Supreme Court, U.S.
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No. 01-1466

In The

Supreme Court of the United States

NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

- against -

PAULINE DAVIS; CYNTHIA WILLIAMS; CORNELIA SIMMONS; KIM RIVERA, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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USSC01146602001

QUESTION PRESENTED

Whether the lower courts correctly enjoined the use of petitioner's local admission preference at 14 public housing projects that had been previously segregated because of racially discriminatory housing practices, where use of the preference would substantially delay or reverse desegregation.

USSC01146602002

LIST OF PARTIES

The petitioner is the New York City Housing Authority.

The respondents are Pauline Davis, Cynthia Williams, Blanca Iris Hernandez, Gina Campbell, Jeanette Vargas, Cornelia Simmons, and Kim Rivera, on behalf of themselves and a class comprised of all Black or Hispanic Applicants who applied for Conventional Public Housing during the period beginning January 1, 1983, and ending December 31, 1990, or extending to May 31, 1991 for claimants who selected Staten Island as a borough of choice on their applications or who applied at the Staten Island Applications Office (Consent Decree ¶¶ 2, 1*l*, Pet. App. 193a, 192a).

The United States is not a party to *Davis v. New York City Housing Authority*, and was not a party in the Court of Appeals. The United States is the plaintiff in an action consolidated with this case, *United States v. New York City Housing Authority* (Consent Decree ¶ 3, Pet. App. 193a).

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OPINIONS AND ORDERS BELOW

The opinions and orders below are set forth in the Petition at 1-2. For consistency, they are cited here using the same nomenclature employed in the Petition.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

In addition to those provisions cited in the Petition at 3, this petition involves 24 C.F.R. § 960.203(a) (Resp. App. 20a); Fed. R. Civ. P. 52(a) (Resp. App. 20a); and the HUD Public Housing Occupancy Handbook 7465.1, REV-2, ch. 5, § 5-7, pp. 5-19 to 5-20 (Resp. App. 11a-13a).

STATEMENT OF THE CASE

A. History of Intentional Segregation in New York City

Petitioner's Statement of the Case omits and misrepresents critical material facts. Beginning in 1960, and continuing in some areas of New York City until 1991, petitioner engaged in an intentional policy and practice of segregating certain public housing projects by race. *Davis v. New York City Housing Authority*, 278 F.3d 64, 66-67, 81-82 (2d Cir. 2002) ("*Davis IX*") (Pet. App. 3a-5a, 33a-35a). The discriminatory practices used to achieve that result included the deliberate use of codes denoting housing projects to which only white families could be assigned, *Davis v. New York City Housing Authority*, 1992 U.S. Dist. LEXIS 19965, at *4 (S.D.N.Y. Dec. 30, 1992) ("*Davis I*") (Pet. App. 177a); the deliberate use of racial goals or targets when new projects were "rented up" and on an ongoing basis thereafter, *id.*; and the intentional practice of permitting white applicants on Staten Island to select predominantly white projects even when such

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projects were not anticipating vacancies, *see* NYCHA Memorandum of Law in Support of the Fairness and Adequacy of the Davis Settlement and the Entry of the Consent Decree and in Response to Comments Submitted by Interested Persons, dated October 30, 1992 ("NYCHA Memorandum Supporting Consent Decree" or "NYCHA Memorandum"), at 22 (Resp. App. 7a). Petitioner also employed several practices that were ostensibly neutral on their face but that had the intent and effect of discriminating on the basis of race. They included the use of local area preferences which, "[i]n neighborhoods where one race predominated, . . . had a racially discriminatory effect," NYCHA Memorandum, at 22 (Resp. App. 6a), and the use of "Director's Cards" that "[o]ften . . . favored white applicants who sought an apartment at a predominantly white project." *Id.* (Resp. App. 6a-7a).

These policies led to "a consistent pattern of white families being replaced by other white families over time," a pattern which " 'could only occur as a result of a deliberate racial quota system.' " *Davis v. New York City Housing Authority*, 60 F. Supp. 2d 220, 233 (S.D.N.Y. 1999) (*"Davis VI"*) (Pet. App. 92a). In its memorandum to the district court urging approval of the Consent Decree, petitioner candidly admitted that these and other discriminatory measures "created a breeding ground for racial steering." NYCHA Memorandum, at 17 (Resp. App. 5a). Petitioner also admitted that "these policies were wrong," that plaintiffs' complaint "had merit," and that its own policies "had the effect of discriminating against Black and Hispanic applicants." *Id.* at 21-22 (Resp. App. 6a-7a); *see Davis IX*, 278 F.3d at 67, 82 (Pet. App. 4a, 34a).

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Petitioner's policies intentionally caused the segregation of numerous public housing projects. When the district court approved the Consent Decree in 1992, white families constituted only 8.8 percent of the public housing tenant body (Resp. App. 8a), and only 10 percent of all families on the public housing waiting list. *Davis v. New York City Housing Authority*, 1997 U.S. Dist. LEXIS 10451, at *12 (S.D.N.Y. July 17, 1997) ("*Davis II*") (Pet. App. 146a). Nonetheless, 20 housing projects had white populations ranging from 38.0 percent to 84.4 percent (Resp. App. 8a). Seventeen had white populations greater than 50 percent. *Id.* As a result, over 71 percent of all white families in New York City public housing were concentrated in only 35 of petitioner's 322 housing projects. *Davis IX*, 278 F.3d at 81, 85 (Pet. App. 34a, 41a). "More than 51% of the white families (7,929 of 15,530) lived in the 20 projects that are at issue on this appeal." *Id.* at 85 (Pet. App. 41a).

The racial disparities caused by these policies were so striking that petitioner itself, in its memorandum to the district court seeking approval of the Consent Decree, described them as "disturbing." NYCHA Memorandum Supporting Consent Decree, at 17 (Resp. App. 4a). Cataloging its own discriminatory policies on Staten Island, petitioner admitted:

> As a result, the eleven Staten Island projects have a disturbing racial composition. Six of the projects have remained disproportionately white, while five of the projects are overwhelmingly minority. Just as disturbing, the six disproportionately white projects are located on the North side of Staten Island, while the five overwhelmingly minority projects are located on the South side of Staten Island.

Id. (Resp. App. 4a-5a).

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B. Approval of the Consent Decree and HUD's Waiver of Project Choice Rules

The parties resolved the claims in this case in a Consent Decree (Pet. App. 185a-264a) approved by the district court on December 30, 1992. *Davis I* (Pet. App. 174a-184a). The Decree permanently enjoined various discriminatory housing practices (Consent Decree ¶ 4, Pet. App. 193a-195a); afforded remedial relief for up to 2,190 class members (*id.* ¶¶ 10-38, Pet. App. 199a-215a), *see Davis VI*, 60 F. Supp. 2d at 224 & n.4 (Pet. App. 75a); and provided for the payment of monetary damages to the named plaintiffs (Consent Decree ¶ 40, Pet. App. 215a). Additionally, the Decree incorporated by reference a Tenant Selection and Assignment Plan ("TSAP") (Pet. App. 230a-264a) that was to remain in effect for five years (Consent Decree ¶¶ 5, 6(a), Pet. App. 195a-196a). Petitioner agreed to implement the TSAP "to prevent any unlawful discrimination on the basis of race, color, or national origin, in compliance with the Housing Authority's obligations under Title VI, [and] the Fair Housing Act. . . . " (Consent Decree ¶ 5, Pet. App. 195a.) During the five-year period, petitioner could modify the TSAP "at its own risk," subject to the plaintiffs' right to move to enjoin the proposed modification and to obtain "any other appropriate relief authorized by the Fair Housing Act." (Consent Decree ¶ 6(b), Pet. App. 196a-197a.)

