persistence of NYCHA's past segregation.

2. The Consent Decree reflects the parties' agreement that projects more than 30 percent white are affected by past segregation

This Court need not fall back on the accepted judicial guidelines regarding perpetuation of segregation because, as Judge Sweet correctly found, the Consent Decree reflects the parties' agreement that the vestiges of NYCHA's past segregation persist at projects more than 30 percent white.

The Borrowing Provision prohibits significant numbers of white families from transferring from one segregated project to another nearby segregated project in need of applicants. The district court found that the 30-percent standard is not arbitrary, as NYCHA alleged, but reflected the parties' agreement on a simply administered rule for identifying most of the projects affected by past segregation. 60 F. Supp. 2d at 232 (A-1954). Because that finding is amply supported by the record,[13] it is not clearly erroneous. Indeed, NYCHA has failed to suggest any other plausible purpose for this limitation.

Moreover, the district court correctly reasoned that if the Borrowing Provision had not reflected the parties' agreement that

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[13] In 1990, 28 of 31 Affected Developments were approximately equal to or greater than 30% white (A-1122-23).

projects over 30 percent white were still affected by past segregation, then the Provision would have been unlawful. As the court noted, "remedies containing race-conscious relief 'must be substantially related to the objective of eliminating the alleged instance of discrimination . . . and must not unnecessarily trammel the interests of affected third parties.' Kirkland v. New York State Dep't of Correctional Serv., 711 F.2d 1117, 1132 (2d Cir. 1983), [cert. denied, 465 U.S. 1005 (1984)]. Thus, had there been no finding that housing projects that are greater than 30 percent white were affected by past segregation, the Borrowing Provision would be unlawful." 60 F. Supp. at 232 (A-1955). Since Consent Decrees must "be read in harmony with existing law," id. (A-1954), see Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978), the Borrowing Provision must reflect the parties' agreement that projects more than 30 percent white are affected by past segregation.

NYCHA's suggestion that the district court's adoption of the 30 percent standard somehow violates the "four-corners rule" for construing Consent Decrees (NYCHA Mem. at 12-16) lacks merit. The Consent Decree incorporates the TSAP by reference (¶ 5, A-28). The TSAP adopts the 30 percent standard to prevent a remission of desegregation at previously segregated projects. The

fact that the Consent Decree does not explicitly recite this purpose does not invalidate the district court's ruling. See Sarabia v. Toledo Police Patrolman's Ass'n, 601 F.2d 914, 914-15 (6th Cir. 1979) (rejecting argument that district court's injunction lifting obstacle to desegregation is beyond the power of the court because it disregarded express limitations in the consent decree); Glass City Black Bros. United v. Neeb, 540 F. Supp. 852, 856 (N.D. Ohio 1982) ("this Court has the power to interpret the decree so as to permit the requested supplemental order").[14]

C. The Consent Decree Does Not "Deem" NYCHA's Projects To Be Desegregated When Remedial Relief For Victims of Discrimination Ends

NYCHA's contention that its projects "can no longer be considered segregated" once it has provided remedial relief to claimants (NYCHA Mem. at 16-18) is inconsistent with the language of the Decree and the record on which it is based. As the district court found, "even after claimant relief is completed,

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[14] NYCHA's attempt to belittle the Borrowing Provision as a "minor administrative mechanism" "at the back of the TSAP" (NYCHA Mem. at 13) is entirely without merit. Most of the TSAP deals with normal rent-up procedures. The Borrowing Provision comes into play only when the normal rental procedures fail to achieve their purpose. See pp. 12-13 supra. Since most of the TSAP is devoted to describing NYCHA's normal rental procedures, the Borrowing Provision naturally appears toward the end. That fact scarcely makes it any less significant.

every Affected Development will still have white populations significantly greater than the prevalence of whites in the relevant applicant pool."[15] 60 F. Supp. 2d at 233 & Table 8 (A-1956-57). That finding is not clearly erroneous, Fed. R. Civ. P. 52(a); indeed, it is not seriously disputed.[16]

Thus, NYCHA is relegated to arguing that the Consent Decree somehow requires the court to "deem" that the projects are de-segregated even though they are not. But as the district court correctly found, see 60 F. Supp. 2d at 233-36 (A-1958-65), the text, structure, and history of the Decree demonstrate the oppo-

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[15] For example, the district court found that after the completion of remedial relief, the Berry project on Staten Island will remain over 56 percent white; the South Beach project on Staten Island will remain over 53 percent white; Staten Island's New Lane project will remain 73 percent white (id. Table 8, A-1957).

[16] NYCHA does not dispute the court's findings regarding expected white population levels after the conclusion of remedial relief (column 6 of Table 8 of the district court's findings, 60 F. Supp. 2d at 233 (A-1957)). In a footnote, NYCHA Mem. at 21 n.6, NYCHA does complain that in comparing these figures to the relevant applicant pool (column 7), the court should have defined the applicant pool as "the overall waiting list of qualified public housing applicants" rather than "the percentage of whites entering a given project at a given time." But an accurate measure of the number of whites in the eligible applicant pool for a particular project is the number who were actually found eligible and who moved into that project. Indeed, this is exactly the same measure used by the United States in support of the Consent Decree. (See A-1117.) The district court's decision to adopt this measure was not clearly erroneous.

site.