In settling the action, petitioner considered as "especially important," NYCHA Memorandum, at 3 (Resp. App. 2a), a waiver it obtained from HUD concerning a provision of the TSAP that differs from tenant selection plans elsewhere in the nation. Specifically, petitioner's TSAP permits most applicants to choose a specific project

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from among those anticipating vacancies in the appropriate apartment size[1] (TSAP § V(C), Pet. App. 243a-244a). As petitioner represented to the district court, "[s]uch choices are not permitted to most applicants for public housing outside of New York City" because they are prohibited by HUD's Public Housing Occupancy Handbook. NYCHA Memorandum, at 3 (Resp. App. 2a-3a) (citing Public Housing Occupancy Handbook 7465.1, REV-2, ch. 5, § 7, pp. 5-19 through 5-22).[2] As petitioner itself noted, because the TSAP "deviates from the standard procedure set forth in the Handbook, the Housing Authority needs HUD approval to continue its system of limited choice." *Id.* at 4 (Resp. App. 3a). The Consent Decree acknowledges this departure from HUD rules (Consent Decree, 16th WHEREAS Clause, Pet. App. 188a), and confers HUD's approval of it for the five-year duration of the TSAP (Consent Decree ¶ 9, Pet. App. 199a).

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[1] Under the original TSAP, applicants permitted to choose a specific project were those in non-emergency priority categories who qualified for an apartment of two bedrooms or less (TSAP § V(C), Pet. App. 243a). As noted *infra*, in 1995 petitioner proposed, and HUD and the district court permitted, an expansion of the project choice option to non-emergency applicants seeking apartments of three or four bedrooms. *Davis II*, 1997 U.S. Dist. LEXIS 10451, at *46-*53 (Pet. App. 168a-172a); *see Davis v. New York City Housing Authority*, 1997 U.S. Dist. LEXIS 18111, at *14 (S.D.N.Y. Nov. 13, 1977) ("*Davis III*") (Pet. App. 133a).

[2] Public Housing Occupancy Handbook 7465.1, REV-2, ch. 5, § 5-7, pp. 5-19 to 5-20 (Resp. App. 11a-13a). Unless otherwise approved by HUD, the Occupancy Handbook requires a public housing agency to follow either a "1-offer plan" (Plan A) or a "2-3 offer plan" (Plan B). If an applicant turns down the offers without good cause, the applicant's name is placed on the bottom of the waiting list. *Id.* § 5-7(a)(4) (Resp. App. 11a-13a).

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Because of this HUD waiver, petitioner's TSAP differs in a critical respect from other tenant selection plans throughout the nation. As set forth below, this critical difference is responsible for the impairment of segregation caused by petitioner's so-called Working Family Preference, and renders the issues raised here unique to a single public housing agency.

C. Petitioner's Adoption of a Working Family Preference

HUD regulations permit housing authorities to use "local preferences, as provided in [24 C.F.R.] § 960.206." 24 C.F.R. § 960.203(a) (Resp. App. 20a).[3] Section 960.206(b)(2) authorizes but does not require a housing authority to adopt a preference for admission of families where the head, spouse, or sole member is employed. 24 C.F.R. § 960.206(b)(2) (Pet. App. 272a-273a). If such a preference is adopted, an applicant must be given the benefit of the preference "if the head and spouse, or sole member is age 62 or older, or is a person with disabilities." *Id.*

In July 1995, petitioner proposed to change its TSAP by enlarging the number of families who could select a project, *see* note 1 *supra*, and by adopting a so-called "Working Family Preference" ("WFP").[4] Petitioner has

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[3] Petitioner's citation to 24 C.F.R. § 960.205(a) (2001) (Petition at 5, Pet. App. 272a) is erroneous. That section was recodified and amended by 66 Fed. Reg. 28776, 28799-28800 (May 24, 2001). The current language, as amended, appears at 24 C.F.R. § 960.203(a) (Resp. App. 20a).

[4] Petitioner defined "working families" as families in which "income is based on actual employment or if the head and spouse, or sole member, are age 62 or older or are receiving

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failed to include the text of its WFP in either the Petition or the Appendix. An excerpt containing the relevant changes made by the WFP to the TSAP as they were presented to the district court therefore appears in Respondents' Appendix at 14a-19a. As the text of these provisions makes plain, petitioner's version of the WFP does more than merely accord a preference based on employment.

Under petitioner's proposal, applicants were given both a "Local Preference priority" and a "Federal Preference priority"; the ultimate priority is the "one which first gains the applicant an eligibility interview" (Revised TSAP, § 3(A), Resp. App. 14a). Among Local Preference holders, petitioner eliminated the applicant's "need for housing" as a condition of receiving a priority. Instead, highest priority was given to Local Preference holders in the highest income range; second priority was given to applicants in the second-highest range; and lowest priority was given to applicants with the lowest incomes, provided they are "working" as defined in the TSAP, *see* note 4 *supra*. (Revised TSAP, § 3(B), Resp. App. 15a-16a.) Among Federal Preference holders, non-emergency applicants who were involuntarily displaced, living in substandard housing, or paying more than 50 percent of family income for rent were divided into two categories labeled "Code F3" ("working families") and "Code F4" ("[a]ll other families"). All Code F3 ("working") applicants were given priority over Code F4 (non-working) applicants. *Id.* (Resp. App. 18a).

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social security disability, supplemental security income disability benefits, or any other payments based on an individual's inability to work" (Revised TSAP, § 3(B), Resp. App. 15a).

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The district court summarized these changes as follows: "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. . . . [U]nder 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 housing need." *Davis VI*, 60 F. Supp. 2d at 225 (Pet. App. 76a).

As the district court noted, local preferences do not require approval by HUD. *Id.* (Pet. App. 76a-77a); *see Davis II*, 1997 U.S. Dist. LEXIS 10451, at *15-*16 (Pet. App. 148a) ("HUD does not approve local preferences"). Accordingly, HUD played no role in approving or disapproving petitioner's WFP. *Id.*; *see Davis IX*, 278 F.3d at 69-70 (Pet. App. 10a).[5]

Petitioner's WFP is currently in effect in over 300 of petitioner's 322 housing projects. Although petitioner erroneously implies that the economic stability of the 14 projects where the WFP has been enjoined would be jeopardized unless a higher proportion of applicants with higher incomes receive rentals (Petition at 11), the district court found to the contrary: "NYCHA has not presented any statistical analysis to establish that the WFP is necessary to attain a tenant body with a broad range of incomes in the Disproportionate Projects." *Davis III*, 1997 U.S. Dist. LEXIS 18111, at *13-*14 (Pet. App. 133a). Indeed, the 14 projects at issue here have significantly

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[5] Petitioner states that the United States "did not oppose NYCHA's admission preference for working families" (Petition, at ii), without disclosing that HUD plays no role in approving or disapproving such preferences.