First, remedial relief for victims of discrimination generally covers the period from 1983 to 1990; priority placement at the Affected Developments covers only the period from 1985 through 1990. In their submissions to the district court in support of the Consent Decree, however, all the parties (including NYCHA) meticulously documented discrimination by the Authority beginning in at least 1960 and persisting through the 1970s and 1980s. The Department of Justice, for example, documented the use of racial balancing programs during the 1960s and 1970s (A-1112-13), and detailed move-in and move-out patterns between 1973 and 1988 that conclusively demonstrated NYCHA's use of "a deliberate racial quota system" (A-1116-17). Even NYCHA admitted to the use of a so-called "integration program" beginning in 1960 that resulted "in a higher proportion of whites than would have resulted from a race neutral admissions policy" (A-715).

If the parties' sole purpose had been to rectify discrimination beginning in 1985 (or 1983), then this evidence would have been irrelevant. Indeed, NYCHA would apparently have the Court believe that it gratuitously confessed to serious civil rights violations beginning in 1960 and continuing for 30 years for no evident reason. Rejecting this implausible view, the district

court correctly found that all the parties, including NYCHA, intended to demonstrate a history of segregation beginning in 1960. "Because the victim relief afforded by the Consent Decree is limited to a subset of the years in which NYCHA practiced racial steering, the Consent Decree's remedial relief provisions only go a part of the way toward effectuating desegregation." 60 F. Supp. 2d at 234 (A-1959).

Second, the record demonstrates that the decision to limit victim relief to 1985 (and to 1983 for Section 8 vouchers) was not because that relief was sufficient or intended to eradicate all past segregation, but because "as time passes, the capacity to identify and locate victims of discrimination diminishes" and because "[t]he desire of class members to participate in relief for wrongs done long ago likewise diminishes over time" (A-226). This practical decision did not immunize the Housing Authority for wrongs committed before 1983, however; in fact, the Consent Decree says exactly the opposite. Paragraph 4(j) explicitly provides that nothing "shall be deemed to prohibit the provision of remedial relief under this Consent Decree or remedial relief to any identified victims of past discrimination on the basis of race, color, or national origin who do not receive relief under this Consent Decree." While the Housing Authority attempts to

construe ¶ 4(j) as requiring pre-1983 victims to bring a new action, see NYCHA Mem. at 17, nothing in ¶ 4(j) requires any such thing. Thus, the Consent Decree contradicts NYCHA's position that relief for victims exhausts its obligation to make redress for wrongs before 1983.

Finally, other provisions of the Consent Decree belie NYCHA's view. For example, ¶ 6(b) permits NYCHA to modify the TSAP, but permits the plaintiffs "to move the court to enjoin the proposed modification as inconsistent with the terms of this Consent Decree, and to seek full and complete relief for persons harmed by the changes, and any other appropriate relief authorized by the Fair Housing Act" (A-30). As the district court found, 60 F. Supp. 2d at 235 (A-1962-63), "[i]f the Court could not find that increases in segregation caused by changes to the TSAP violate the Fair Housing Act after victim-relief ends, as NYCHA claims, then ¶ 6(b) would be extraneous, since the Court could not order full and complete relief once victim-relief ended."

Likewise, the district court correctly recognized that the permanent injunctions are intended to bring about desegregation not only at the 31 Affected Developments, but in all of NYCHA's housing, "conventional or otherwise." If the Consent Decree

sought only to redress discrimination at the 31 Affected Developments, then there would have been no purpose to extending the permanent injunctions more broadly. 60 F. Supp. 2d at 235 (A-1962).[17]

In sum, nothing in the Consent Decree remotely suggests that once remedial relief for victims ends, all of NYCHA's housing projects are somehow "deemed" to be desegregated.

D. The District Court's Construction of the Decree Does Not Impermissibly Extend the Court's Jurisdiction

NYCHA's argument that the district court's construction of the Consent Decree impermissibly extends its jurisdiction is

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[17] The district court also observed correctly that NYCHA erroneously attempts to conflate relief for identified victims of discrimination with relief designed to effect desegregation. These forms of relief stand on entirely different footings. Race-conscious relief designed to eradicate the effects of past segregation is permissible under the civil rights acts, see Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 516 (1986), and the Fourteenth Amendment, see Wygant v. Jackson Board of Ed., 476 U.S. 267, 287 (1986), even if the relief benefits a class that includes non-victims, so long as it is narrowly tailored to serve a compelling state interest. See Yonkers I, 837 F.2d at 1236. Individual relief for victims, in contrast, is always a permissible equitable remedy because a preference is made not on the basis of race, but on the basis that the victim has been individually wronged. Coalition for Economic Equity v. Wilson, 122 F.3d 692, 700 n.7 (9th Cir.), cert. denied, 522 U.S. 963 (1997). As the district court found, the Consent Decree incorporates both forms of relief. 60 F. Supp. 2d at 236 (A-1964). The Housing Authority ignores the former and focuses exclusively on the latter.

frivolous. First, the permanent injunctions are intended to bring about desegregation of all of NYCHA's segregated housing projects. Those injunctions do not expire. (See ¶ 50, A-60.)

Second, while ¶ 6(b) authorized NYCHA to change the TSAP during its five-year duration, it further provided that any change was "without prejudice to the right of the plaintiffs to move the court to enjoin the proposed modification as inconsistent with the terms of this Consent Decree, and to seek full and complete relief for persons harmed by the changes, and any other appropriate relief authorized by the Fair Housing Act" (A-30) (emphasis added). The Fair Housing Act authorizes injunctive relief to prevent the perpetuation of past segregation. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir.), aff'd on other grounds, 488 U.S. 15 (1988); Yonkers II, 96 F.2d at 618-19. When NYCHA modified the TSAP, it triggered ¶ 6(b), which authorized the district court to issue injunctive relief to prevent the perpetuation of past segregation.

Because the Consent Decree expressly authorized the district court to issue an injunction barring the perpetuation of past segregation, that injunction did not improperly extend the court's jurisdiction.

II

THE WFP SIGNIFICANTLY PERPETUATES PAST SEGREGATION

The district court found that the WFP would significantly perpetuate past segregation by substantially decreasing or reversing the rate of desegregation. The court quantified the impact of the WFP at every affected project by determining the rate of reduction in desegregation, and by determining the number of additional white families who would live in those projects because of the WFP.

As noted, the WFP would boost the number of white families at the 21 projects originally subject to the court's injunction by between 18.6 and 19.3 percent, or between 711 and 855 families. The impairment in desegregation at individual projects would generally be at least 25 percent. Most of the affected projects would see an increase of at least 25 white families in occupancy after ten years. See pp. 20-22 supra. At either one or five projects, desegregation would actually reverse[18] and

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[18] The number of projects where desegregation would be reversed, rather than merely significantly delayed, depends on whether future move-out rates at each project are the same for each race, or whether small differences between move-out rates for each race persist. Between 1991 and 1994, move-out rates for white families were, in general, a few percentage points higher

(continued...)

white populations would begin to increase again.

A. The District Court Correctly Compared the Rate of Desegregation Under the WFP to the Rate of Desegregation under the Original TSAP

In making these findings, the district court correctly compared the rate of desegregation under the WFP to the rate of desegregation under the original TSAP. NYCHA's contention that the court should instead have compared the expected tenant population under the WFP to "the actual tenant population at each of the Developments" (NYCHA Mem. at 21) is illogical and contrary to Supreme Court precedent.

Governing precedent requires the court to compare the old tenanting plan to the new plan. The district court correctly

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[18](...continued)
than for non-whites (A-1699; see A-1396). If that trend continues, then desegregation will reverse at one project (Middletown Plaza) and be significantly slowed at the others. See 60 F.2d at 229 (Table 5) (A-1948). On the other hand, if move-out rates for each race converge in the future, then desegregation will reverse at five projects and be significantly slowed at the others (A-1699).

Citing its own expert's opinion (NYCHA Mem. at 25 n.9), which the district court rejected, NYCHA asserts that the possibility of equal move-out rates is "counterfactual" and should be ignored. As the district court recognized, NYCHA is mistaken. Neither projection is "counterfactual"; they are simply reasonable alternative estimates of future turnover rates. Taking both possibilities into consideration is "a further refinement" of the analysis. 60 F. Supp. 2d at 226 (A-1943). The district court correctly considered both possibilities.

held that "where a court-ordered plan intended to eradicate desegregation is in effect, and where, as here, a proposed change to the plan is alleged to perpetuate past segregation, the Supreme Court has compared the results under the proposed plan with those under the original, court-ordered plan." 60 F. Supp. 2d at 237 (A-1967). See Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck City Board of Educ., 407 U.S. 484 (1972).

The Authority purports to distinguish those cases because the desegregation plans at issue involved "explicit racial-mix goals." NYCHA Mem. at 22. The TSAP, NYCHA contends, "cannot be used as the basis for comparison" because it "contains no plan to achieve racial-mix goals." Id. at 23. But that assertion is erroneous. The TSAP may be used as a basis for comparison because its future impact can be and has been accurately quantified. The fact that the TSAP did not incorporate explicit racial goals has no bearing on whether it can be used as a basis for comparison.

Further, the comparison the Authority urges would sanction any delay in desegregation, no matter how great, so long as the white population keeps falling. The district court correctly rejected that position as contrary to Supreme Court precedent and

patently absurd. 60 F. Supp. 2d at 238 (A-1969). The Supreme Court has specifically held that changes that significantly delay desegregation are unlawful. Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1968). NYCHA's view that any delay would be acceptable so long as the white population keeps falling, however slowly, is in direct conflict with this principle.[19] The court also reasoned correctly that NYCHA's argument is illogical. A change that causes desegregation to take place over 20 years, for example, rather than five years, obviously delays desegregation by 15 years and therefore impedes desegregation. 60 F. Supp. 2d at 238 (A-1969). "The relevant inquiry here is not whether desegregation will occur eventually, but whether the WFP will significantly delay desegregation at the Disproportionate Projects." Id.

Accordingly, the district court correctly compared the WFP to the original TSAP.