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lower percentages of families receiving welfare than petitioner's system-wide average (Resp. App. 10a).[6]

D. Impairment of Desegregation Caused by the Working Family Preference

Because white families on petitioner's waiting list generally have lower "housing need" and higher incomes than African-American and Latino families, the WFP was expected to and did dramatically increase the number of white families admitted to petitioner's housing projects. Based on an analysis of petitioner's computer tapes, the district court found that full implementation of the WFP in 1995 would have increased white admissions from 250 to 580 families, *Davis VI*, 60 F. Supp. 2d at 225 (Pet. App. 77a), an increase of 132 percent. This increase represented an expected surge in the white admissions rate from 4.2 to approximately 9.9 percent. *Id.*

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[6] Referring (without citation) to a district court finding from 1997, *Davis II*, 1997 U.S. Dist. LEXIS 10451, at *11 (Pet. App. 145a), petitioner asserts that fewer than one-third of its families have an "employed person" (Petition at 10). In so stating, petitioner fails to note that its WFP affords preference not only to families with an "employed person," but to those in which "the head and spouse, or sole member, are age 62 or older or are receiving social security disability, supplemental security income disability benefits, or any other payments based on an individual's inability to work." *See* note 4 *supra*. A more accurate indicator of the number of families who are not "working," as defined by the WFP, is the number of families with one or more members receiving welfare. As of January 1, only 22.6 percent of families in petitioner's housing projects had one or more persons receiving welfare (Resp. App. 10a). At each of the 14 projects at issue here, the percentage of welfare families is lower than the system-wide average. *Id.*

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After the WFP took effect at all but 21 "Disproportionate Projects" where it was originally enjoined, the district court found that it had in fact increased white admissions to 8.28 percent. *Davis v. New York City Housing Authority*, 103 F. Supp. 2d 228, 231-32 (S.D.N.Y. 2000) ("*Davis VIII*") (Pet. App. 59a-60a). Although that increase was somewhat less than the predicted 9.9 percent figure, the court found it likely that the difference was caused by the extant injunction, which "could have led to white 'turndowns,' *i.e.*, certain white families may have declined offers to live in public housing projects unless they could live in a predominantly white project." *Id.* at 231 (Pet. App. 59a). Accordingly, the court determined not to revise the 9.9 percent rate used in its calculations. *Id.* at 232 (Pet. App. 60a). The district court also found that "utilization of an 8.28% rate does not significantly decrease the WFP's effect of delaying the desegregation of the Disproportionate Projects." *Id.* at 232 (Pet. App. 61a).

Coupled with petitioner's unique "project choice" rules – prohibited elsewhere by the Public Housing Occupancy Handbook – this surge in white admissions would have had a significant impact on the desegregation of petitioner's previously segregated housing projects. Exercising their right to choose projects, white families tend to cluster in petitioner's disproportionately white housing projects. As the district court found, about 34 percent of all white families admitted into New York City public housing choose to live in only 21 out of petitioner's 322 housing projects. *Davis VI*, 60 F. Supp. 2d at 226 (Pet. App. 79a-80a).

If the WFP had become effective at the projects at issue here, this clustering of white families would have had the effect of concentrating significant increases in

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white admissions caused by the WFP at the same housing projects where past segregation occurred. The district court assessed that impact in several different ways, including the number of additional white families who would be expected to reside in the segregated projects because of the WFP; changes in the percentages of white families at those projects; and delays in desegregation that the WFP would be expected to cause. *Id.* at 227-230 (Pet. App. 80a-87a).

In terms of numbers of families affected, the district court found that if the WFP had been effective in 1995, then over 400 additional white families would have resided at 21 previously segregated housing projects. *Id.* at 227 (Pet. App. 81a-82a). After ten years, the increase would have grown to over 700 additional white families. *Id.* at 229 (Pet. App. 85a).

Because large numbers of additional white families would have moved into projects that were otherwise desegregating under the permanent injunctive and remedial provisions of the Consent Decree, the WFP would have significantly impaired the desegregation of those projects. In order to quantify the extent of impairment, the Second Circuit remanded for further fact-finding regarding the number of months it is expected to take to achieve a white occupancy rate below 30 percent under both the original TSAP and the WFP. *Davis v. New York City Housing Authority*, 2000 U.S. App. LEXIS 2746, at *3 (2d Cir. Feb. 23, 2000) ("*Davis VII*") (Pet. App. 64a-65a). On remand, the district court found that at seven housing projects, the additional delay in desegregation would range from 2.33 years to over 56 years. *Davis VIII*, 103 F. Supp. 2d at 231 (Table 2) (Pet. App. 58a); *see Davis IX*, 278 F.3d at 86 (Pet. App. 42a-43a) (summarizing district court findings in terms of additional years of delay in

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desegregation). Five additional housing projects would have desegregated to the 30 percent threshold under the original TSAP, but would never do so under the WFP. *Id.* Finally, at two housing projects (Middletown Plaza and New Lane) that would not have reduced to the 30 percent level under either plan, the WFP would cause desegregation to reverse (Middletown Plaza) or cease (New Lane).

Petitioner now seeks a writ of certiorari to challenge an injunction barring the use of the WFP at these 14 of petitioner's 322 housing projects.

REASONS FOR DENYING THE PETITION

The issues raised by petitioner are not sufficiently important to warrant the Court's attention for several reasons. First, the circumstances are unique and unlikely to arise at any other public housing agency in the nation. Second, the statistical disputes raised by petitioner involve factual and evidentiary issues that are specific to this case and do not warrant review by this Court. As this Court has noted, "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Third, the Court of Appeals' decision thwarts no federal policy concerning the settlement of disputes or the economic integration of public housing. Finally, the decision imposes no racial quota of any kind. Neither does it conflict with a decision of this Court or a Court of Appeals on any important matter.

Additionally, the decision below gave full consideration to the issues and decided them correctly. For over 30 years, petitioner employed "race-conscious admissions practices," including a "deliberate racial quota system," *Davis VI*, 60 F. Supp. 2d at 233 (Pet. App. 92a), that petitioner has admitted "were wrong," "created a breeding ground for racial steering," and "had the effect of

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discriminating against Black and Hispanic applicants." NYCHA Memorandum at 17, 21 (Resp. App. 5a). *See Davis IX*, 278 F.3d at 67 (Pet. App. 4a). Those practices led to the placement of more than 71 percent of petitioner's white families in only 35 of 322 housing projects. *Davis IX*, 278 F.3d at 81, 85 (Pet. App. 33a-34a, 41a). The Consent Decree was designed not only to afford relief to 2,190 victims of that discrimination, *Davis VI*, 60 F. Supp. 2d at 224 & n.4 (Pet. App. 75a), but "to ensure the achievement of a non-discriminatory system and the elimination of segregation." *Id.* at 234 (Pet. App. 93a). Because petitioner unilaterally modified the TSAP in a manner that was expected to and did significantly increase white admissions, *see Davis VIII*, 103 F. Supp. 2d at 231-32 (Pet. App. 59a-60a), implementation of the WFP at 14 previously segregated housing projects would substantially delay their desegregation. *See Davis IX*, 278 F.3d at 86-88 (Pet. App. 43a-46a). The Court's injunction prohibiting that result is fully consistent with an unbroken line of authority applied by this Court and the lower courts for decades.

POINT I

THE ISSUES RAISED BY PETITIONER ARE NOT SUFFICIENTLY COMPELLING TO WARRANT THE COURT'S ATTENTION

This Court will grant a petition for a writ of certiorari only for compelling reasons. Sup. Ct. R. 10. The issues raised by petitioner do not warrant the Court's attention because (1) the circumstances are unique to petitioner and unlikely to arise in any other case; (2) the factual and evidential issues are specific to this case and do not merit the Court's attention; and (3) petitioner has identified no important federal question or conflict of authority.

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A. The Issues At Stake Are Unique To Petitioner And Unlikely To Arise In Any Other Case

For three reasons, the features of this case are unique and unlikely to arise at any other housing authority. First, the TSAP incorporated in the 1992 Consent Decree differs significantly from others in the nation. Most importantly, the TSAP permits most applicants to choose the housing projects to which they will be assigned (TSAP § V(C), Pet. App. 243a-246a). As noted, that practice is prohibited elsewhere by § 5-7(a)(4) of HUD's Public Housing Occupancy Handbook (Resp. App. 11a-13a). *See* NYCHA Memorandum, at 3 (Resp. App. 2a) ("Such choices are not permitted to most applicants for public housing outside of New York City").

This unique feature of petitioner's admission plan is responsible for the district court's factual finding, affirmed on appeal, *Davis IX* (Pet. App. 35a-36a), that white families admitted by petitioner will tend to cluster in predominantly white developments. *Davis VI*, 60 F. Supp. 2d at 227 (Pet. App. 79a-80a, Table 3) (34.19% of all white admissions are concentrated in 21 of over 320 projects); *id.* at 239 (Pet. App. 103a-104a) ("existing trends demonstrate that many of these additional white families will be concentrated in predominantly white developments"). Coupled with the boosting of the white admission rate caused by petitioner's WFP (a feature also unique to petitioner, *see infra*), this aspect of the admission plan is responsible for the impairment of desegregation at petitioner's disproportionately white housing projects. That impact does not and cannot arise at other public housing projects where the HUD Public Housing Occupancy Handbook prohibits applicants from freely choosing their projects. Accordingly, the phenomenon at issue here is unique to a single public housing agency.

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Second, the provisions of the WFP, and their impact on the white admissions rate, are unique to petitioner. HUD permits local public housing authorities to exercise wide latitude over the manner in which a preference for working families is applied, provided that "the preference may not be administered in a way that will violate the legal prohibitions against discrimination." 59 Fed. Reg. 36616, 36618-19 (July 18, 1994) (Pet. App. 274a-275a). HUD has no role in approving local preferences, *see Davis VI*, 60 F. Supp. 2d at 225 (Pet. App. 76a-77a); *Davis II*, 1997 U.S. Dist. LEXIS 10451, at *15-*16 (Pet. App. 148a); *Davis IX*, 278 F.3d at 69-70 (Pet. App. 10a), and therefore played no role in reviewing petitioner's working family preference (beyond cautioning petitioner to "be mindful of the injunctive relief provided for by the *Davis* consent decree and its responsibilities under civil rights statutes"). *See Davis IX*, 278 F.3d at 69-70 (Pet. App. 10a). Local preferences therefore differ – often significantly – from one public housing agency to another.

The unique features of petitioner's WFP, which have no necessary parallel at other public housing agencies, are responsible for significantly boosting the white admission rate. For example, petitioner's WFP not only accords a preference based on employment, but affords the highest priority to persons with the highest incomes. White wage-earners with higher incomes than African-American and Latino wage-earners therefore tend to receive higher priorities. This and the extension of petitioner's WFP to Code F3 Federal Preference holders, coupled with the racial and income demographics of families on the waiting list, are responsible for the significant boost in petitioner's white admission rate caused by the WFP.

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Many alternative implementations of petitioner's preferences would have been permissible and fully consistent with HUD regulations, and would have engendered less interference with desegregation. Indeed, several modifications with less discriminatory effect were proposed by the plaintiffs and rejected by petitioner, one of which was discussed by the district court. *Davis IX*, 278 F.3d at 69 (Pet. App. 9a); *Davis II*, 1997 U.S. Dist. LEXIS 10451, at *43-*45 (Pet. App. 166a-167a). Moreover, as the district court found, "NYCHA has considerable flexibility in implementing local preferences and has presented no reason that it could not adopt yet other measures that would increase working family rentals without perpetuating segregation." *Davis II*, 1997 U.S. Dist. LEXIS 10451, at *45 (Pet. App. 167a).

Additionally, even if another public housing agency were to adopt the same WFP as petitioner's, the racial impact would not necessarily be the same. The racial impact of petitioner's WFP is highly dependent on the racial and economic demographics of families on its waiting list. Similar effects would not necessarily arise at other housing authorities whose waiting lists have different racial and economic characteristics. Notably, petitioner points to no comparable litigation elsewhere in the nation and certainly no inconsistent judicial holdings – strong indicators that the impairment of desegregation seen here is particular to petitioner alone.

Finally, the provisions of the Consent Decree at issue here are specific to petitioner. Although petitioner focuses narrowly on the 30 percent threshold set forth in § VIII(A) of the TSAP (Pet. App. 260a), the courts below rooted their interpretation of the Consent Decree on various interrelated provisions, *Davis VI*, 60 F. Supp. 2d at 234-36 (Pet. App. 94a-98a); *Davis IX*, 278 F.3d at 80-81

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(Pet. App. 30a-32a), that, taken together, "are intended to eradicate the effects of past segregation at NYCHA's projects" *Davis VI*, 60 F. Supp. 2d at 236 (Pet. App. 98a); *see id.* ("the Consent Decree adopted a comprehensive package of remedies designed to correct segregation that occurred over decades"). These Consent Decree provisions are unique to petitioner. An interpretation by this Court of the 30 percent threshold or the other Consent Decree provisions at issue here would have no ramifications for other public housing agencies.

B. Statistical Disputes Raised by Petitioner Involve Factual And Evidentiary Issues Specific To This Case That Do Not Warrant Review by this Court

The statistical disputes raised by petitioner involve factual and evidentiary issues specific to this case that do not warrant review by this Court. For example, petitioner contends that plaintiffs' expert should have relied upon actual move-in and move-out data obtained after the challenged practice went into effect, rather than on historical trends before it took effect. In fact, the Court of Appeals remanded for consideration of this issue. *Davis VII*, 2000 U.S. App. LEXIS 2746, at *2 (Pet. App. 64a). On remand, petitioner's own expert found that the use of actual 1998 numbers "does not necessarily increase the accuracy of the projections." *Davis VIII*, 103 F. Supp. 2d at 230 (Pet. App. 56a). Further, the district court found that "[u]se of the actual 1998 numbers did not influence the experts' conclusions," *id.*, and the Court of Appeals noted that "both sides' experts agreed that use of actual turnover data for the available period would not change their views as to the likely effects of the WFP in the future." *Davis IX*, 278 F.3d at 82 (Pet. App. 36a). Accordingly, the analysis advanced by petitioner would have made no

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difference here. Equally important, no useful purpose would be served were this Court to review a technical statistical issue on which the experts essentially agree.

Likewise, petitioner challenges an assumption employed by plaintiffs' expert, and accepted by the lower courts, that the racial composition of projected move-ins would mirror that observed during a historical baseline from 1991 to 1994. The district court found, however, that this historical baseline was carefully selected to be free of distortions caused by discrimination before 1991 and by the commencement of remedial relief for victims in 1995. *Davis VI*, 60 F. Supp. 2d at 226 (Pet. App. 78a). Reasonable steps were taken, including the use of historical averages, in order to minimize uncertainties. *Id.* at 239 n.17 (Pet. App. 104a n.17); *see Davis IX*, 278 F.3d at 82 (Pet. App. 35a). At three housing projects where remedial relief under another consent decree occurred during the baseline period, those effects were taken into account. *Davis VI*, 60 F. Supp. 2d at 226 (Pet. App. 79a n.6). No useful purpose would be served by this Court's review of these technical factual findings, which are unique to this litigation, were carefully considered by the courts below, and are not clearly erroneous, Fed. R. Civ. P. 52(a).