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[19] As the district court noted, the decision of the Sixth Circuit in Sarabia is squarely on point. There, the percentage of African-Americans on the Toledo police force increase from 7 percent to only 8.4 percent after three and one-half years under a consent decree. Concluding that a civil service hiring rule was impeding desegregation, the Sixth Circuit sustained the district court's order suspending the rule. Id. at 619. As the district court observed, "it was no defense that the percentage of whites on the force was slowly declining even with the challenged rule in place." 60 F. Supp. 2d at 238 (A-1970).

B. The District Court Performed A Project-by-Project Analysis

In a mystifying objection, NYCHA faults the district court for failing to analyze the impact of the WFP on a project-by-project basis. (NYCHA Mem. at 23-24.) As a cursory reading of the district court's opinion reveals, however, that is exactly what the court did. Every table prepared by the district court lists the 21 projects individually and makes specific findings regarding each. 60 F. Supp. 2d at 227-33 (A-46-57).

Nor did the district court err, as NYCHA alleges, because the injunction applies "equally" to projects with differing rates of desegregation. (NYCHA Mem. at 24.) A change that significantly delays or impedes desegregation may be enjoined, Monroe, 391 U.S. at 459, regardless of whether the rate of desegregation at any particular project is fast or slow.[20]

Finally, the district court did not err by including, in the

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[20] NYCHA also erroneously faults the district court because the injunction covers four projects (Haber Houses, Independence Towers, Williams Plaza, and Taylor-Wythe) that are not Affected Developments where relief for victims is taking place. (NYCHA Mem. at 24.) This objection is equivalent to NYCHA's position that the Consent Decree was intended to desegregate only the Affected Developments. As noted earlier, and as the district court correctly held, various provisions of the Consent Decree demonstrate that it was not intended to desegregate only the Affected Developments. 60 F. Supp. 2d at 234-36 (A-1959-63).

aggregate total of additional white move-ins, six projects where relief for victims may eventually reduce the white population below 30 percent.[21] (NYCHA Mem. at 25.) As the district court explained, 60 F. Supp. 2d at 240 (A-1974), plaintiffs' expert accounted for move-ins by Davis claimants, all of whom are by definition African-American or Hispanic (A-1388), by calculating the expected impact of all future Davis claimant move-ins, and then adjusting the number of whites at each Affected Development downward to simulate the completion of Davis relief by June 30, 1998. (See A-1386-88.) But Davis relief had not, in fact, concluded by June 30, 1998, nor is the date on which it will conclude at any particular project known. Relief for victims proceeds slowly because it is limited by the rate at which vacancies arise in suitably sized apartments in the Affected Developments.[22] The district court did not err in failing to speculate that relief for Davis claimants will drive the white population of the Disproportionate Projects below 30 percent during the time

[21] The six projects in question are Bay View, Holmes Towers, Isaacs, Pelham Parkway, Sheepshead Bay, and Straus. (NYCHA Mem. at 25.)

[22] At the Straus project, for example, no victims moved in during 1997 or 1998 (A-1565); at Bay View, only six victims moved in during 1998 (A-1496).

frames examined.

Further, in identifying six projects that may drop below the 30-percent threshold, NYCHA assumes that the small differential between move-out rates for whites and non-whites will persist in the future. If those move-out rates converge, then only three of those projects would fall below the 30 percent benchmark under the WFP even after all victim relief has ended (see A-1923). As noted, the district court correctly rejected NYCHA's categorical assumption that move-out rates will not converge in the future and considered both possibilities. See note 18 supra.[23]

C. The District Court Properly Accounted for the Outflow of White Families from the Disproportionate Projects

NYCHA erroneously claims that the district court did not account properly for the outflow of white families from the Disproportionate Projects. To the contrary, the district court expressly took outflow into consideration in assessing the impact

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[23] NYCHA also objects to counting ten additional white tenants at the Glenwood project, which did drop below the 30 percent threshold after the first year of operation of the WFP. But the district court's findings are based on projections commencing on June 30, 1998. A portion of the Glenwood changes are properly credited to that period. The failure to make a tiny adjustment for the balance of the ten Glenwood move-ins had no material impact on the court's conclusions and was not clearly erroneous.

of the WFP. The court adopted the methodology of plaintiffs' expert, who "calculated the number of white move-ins and move-outs that would occur at each Disproportionate Project with the WFP operating." 60 F. Supp. 2d at 227 (A-1945) (emphasis added). Tables 3, 5, 6, and 7 of the district court's opinion all reflect changes in the numbers or percentages of occupants at the projects caused by the WFP. These changes reflect outflow as well as inflow.

An example will clarify that the district court explicitly considered outflow as well as inflow. As Table 3 of the court's opinion indicates, the South Beach project has 416 apartments. Using known move-out rates,[24] plaintiffs' expert calculated the total number of vacancies that are expected to arise at South Beach during one year (in other words, outflow). See 60 F. Supp. 2d at 226 (A-1943). Based on that number of vacancies and the move-in probabilities for each race at South Beach in Table 2,[25] plaintiffs' expert then calculated the expected number of white

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[24] The move-out rates for South Beach during the period examined (1991-1994) were 8.4 percent per year for whites and 5.3 percent for non-whites (A-1396).