C. The Court of Appeals' Decision Does Not Frustrate a National Policy Favoring Settlements Or The Economic Integration of Public Housing

The Court of Appeals' decision does not frustrate any national policy favoring settlements. Petitioner explicitly consented to subject any changes to the TSAP to Fair Housing Act standards. Specifically, petitioner agreed to implement the TSAP "to prevent any unlawful discrimination on the basis of race, color, or national origin, in compliance with the Housing Authority's obligations

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therewith under Title VI [and] *the Fair Housing Act. . . .* " (Consent Decree, ¶ 5, Pet. App. 195a) (emphasis added). Further, in exchange for the right to modify the TSAP during its initial five-year period, petitioner agreed that any change would be implemented "at its own risk" and subject to the plaintiffs' right "to seek full and complete relief for persons harmed by the changes, *and any other appropriate relief authorized by the Fair Housing Act*" (Pet. App. 197a) (emphasis added). Thus, petitioner agreed to implement the TSAP in compliance with the Fair Housing Act, and bargained for the right to modify the TSAP subject to the condition that changes to the plan would be tested against Fair Housing Act standards.

During the five-year period, petitioner did, in fact, propose a significant modification – the working family preference – that abolished "the applicant's need for housing as a priority" (Pet. App. 76a), afforded priorities "to families who can pay the most, regardless of their housing need" (*id.*), and significantly increased the white admissions rate. When petitioner exercised its right to make those changes, it triggered the provisions in ¶¶ 5 and 6(b) of the Consent Decree that measure the legality of the changes by Fair Housing Act standards. As the Court of Appeals correctly held, "[a]ccordingly, the existence of segregation in New York City public housing may properly be measured by FHA standards." *Davis IX*, 278 F.3d at 80 (Pet. App. 32a). Finding that petitioner's changes would perpetuate past segregation – a standard generally accepted and applied under the Fair Housing Act[7] – the lower courts enjoined them as violations of the

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[7] *E.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.), *aff'd*, 488 U.S. 15 (1988); *Metropolitan*

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Act. That holding did not frustrate any policy favoring settlements. Petitioner bargained for the right to modify its plan in exchange for an agreement that any changes could be enjoined if they violated the Fair Housing Act. The lower courts enforced that bargain.

Nor did the Court of Appeals violate the "four corners" rule for interpreting consent decrees. By providing that the TSAP and any changes to it would be tested against Fair Housing Act standards, ¶¶ 5 and 6(b) of the Consent Decree (Pet. App. 195a-197a) incorporate those standards by reference. The standards applied by the district court and the Court of Appeals were contemplated by and embodied within the Decree.

Petitioner erroneously faults the factual finding of the courts below that the 30-percent threshold, which appears in the TSAP as a rule limiting the use of "Project Outreach"[8] (Pet. App. 260a), reflected the parties' joint understanding of which projects had been infected by past segregation. There is no error in these factual findings. When the Consent Decree and original TSAP were negotiated and approved, the parties expected them to eradicate the effects of past segregation, so long as Project Outreach efforts did not impede desegregation by filling vacancies at affected projects from nearby project waiting

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Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

[8] Project Outreach is used by the Occupancy Control Division ("OCD") to fill vacancies by "borrowing" applications from the waiting list of a nearby project instead of by drawing them from the larger central waiting list (*see* TSAP § VIII(A), Pet. App. 260a). The TSAP provides in § VIII(A): "However, if the borrowing project's tenant body is more than 30% white, OCD shall not select a project whose tenant body is also more than 30% white." *Id.*

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lists that had also been tainted by past segregation. The parties adopted the 30-percent standard limiting the use of Project Outreach to prohibit that result. Thus, the lower courts correctly found that the 30-percent standard is "a reflection of which projects the parties had agreed were infected by past segregation." *Davis IX*, 278 F.3d at 80 (Pet. App. 31); *see Davis VI*, 60 F. Supp. 2d at 232 (Pet. App. 89a) ("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."). These findings are not "clearly erroneous." Fed. R. Civ. P. 52(a). Further, petitioner has failed to suggest any plausible alternative purpose for the 30-percent standard.[9]

Petitioner makes much of an observation that the *original* TSAP does not employ the 30-percent threshold outside of the context of Project Outreach or explicitly "define developments more than 30% white as segregated" (Petition at 22). That observation about the *original* TSAP is unavailing. It must be remembered that the *original* TSAP differed markedly from the revised plan at

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[9] Petitioner erroneously asserts that "Plaintiffs and the United States explicitly agreed that setting aside a specific number of apartments at the Affected Developments for qualified minority applicants would adequately redress any past discrimination" (Petition at 8). To the contrary, the parties agreed that such remedial relief *coupled with the original TSAP and the permanent injunctive provisions* would adequately redress past discrimination. The plaintiffs did not agree that past discrimination would be adequately redressed if the TSAP were significantly modified, and indeed reserved the right to challenge such modifications (Consent Decree ¶ 6, Pet. App. 196a-197a).

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issue here. The original plan ranked applicants "based upon the need for housing as expressed in the application." TSAP § III(A) (Pet. App. 234a); *see* TSAP § II (Pet. App. 233a). The revised plan, in contrast, affords priority to families who can pay the most, regardless of need, *see Davis VI*, 60 F. Supp. 2d at 225 (Pet. App. 76a), and thereby significantly increases white admissions. *Id.* (Pet. App. 77a). The 30-percent rule was not applied more broadly in the *original* plan for a plain and simple reason. There was no need to do so. The *original* plan was adequate to accomplish its objective, so long as distortions were not introduced by Project Outreach. The 30-percent standard was therefore confined to that domain. But the *revised* plan severely compromised desegregation. For purposes of determining whether that impact violated the Fair Housing Act, as the Consent Decree requires, *see* ¶¶ 5, 6(b) (Pet. App. 195a-197a), it was necessary to identify projects that had previously been segregated. The 30-percent standard reflected the parties' agreement on that issue.

Finally, the Court of Appeals' decision does not frustrate a policy favoring economic diversity in public housing (Petition at 24). The district court found that petitioner presented no evidence that the WFP is necessary to attain a tenant body with a broad range of incomes in the projects at issue here. *Davis III*, 1997 U.S. Dist. LEXIS 18111, at *13-*14 (Pet. App. 133a). Indeed, all 14 projects have lower percentages of families receiving welfare than petitioner's system-wide average (Resp. App. 10a). Further, federal housing policy explicitly provides that working family preferences may not be administered in a manner that would violate prohibitions on discrimination. As HUD itself stated, "[t]here are, however, two limits on the use of a preference for working

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families. First, the preference may not be administered in a way that will violate the legal prohibitions against discrimination. . . . " 59 Fed. Reg. at 36618 (Pet. App. 274a-275a). Various alternative means of implementing a working family preference exist and have less discriminatory effect than petitioner's. *See Davis II*, 1997 U.S. Dist. LEXIS 10451, at *43-*45 (Pet. App. 166a-167a). Federal law requires no particular version of the working family preference; indeed, federal law does not even require the use of *any* working family preference. No provision of federal law would be offended if petitioner were to adopt a less discriminatory version of its local preferences. Thus, there is no conflict between the Court of Appeals' holding and any national housing policy.

D. The Court of Appeals' Decision Does Not Impose a "Quota"

Petitioner erroneously asserts that the question presented is whether a federal court may impose a "racial quota for white families" (Petition, at i). To the contrary, the Court of Appeals' decision imposes no "racial quota" of any kind. A quota is a set-aside based on a factor otherwise irrelevant to eligibility. For example, the reservation of a specified number or percentage of apartments for persons of one race could constitute the use of a racial quota.[10] Petitioner's reservation of up to 50 percent of all newly vacant apartments for "working families" is an example of an income-based quota.