[25] The probabilities of a family selecting South Beach are 1.8 percent for whites and 0.23 percent for non-whites. 60 F. Supp. 2d at 226 (Table 2)(A-1944).

and non-white move-ins for one year. That procedure was repeated for five and ten years. As the district court found, after five years under the WFP, the white population at South Beach would fall from 221 to 198 families (a reduction of 23 families). Under the original TSAP, in contrast, the white population would have fallen by 48 families, or more than twice as many as under the WFP. Id. (Table 4) (A-1947). Thus the impairment of desegregation at South Beach was 52.1 percent. Id.

This procedure clearly takes into account both outflow and inflow. Thus, NYCHA is simply wrong in claiming that "differences in white outflow could more than compensate for differences in white influx" (NYCHA Mem. at 27.) The district court correctly found that white outflow does not compensate for the additional influx of white families caused by the WFP.

D. The District Court Correctly Analyzed Statistical Significance

In an argument made for the first time on appeal (NYCHA Mem. at 28-30), NYCHA now claims that the district court erred by using the number of white move-ins as the appropriate variable for calculating the point in time at which the impact of the WFP can be said to be statistically significant. NYCHA asserts the court should instead have used the percentage of white occupants

as the appropriate variable.[26] This argument has been waived because it was never presented to the district court. See Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A., 176 F.3d 601, 609-10 (2d Cir. 1999); Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc., 54 F.3d 69, 72-73 (2d Cir.1995). Even if the point had not been waived, however, it is incorrect.

To understand NYCHA's error, a review of the court's analysis of statistical significance is necessary. As the record indicates, the court's analysis was similar to an analysis of how many times a coin must be flipped before it can be said, with 95 percent confidence, that the coin is not weighted evenly between heads and tails (A-1856-57). After ten flips, a coin with a 60 percent chance of landing on heads is most likely to land on heads six times. Nonetheless, if a coin were flipped ten times and landed heads on six, it could not be said with confidence that the coin is weighted unfairly. This is because the coin has not been flipped enough times for the difference between what was expected (five) and what was observed (six) to be statistically significant (A-1857).

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[26] Although NYCHA's expert scrutinized Dr. Cupingood's calculations of statistical significance on three occasions (A-1640-42, A1842-44, A-1899-1900), he never made the argument now devised for the first time on appeal by counsel.

For purposes of calculating statistical significance, move-ins under the WFP and the original TSAP are analogous to the flip of two coins with unknown (and possibly different) probabilities for landing on heads. A white move-in under either plan is analogous to heads (A-1857). Just as disparities between the number of heads for each coin might arise when the two coins are flipped a small number of times, so, too, might disparities between the two tenanting plans arise after only a small number of move-ins. But that alone would not prove that these disparities are statistically significant. Like the coin example, the number of move-ins under each plan must be sufficiently large to conclude that any differences are significant.

Plaintiffs' expert, Dr. Cupingood, calculated the number of move-ins that would have to occur before any disparities could be said, with 95 percent confidence, to be statistically significant. Based on actual turnover rates, he then determined how long those move-ins would take to occur (A-1393). Adopting that analysis, the district court found that at 18 of 21 projects, projected disparities between the TSAP and the WFP would be statistically significant within five years.[27] 60 F. Supp. 2d at

[27] This finding obtained regardless of whether move-out rates for each race converged or tracked their historical trends. (Compare A-1406 (Table 12) with A-1407 (Table 13).)

240 (A-1973-74); see A-1406 (identifying specific projects). Within ten years, projected disparities would be statistically significant at 20 of 21 projects. (Id.; see A-1408.) Because of low turnover, disparities at one project (Williams) would become significant in 12 years (A-1394).

As NYCHA observes, in performing this analysis, plaintiffs' expert chose, and the court adopted, white move-ins rather than the percentage of white occupants as the variable for analysis. This choice was intentionally made. Like the flip of a coin, each move-in represents an event. But occupancy levels are not "events." An occupancy level changes only when a move-out and move-in occur. Thus, to determine how many events must occur before disparities become statistically significant, one must measure either move-outs or move-ins. As between these two choices, move-ins was the correct one. Move-outs are unrelated to the WFP. Move-ins, in contrast, are a direct function of the WFP.

Further, even if there were a way to translate occupancy levels into "events," the test NYCHA proposes would be equivalent to the one performed by plaintiffs' expert and adopted by the district court. The results would be equivalent because move-outs operate independently of both the original TSAP and the WFP.

Regardless of whether move-outs of whites are expected to be large or small, they will be identical under the two plans. The only thing causing differences between the two plans is move-ins. Thus, any statistically significant difference in move-ins will necessarily reflect a statistically significant difference in occupancy levels as well. Thus, the district court correctly chose white move-ins as the appropriate variable for analysis.[28]

NYCHA also asserts that the district court's findings are not probative because "any difference compounded far enough over time may eventually become statistically significant" (NYCHA Mem. at 30). This objection is erroneous, and the district court correctly rejected it. NYCHA is right, of course, that when two events have different probabilities, one can calculate the number of measurements needed to verify, for any level of confidence, that the probabilities are indeed different. But that does not mean that the district court's use of such a calculation was not probative. Indeed, if Dr. Cupingood had shown that projected increases in white move-ins would not become significant for a

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[28] It must be emphasized that, had NYCHA raised this point before Judge Sweet, the issue would have been fully vetted by the trial court. By failing to do so, NYCHA waived the argument here. Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A., 176 F.3d at 609-10.

century, NYCHA would certainly have regarded that as probative. It is equally probative that the increases would become statistically significant for 18 projects within five years, and for all 21 projects within 12 years.