The decisions of the courts below impose no quota of any kind. Rather, they enjoin the use of an income-based

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[10] *E.g., United States v. Starrett City Assocs.*, 840 F.2d 1096, 1098 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988) (owner reserved 64% of apartments for white families).

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preference at housing projects infected by past segregation. The injunction neither mandates nor prohibits any number of move-ins of persons of any race. Petitioner is free to apply its non-working-family preferences at the 14 housing projects still infected by past segregation, and under those preferences, any number of persons of any race may move in. If, for example, half or more of all applicants with non-working-family preferences were white, they would be entirely free to move into the 14 projects. Indeed, even if *all* non-working applicants at a particular time were white, they would still be free to move into the 14 projects. The injunction simply does not speak to or limit the race of families moving into petitioner's projects.

The injunction does, in contrast, gauge which housing projects continue to be infected by past segregation by using statistics regarding the percentage of white families who live there. That does not, however, constitute the use of a racial quota. As the district court correctly held:

> This does not mean, as NYCHA posits, that the TSAP imposes a "quota" or requires that any particular project achieve any specific level of desegregation. Rather, the TSAP identifies housing projects that are 30 percent white as infected by past segregation. Thus, with regard to these identified projects, changes to the TSAP that significantly perpetuate segregation violate the Fair Housing Act.

Davis VI, 60 F. Supp. 2d at 232 n.9 (Pet. App. 90a n.9).

The use of statistical information to determine whether and where segregation remains is essential and

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well-established, *see infra*, and does not constitute the use of a racial quota.[11]

POINT II

THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY

Although misapplication of a properly stated rule of law would rarely be sufficient basis to warrant review by this Court, *see* Sup. Ct. R. 10, the Court of Appeals' decision nonetheless contains no such error of law. The court applied the correct legal standard for identifying 20 housing projects that were infected by past segregation, and correctly determined that petitioner's changes to the TSAP would perpetuate past segregation at 14 of those housing projects.

A. The Court of Appeals Applied The Correct Legal Standard For Identifying Housing Projects Infected By Past Segregation

The Court of Appeals correctly held that 20 of petitioner's public housing projects were infected by past segregation. *Davis IX*, 278 F.3d at 80-82 (Pet. App.

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[11] Advancing an argument for the first time in this Court, petitioner asserts that the 30-percent standard could not have been intended to "set a quota or afford other race-conscious relief" because, had that been the case, "the District Court would have subjected it to strict scrutiny, and found it invalid" (Petition at 25). Even if it had been preserved, this argument misapprehends the holdings of the lower courts. Neither court below found that the 30-percent standard set a quota, nor does it. Rather, the 30-percent standard is "a reflection of which projects the parties had agreed were infected by past segregation." *Davis IX*, 278 F.3d at 80 (Pet. App. 31a).

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30a-35a). Substantial evidence supported the findings of the courts below that discriminatory housing practices occurred at these projects. *See* pp. 1-3 *supra*. The district court found, for example, that petitioner's replacement of white families moving out of public housing with other white families moving in "could only occur as a result of a deliberate racial quota system." *Davis II*, 1997 U.S. Dist. LEXIS 10451, at *34 (Pet. App. 160a); *see Davis VI*, 60 F. Supp. 2d at 233 (Pet. App. 92a). As the courts below noted, petitioner itself admitted that the allegations in the complaint "had merit"; that "[t]he Housing Authority engaged in a number of policies and practices that had the effect of discriminating against Black and Hispanic applicants"; and that its own practices had "created a breeding ground for racial steering." NYCHA Memorandum Supporting Consent Decree, at 17, 21-22 (Resp. App. 5a-7a); *see Davis IX*, 278 F.3d at 67 (Pet. App. 4a). These and the remainder of the district court's factual findings regarding the existence of discrimination are subject to the clearly erroneous standard of Rule 52(a), *see Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 287-90 (1982). Because they are amply – indeed overwhelmingly – supported, there is no basis for setting them aside here.

Substantial evidence also supported the findings of the courts below that these unlawful practices caused segregation at petitioner's housing projects. When the Consent Decree was approved, petitioner "had placed more than 71% of the white public housing population in 35 of its 320-odd projects." *Davis IX*, 278 F.3d at 81, 85 (Pet. App. 34a, 41a). "More than 51% of the white families (7,929 of 15,530) lived in the 20 projects that are at issue

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on this appeal." *Id.* at 85 (Pet. App. 41a). White populations at these projects greatly exceeded the prevalence of white families in both the applicant pool and the tenant body. The 20 projects at issue here had white populations in 1992 ranging from 38.0 percent to 84.4 percent (Resp. App. 8a), despite the fact that white families constituted only 8.8 percent of the tenant population, *id.*, and only 10 percent of the relevant applicant pool.[12] *Davis II*, 1997 U.S. Dist. LEXIS 10451, at *12 (Pet. App. 146a). These statistics and other record evidence amply supported the lower courts' findings that petitioner had deliberately caused the segregation of certain housing projects. Those factual findings are controlling under Rule 52(a). *Anderson*, 470 U.S. at 573; *Pullman-Standard*, 456 U.S. at 287-90.

The Court of Appeals likewise applied the correct legal standard in concluding that the vestiges of segregation still remain at those housing projects. "[W]hen the permanent injunction was entered [in 1999], 20 of NYCHA's 322 housing projects (6.2%) still housed 47.36% of the white families." *Davis IX*, 278 F.3d at 85 (Pet. App. 41a). Although white families constituted only 7.0 percent of all of petitioner's tenants in 1999, *id.* at 80 (Pet. App. 32a), these 20 housing projects still had white populations ranging from 30.2 percent to 72.3 percent (Resp. App. 9a).

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[12] Petitioner asserts misleadingly that white representation in the New York City-wide pool of "individuals income-eligible for public housing exceeds 38%" (Petition at 26). Rejecting that comparison, the district court found that the whites constituted 10 percent of the relevant applicant pool. *Davis II*, 1997 U.S. Dist. LEXIS 10451, at *12 (Pet. App. 146a). As the district court correctly recognized, the prevalence of whites in the pool of families who are financially eligible for public housing but who choose *not* to apply is irrelevant.

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Accordingly, all 20 projects had white populations in excess of the figure identified in the Consent Decree "as a reflection of which projects the parties had agreed were infected by past segregation." *Davis IX*, 278 F.3d at 80 (Pet. App. 31a). Further, at all 20 projects, the discrepancy between the percentage of white families at the project and the percentage of white families in the tenant body at large exceeded 23 percentage points. Deviations of this magnitude are widely recognized by the courts as indicative of continuing segregation.[13] Attempting to distinguish the applicability of those cases, petitioner erroneously asserts that "there has been no showing that unlawful discrimination, as opposed to legitimate factors, caused the patterns the Second Circuit deems segregative" (Petition at 23). In fact, however, as noted earlier, there was a massive, clear, and uncontroverted showing that unlawful discrimination was responsible for segregation in petitioner's housing projects.

B. The Court of Appeals Correctly Determined That Petitioner's Changes Would Perpetuate Past Segregation at 14 Housing Projects

This Court has long made clear that actions by a governmental defendant that impede the dismantling of segregation are unlawful. *Wright v. Council of the City of Emporia*, 407 U.S. 451, 460 (1972); *United States v. Scotland*

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[13] *E.g., Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 767 & n.21 (3d Cir. 1996); *Brown v. Board of Education*, 892 F.2d 851 (10th Cir. 1989), *vacated*, 503 U.S. 978 (1992), *reinstated in full*, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993); *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Pennick v. Columbus Board of Education*, 583 F.3d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979).