For these reasons, the district court's analysis of statistical significance was not clearly erroneous.

E. Differences Between the TSAP and the WFP are Legally and Practically Significant

As the district court held, it must "be determined whether the statistically significant difference occasioned by the WFP is of ample magnitude to be of practical importance." 60 F. Supp. 2d at 240 (A-1975). The court correctly held that the difference is indeed practically important.

1. The impact of the WFP is practically significant as measured in the aggregate

As the district court found, if move-out rates reflect the historical trend for each race, then in the aggregate, the WFP will result in 432 additional white occupants at the 21 projects after five years,[29] and 711 after ten years.[30] If move-out rates

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[29] 60 F. Supp. 2d at 227 (Table 3) (A-1946) (5172 white occupants under the WFP - 4740 under the original TSAP = 432).

[30] Id. at 229 (Table 6) (A-1950) (4530 white occupants under the WFP - 3819 under the original TSAP = 711).

for whites and non-whites are equal, then the WFP will result in 504 additional white occupants after five years and 855 after ten years. 60 F. Supp. 2d at 230 (A-1950-51).

These figures must be compared with the total number of white families at the projects. Assuming move-out rates reflect historical trends for each race, under the TSAP there would have been 3,819 white families at the 21 projects after ten years. The WFP will boost the figure by 711 to 4,530, an increase of 18.6 percent.

At projects where past segregation was virulent, an increase in the number of white families of 18.6 percent is quite substantial. Further, this figure assumes that turnover rates for whites will remain slightly higher than for non-whites. If the two turnover rates prove to be equal, then the WFP will augment the number of white tenants from 4,433 to 5,288, an increase of 19.3 percent.

While, as the district court observed, there is no "bright line rule" for assessing when an increase in segregation is legally significant, see 60 F. Supp. 2d at 240 (A-1975), these increases are obviously substantial, whether measured in terms of the number of families affected or the percentage increase. At projects where discrimination was virulent a decade ago, the WFP

would boost the white population by almost 20 percent, or between 711 and 855 families. By no stretch of the imagination is that impact de minimis.

In other cases where comparable or even smaller decreases in desegregation were involved, courts have enjoined policies that were responsible for impeding desegregation. In Sarabia v. Toledo Police patrolman's Ass'n, 601 F.2d 914 (6th Cir. 1979), for example, a consent decree had been adopted for the purpose of "eras[ing] any vestiges of past employment discrimination within" the Toledo Division of Police. 601 F.2d at 915. After three and one-half years, the percentage of African-Americans on the police force had increased from seven percent to 8.4 percent. During the same period, African-Americans comprised approximately 14% of the population of Toledo. Id. at 917. In the most recent civil service examination, 18 of 193 applicants who passed the examination (9.3 percent) were African-American. Id. at 916.

Agreeing with the plaintiffs that a civil service rule was impeding desegregation under the consent decree, the Sixth Circuit affirmed an order suspending operation of the rule. Notably, the impact of that rule was not materially greater than the impact of the WFP in this case. Had the civil service rule in Sarabia been enjoined before the most recent civil service

examination, and had the results of the examination reflected the percentage of African-Americans in the Toledo population (14%), then nine additional African-Americans would have passed the exam. Even if all nine additional African-Americans had been hired, the percentage of African-Americans on the force would have increased only from 8.4 percent to 9.56 percent.[31] Yet the Sixth Circuit had no hesitation concluding that the rule was impeding desegregation under the Consent Decree and should be enjoined. See also Glass City Black Brothers United v. Neeb, 540 F. Supp. 852 (N.D. Ohio 1982) (similar rule impairing desegregation of the Toledo Fire Division enjoined).

The impact on desegregation in Sarabia was no greater than the impact of the WFP in this case. The civil service rule reduced desegregation by less than 1.2 percentage points (from 9.56 to 8.4 percent), equivalent to only nine African-American officers. Whether measured in terms of absolute numbers or percentages, that impact is smaller than the impairment of desegrega-

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[31] At the relevant time, the Sarabia police force employed 784 officers. See Afro American Patrolmen's League v. Duck, 366 F. Supp. 1095, 1101 (N.D. Ohio 1973), aff'd and remanded, 503 F.2d 294 (6th Cir. 1974). By 1977, 8.4 percent, or 66, were African-American. Sarabia, 601 F.2d at 917. Had all nine additional African-American candidates been hired, the number of African-Americans on the force would have increased from 66 to 75, or 9.56 percent of the workforce.

tion at issue here.