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Neck City Board of Educ., 407 U.S. 484, 489 (1972) ("If the proposal would impede the dismantling of a dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out"). Applying that principle, the lower courts correctly recognized that "past segregation may be perpetuated by actions that slow the pace of desegregation, even though they do not reverse it." *Davis IX*, 278 F.3d at 83-84 (Pet. App. 38a).[14] The Court of Appeals applied that principle correctly here.

At seven of the 14 projects at issue here, delays in desegregation to the 30 percent threshold caused by petitioner's WFP would range from 2.33 years to over 56 years. *Id.* at 86 (Pet. App. 43a). Five additional projects would have desegregated under the original plan but would never do so under the revised plan. *Id.* These delays are substantial, whether measured in years or percentage increases in time that desegregation would require under the WFP. For example, as the Court of Appeals correctly held, "even without the WFP, the projected time remaining after 1999 for desegregation of the Pomonok and Todt Hill projects was some seven or eight years, *i.e.*, some 13-14 years after entry of the Decree. We regard NYCHA's proposed expanded delays, most ranging from more than seven years to eternity, as legally significant. . . . " *Id.* at 87 (Pet. App. 45a). At the remaining two projects affected by the injunction (Middletown Plaza and New Lane), the WFP would either stop or reverse the desegregation process. *Davis IX*, 278 F.3d at 87-88 (Pet. App. 45a-46a). Accordingly, at all 14 projects,

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[14] *See also Arthur v. Nyquist*, 712 F.2d 816, 822 (2d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Sarabia v. Toledo Policy Patrolman's Ass'n*, 601 F.2d 914 (6th Cir. 1979).

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delays in desegregation engendered by the WFP would be substantial. The number of additional white families who would occupy the segregated projects because of the WFP, *see Davis VI*, 60 F. Supp. 2d at 227-229 (Pet. App. 81a-87a), would also be substantial.

CONCLUSION

Because petitioner has failed to identify any important federal question or conflict of authority, and because the issues raised are unique to petitioner and unlikely to arise elsewhere, the Petition should be denied.

Dated: Brooklyn, New York
May 6, 2002

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

PAULINE DAVIS, CYNTHIA WILLIAMS, CORNELIA SIMMONS, AND KIM RIVERA, on behalf of themselves and all others similarly situated, Plaintiffs, BLANCA IRIS HERNANDEZ, GINA CAMPBELL, and JEANETTE VARGAS, on behalf of themselves and all others similarly situated, Plaintiffs-Intervenors, - against - THE NEW YORK CITY HOUSING AUTHORITY, Defendant.	90 Civ. 628 (PNL)
UNITED STATES OF AMERICA, Plaintiff, v. NEW YORK CITY HOUSING AUTHORITY, Defendant.	92 Civ. 4873 (PNL)

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THE NEW YORK CITY HOUSING AUTHORITY'S MEMORANDUM OF LAW IN SUPPORT OF THE FAIRNESS AND ADEQUACY OF THE *DAVIS* SETTLEMENT AND THE ENTRY OF THE CONSENT DECREE AND IN RESPONSE TO COMMENTS SUBMITTED BY INTERESTED PERSONS

* * *

* * * During these negotiations, the Housing Authority reached agreement with its adversaries on a number of issues that weighed heavily in favor of settling these actions. The following five issues were especially important to the Housing Authority.

A. The settlement would permit the Housing Authority to continue its current practice of offering applicants some choice of where they wish to live.

The settlement would incorporate a Tenant Selection and Assignment Plan ("TSAP") to last for five years.[1] Under the TSAP, as at present, all applicants may choose the borough in which they wish to live. Most applicants may also choose a specific project, from among projects anticipating vacancies in the appropriate apartment size.

Such choices are not permitted to most applicants for public housing outside of New York City. The Department of Housing and Urban Development ("HUD") has established standard procedures for tenant selection.

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[1] Pursuant to the terms of the Consent Decree, the TSAP remains in effect for a five year period, after which it is subject to reevaluation by counsel for the *Davis* plaintiffs and by the United States.

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These standards require housing authorities to offer applicants vacancies in the order they arise, without regard to the applicants' preferences. Public Housing Occupancy Handbook, 7465.1 REV-2, Chapter 5, subsection 7, pp. 5-19 through 5-22.

* * *

Because it deviates from the standard procedure set forth in the Handbook, the Housing Authority needs HUD approval to continue its system of limited choice. HUD has agreed to give its approval as part of the settlement, but not if this matter is litigated. Because this issue is so important to the Housing Authority, it strongly prefers a settlement that guarantees HUD's approval, for the five year period of the TSAP.

* * *

F. The number of Staten Island apartments allocated to members of the victim class, pursuant to the terms of the proposed settlement, is completely appropriate.

More than one objector argues that the terms of the settlement are unfair with respect to the number of apartments allocated to members of the victim class in the Borough of Staten Island. Objectors argue that the Housing Authority inappropriately used city wide statistics in reaching a determination as to the number of Staten Island apartments to be set aside for victims of past discriminatory practices. This argument is both inaccurate and without merit.

An historical perspective is required in order to appreciate the peculiarities of the Staten Island projects.

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Throughout the period covered by the proposed consent decree, Staten Island projects were not *offered* to applicants interviewed at the central applications office in Manhattan. They were only offered to applicants who had chosen Staten Island as their borough of first choice and were interviewed at the Staten Island Applications Office ("SIAO"), which was closed in December, 1990. Thus, applicants who selected a first borough choice other than Staten Island and who therefore were interviewed in Manhattan, would only be offered a Staten Island development if they specifically requested it during the interview. The only applicants who were routinely offered Staten Island projects were those who selected Staten Island as their first borough of choice.

In addition, the SIAO permitted applicants to select projects that were not anticipating vacancies. Staff at the SIAO would then place such applications on a "central office waiting list." When the chosen project had a need for applications, the SIAO would send an applicant from the "central office waiting list." *This practice was forbidden by Housing Authority policy.* The remainder of applicants, all of whom were interviewed at the central office in Manhattan, were prohibited from selecting a project that was not anticipating vacancies. Thus, contrary to the central office practice, white applicants in Staten Island were permitted to select predominantly white projects even when such projects were not anticipating vacancies. As a result, the eleven Staten Island projects have a disturbing racial composition. Six of the projects have remained disproportionately white, while five of the projects are overwhelmingly minority. Just as disturbing, the six disproportionately white projects are located on the

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North side of Staten Island, while the five overwhelmingly minority projects are located on the South side of Staten Island.

A final factor to consider is that the predominantly white Staten Island projects were never listed on the Interviewer's Guide to Anticipated Vacancies ("Interviewer's Guide"), which was used by the Manhattan interviewers to make project offers to applicants during the eligibility interview. Thus, no Manhattan interviewer could offer one of those projects when an applicant made a specific request for a Staten Island project. This failure created a breeding ground for racial steering.

* * *

III. The Housing Authority Has a Good Faith Basis for Agreeing to Settle These Actions on the Terms Presented by the Proposed Settlement

The Housing Authority engaged in a number of policies and practices that had the effect of discriminating against Black and Hispanic applicants. Because the Housing Authority was convinced that these policies were wrong, and indeed in most instances were stopped well before the lawsuits were brought, the Housing Authority believed that the responsible course was to settle these suits to remedy these past practices in as fair a manner as possible.