2. The impact of the WFP should be measured in the aggregate

For purposes of assessing the practical impact of the WFP, the court should consider the Disproportionate Projects as a group and not just individually. NYCHA itself intentionally included these projects as a group in racially discriminatory "Special Needs" programs (A-762-64) or "Programs to Maintain or Achieve Ethnic Balance" (A-757-59). NYCHA Community Affairs staff prepared special reports for this group of projects for the purpose of manipulating their racial composition (A-399-405). In every sense, NYCHA treated these projects as a special subset subject to uniquely discriminatory rules and policies.

Having defined and treated the segregated projects as a special subset subject to discriminatory rules, it is supremely ironic that NYCHA attempts to minimize the impact of its segregation program by claiming that the impact at any one project is only one-twentieth as large as the total impact. The argument smacks of an attempt by the City of Toledo to maintain that the civil service rule in Sarabia had a de minimis impact because Toledo has twenty police precincts, and the impact measured at the precinct level is only one-twentieth as severe as the entire

program. Because the Authority itself placed the Disproportionate Projects in a discriminatory "Special Needs" program, the impact should be measured across that program.

3. The impact of the WFP is practically significant at the project level

Finally, even if the impact of the WFP were to be assessed solely at the project level, the impact at each of the twenty remaining Disproportionate Projects is significant. NYCHA's attempt to minimize the impact at the project level by characterizing the impact "per year" should be rejected. (NYCHA Mem. at 31.) For example, with regard to Middletown Plaza, where desegregation would reverse and white occupancy levels would increase year after year, NYCHA maintains that the increase would be "just 2.26% [sic: percentage points][32] per year." (Id.) There is no justification for trivializing the impact of the WFP by focusing only on the impact "per year," as though the impact over the years does not add up cumulatively. NYCHA might as well maintain that the impact at Middletown Plaza is only 0.006 percentage points per day, as though every day is a discrete event

[32] Throughout its discussion, NYCHA carelessly confuses "percentage points" with "percent." The increase at Middletown Plaza over five years from 49.1% to 60.4% is 11.3 percentage points, or 23.0%.

and days do not add up to years.

The impact of the WFP should instead, as the district court found, be evaluated at the end of pertinent time frames. The court reasonably defined those time frames as five and ten year periods. After ten years (assuming historical turnover trends), the number of white families at one project (Middletown Plaza) would increase from 87 to 109 (22 families) (A-1921). Among 13 of the remaining 19 projects where the white population would slowly fall, differences in the number of white occupants would be at least 25 families (A-1922, Column 4). At one project (Pomonok), the number of additional white families would amount to a whopping 114 (id.). The district court correctly found that increases of dozens or hundreds of white families at these individual projects would be significant.

Further, increases in the white population at individual projects should be compared to the white population that would have existed under the original TSAP, and not to the total project population. For example, at Haber, the white population would have fallen from 193 to 113 after ten years under the original TSAP. Under the WFP, in contrast, it would fall only to 154 (A-1921). The net increase in the number of white families (41) would boost the white population by over 36 percent. As

noted, on average, the WFP would boost the white population by almost 20 percent, depending on future move-out rates. The court correctly found that these increases are not de minimis.

Even at the Independence, Taylor/Wythe, and Williams projects – three housing projects in a small neighborhood in Williamsburg, Brooklyn, where turnover is lowest, and desegregation is therefore slowest – the WFP would boost the white population by eleven, nine, and seven white families, respectively (A-1922, Column 4). The impact at each of these projects is comparable to the number of African-Americans affected by the civil service rule that the district court enjoined, and the Sixth Circuit affirmed, in Sarabia.

Finally, the impact of the WFP on desegregation is smallest where desegregation is slowest. But where segregation is persisting the longest, this Court should be less tolerant of changes that impede desegregation, not more tolerant. The three projects in Williamsburg, for example, are desegregating quite slowly because of low turnover. After ten years, those projects are expected to have the highest white concentrations of all of NYCHA's non-elderly public housing projects: two are expected to remain majority white even after ten years; one (Taylor/Wythe) will remain 49.8 percent white (see A-1921). Where segregation

is proving most resistant to eradication, even small impediments to desegregation are very significant.

For these reasons, the district court was not clearly erroneous in enjoining the WFP at all twenty of the remaining Disproportionate Projects.

F. The District Court Was Not Clearly Erroneous In Accepting Dr. Cupingood's Projections

NYCHA's contention that the district erred in crediting Dr. Cupingood's projections is completely without merit. The district court's findings in this regard are governed by the "clearly erroneous" standard of Rule 52(a). Those findings may not be overturned unless there is no view of the evidence that could possibly support them. Yonkers I, 837 F.2d at 1218.

NYCHA claims that the district court should have found Dr. Cupingood incredible because he did "an about-face with respect to Straus Houses." (NYCHA Mem. at 33-34). What happened, in fact, is that in the course of keypunching into a computer data base thousands of pieces of data reflected in tables comprising over 70 pages of the record (A-1417-88), a data entry operator made a keypunching mistake that affected the Straus project (see A-1696-97). The mistake was discovered and corrected (A-1856). At the district court's request, an updated set of tables was

prepared reflecting the correction (A-1913-30). NYCHA's contention that the district court should have found Dr. Cupingood incredible because of a keypunching error made by a data entry operator is frivolous.

Likewise, NYCHA claims that the court should have found Dr. Cupingood incredible because he "conced[ed]" that white admission rates "may be as low as 8.53% rather" rather than 9.9%. (NYCHA Mem. at 34.) This argument is frivolous. Based on computer models, Dr. Cupingood had originally calculated that the WFP would be expected to increase the white admission rate from 4.2 to 9.9 percent (A-724). After district court permitted the WFP to go into operation at all but 21 Disproportionate Projects, Dr. Cupingood calculated that the actual increase in the white admission rate, correcting for factors like the number of families in the "pipeline" who were admitted under the original TSAP, was 8.53 percent (A-1904-09). He noted that the "corrected figure of 8.53 percent is reasonably close to my original prediction that white admissions under the WFP would increase to approximately 9.9 percent" and did "not change my fundamental conclusion that the WFP will significantly slow or reverse desegregation at the 21 Disproportionate Projects" (A-1909).

In short, Dr. Cupingood found that he had made a reasonably

accurate prediction that confirmed his prior conclusion that the WFP would more than double the white admission rate. The fact that Dr. Cupingood's computer model did not predict the impact of the WFP during its first year with a 100 percent exactitude is no reason to disregard his conclusions. In fact, the district court found that Dr. Cupingood's analysis on this point actually rebutted the conclusions of NYCHA's expert, Dr. Peterson, who reasoned incorrectly that the white admission rate had increased only to 6.48 percent. 60 F. Supp. 2d at 239 n.16 (A-1971). That finding is not clearly erroneous.

Next, repeating arguments of its expert that the district court rejected, NYCHA claims that certain move-ins during 1998 demonstrated that Dr. Cupingood made erroneous assumptions about project selection preferences. (NYCHA Mem. at 34.) Answering these assertions, Dr. Cupingood explained that NYCHA's expert had misunderstood the procedure for using project-selection probabilities (A-1696). Agreeing with Dr. Cupingood, the district court found that Dr. Peterson had completely misunderstood these calculations and had made comparisons that were "meaningless." 60 F. Supp. 2d at 240 (A-1974-75).

NYCHA also claims that Dr. Cupingood's projections are "inherently imprecise and speculative." (NYCHA Mem. at 35.) The

district court, however, expressly rejected that contention, finding that Dr. Cupingood had taken "reasonable steps, such as the use of historical averages, to minimize the impact of possible uncertainties." 60 F. Supp. 2d at 239 n.17 (A-1972). That finding is not clearly erroneous.

Finally, NYCHA faults the district court for not fully updating several tables to reflect some minor corrections caused a small number of keypunching errors.[33] (E.g., NYCHA Mem. at 21 n.6, 27 n.12.) These corrections are of such small magnitude as to be of no significance. Further, most of the corrections "actually show an increase in the levels of disparity and statistical significance" originally reported by Dr. Cupingood (A-1697) (emphasis in original).

To give but a single example, in Table 5, which is based on A-1398 and A-1919, the district court found that the white population at Middletown Plaza would rise to 60.1 percent from 51.8 percent. 60 F. Supp. 2d at 229 (A-1948) (derived from A-1398). The corrected figure is a slightly higher 60.4 percent (A-1919). This tiny correction made no difference to any of the

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[33] Specifically, the source for Tables 3 and 5 is A-1398 with updates from A-1919. The source for Table 4 is A-1399 with updates from A-1920. The source for Table 6 is A-1400 with updates from A-1921. The source for Table 7 is A-1402.

district court's conclusions; indeed it slightly favored NYCHA. The district court had no need to fully update tiny changes in calculations that have no effect on its ultimate conclusions.[34]

For all these reasons, the district court was not clearly erroneous for adopting Dr. Cupingood's projections.

CONCLUSION

The district court's finding that the vestiges of segregation persist at 20 NYCHA housing projects was not clearly erroneous. Further, the court's finding that the WFP would significantly perpetuate past segregation at those projects was not clearly erroneous. Accordingly, the order of the district court should be affirmed.

[34] As the text of the district court's opinion states, the heading for Table 7 should refer to "Historical Overall Turnover" rather than "Historical Turnover by Race." Likewise, the totals for Columns 4 and 5 in that table should refer to 5,176 and 5,680, as the text of the opinion states. (See A-1402.) Since the text of the opinion is correct, these typographical errors have no impact on the district court's conclusions.

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Respectfully submitted,

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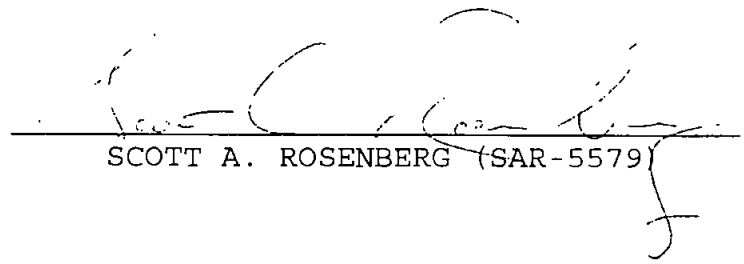
By: 
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