The Housing Authority believes it would be useful to briefly describe a few of these policies.

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A. The Integration Program

In 1960, the Housing Authority adopted an integration program designed to achieve a balance of races at its projects by designating some projects as needing more white tenants and others as needing more minority tenants. While this program was largely terminated by the mid 1980s, the racial steering component of this integration program continued at a few predominantly white projects until January, 1988, resulting in a higher proportion of whites than would have resulted from a race neutral admissions policy.

B. Local Area Preferences

To gain necessary community support for some new projects in some neighborhoods, the Housing Authority agreed to give local area residents a preference for those new projects. In neighborhoods where one race predominated, these preferences had a racially discriminatory effect. These neighborhood preferences were ended, in most instances, by February 1988, although the computerized applicant selection program continued to permit some neighborhood preferences until 1990.

C. Director's Cards

Certain Housing Authority employees in the Applications office improperly engaged in practices that circumvented a neutral tenant selection procedure. At the request of community leaders or project managers, these employees would expedite applications and send them to projects to which they would not otherwise have been

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sent. Often these requests favored white applicants who sought an apartment at a predominantly white project. This practice ended in 1990.

D. The Staten Island Applications Office

As discussed above, the Staten Island Applications Office permitted white applicants to be placed on a waiting list for predominantly white projects even though the projects were not anticipating any vacancies. This practice was terminated in 1990 when the SIAO was closed.

For these reasons, the Housing Authority concluded that the complaint had merit and should be settled. * * *

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Racial Composition of 20 Projects Covered by
District Court Injunction December 31, 1992

NYCHA Tenant Statistics by Race as of Dec. 31, 1992

[Excerpted from 2d Cir. Appendix at A1076-A1083]

Project Name	**No. White**	**Total**	**% White**
Bay View	886	1595	55.5%
Berry	362	498	72.7%
Cassidy-Lafayette	251	370	67.8%
Forest Hills	254	423	60.0%
Haber	157	372	42.2%
Holmes	235	527	44.6%
Independence	483	743	65.0%
Isaacs	334	631	52.9%
Middletown Plaza	127	174	73.0%
New Lane	232	275	84.4%
Nostrand	721	1132	63.7%
Pelham Parkway	677	1257	53.9%
Pomonok	1205	2055	58.6%
Robbins Plaza	98	146	67.1%
Sheepshead Bay	563	1040	54.1%
South Beach	281	419	67.1%
Straus	100	263	38.0%
Taylor St./Wythe Ave.	291	523	55.6%
Todt Hill	305	497	61.4%
Williams	367	575	63.8%
Grant Total [322 Projects]	**15,530**	**176,911**	**8.8%**

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Racial Composition of 20 Projects Covered by District Court Injunction January 1, 1999

NYCHA Research and Policy Development Special Tabulation of Tenant Characteristics as of Jan. 1, 1999

Pp. 1, 25, 29, 59, 113, 136, 177, 192, 193, 203, 207, 223, 236, 241, 251, 258, 262, 297

[Excerpted from 2d Cir. Appendix at A1739-A1759]

Project Name	No. White	Total	% White
Bay View	506	1490	34.0%
Berry	277	501	55.3%
Cassidy-Lafayette	170	328	51.8%
Forest Hills	200	393	50.9%
Haber	207	374	55.3%
Holmes	159	526	30.2%
Independence	431	713	60.4%
Isaacs	229	631	36.3%
Middletown Plaza	85	172	49.4%
New Lane	193	267	72.3%
Nostrand	463	1129	41.0%
Pelham Parkway	415	1253	33.1%
Pomonok	841	2051	41.0%
Robbins Plaza	73	150	48.7%
Sheepshead Bay	365	1043	35.0%
South Beach	217	417	52.0%
Straus	82	266	30.8%
Taylor St./Wythe Ave.	281	517	54.4%
Todt Hill	233	497	46.9%
Williams	344	563	61.1%
Grant Total [322 Projects]	**12,185**	**175,184**	**7.0%**

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Families With 1 or More Persons
Receiving Welfare January 1, 1999

NYCHA Research and Policy Development Special
Tabulation of Tenant Characteristics as of Jan. 1, 1999

Pp. 1, 25, 29, 59, 113, 136, 177, 192, 193, 203, 207, 223, 236, 241, 251, 258, 262, 297

[Excerpted from 2d Cir. Appendix at A1739-A1759]

Project Name	No. Welfare Families	Total	Percentage
Bay View	268	1490	18.0%
Berry	72	501	14.4%
Cassidy-Lafayette	1	328	0.3%
Forest Hills	11	393	2.8%
Haber	4	374	1.1%
Holmes	65	526	12.4%
Independence	57	713	8.0%
Isaacs	91	631	14.4%
Middletown Plaza	3	172	1.7%
New Lane	0	267	0.0%
Nostrand	170	1129	15.1%
Pelham Parkway	192	1253	15.3%
Pomonok	304	2051	14.8%
Robbins Plaza	0	150	0.0%
Sheepshead Bay	209	1043	20.0%
South Beach	71	417	17.0%
Straus	26	266	9.8%
Taylor St./Wythe Ave.	53	517	10.3%
Todt Hill	66	497	13.3%
Williams	45	563	8.0%
Grant Total [322 Projects]	**39,536**	**175,184**	**22.6%**

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PUBLIC HOUSING OCCUPANCY
HANDBOOK 7465.1 REV-2

CHAPTER 5: TENANT SELECTION

* * *

5-7. SELECTING APPLICANTS FROM THE WAITING LIST

a. POLICY

(1) In filling an actual or expected vacancy, the PHA must offer the dwelling to an applicant needing that size and type of unit in that type of project, with the PHA making the offer in sequence, until someone accepts it, in the order of the applicants' priority, based on the PHA's tenant selection preferences and the date and time of application.

(2) The PHA must adopt procedures which will limit the duration of a vacancy due to turnover to the minimum amount of time necessary.

(3) Each PHA must follow its tenant selection plan, which has been duly adopted and approved by HUD, and which describes whether an applicant is permitted one offer or up to three offers before dropping to the bottom of the waiting list.

(4) Unless otherwise approved by HUD, the number of offers an applicant can be given must be according to one of the following two plans:

(a) A 1 offer plan, (Plan A)

This plan is not based on the distribution of vacancies in the PHA's projects.

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The applicant is offered a suitable unit. If the applicant refuses it, the applicant's name goes to the bottom of the waiting list.

(b) A 2-3 offer plan, (Plan B)

This plan is based on the distribution of vacancies in the PHA's projects.

The PHA determines how many locations within its jurisdiction have available units of suitable size and type in the appropriate type of project. If a suitable unit is available in:

- o 3 or more locations, the applicant must be offered a suitable unit in the location with the highest number of vacancies. If the offer is rejected, the applicant must be offered a suitable unit in the location with the second highest number of vacancies. If that offer is rejected, the applicant must be offered a suitable unit in the location with the third highest number of vacancies. If that offer is rejected, the applicant's name must be put at the bottom of the waiting list.

- o 2 locations, the applicant must be offered a suitable unit in the location with the higher number of vacancies. If the offer is rejected, the applicant must be offered a suitable unit at the other location. If that offer is rejected, the applicant's name must be moved to the bottom of the waiting list.

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- 1 location, the applicant must be offered a suitable unit in that location. If the offer is rejected, the applicant must be offered the next suitable unit that becomes available, whether it is at the same location as the first offer or at another location. If the applicant rejects the second offer, the applicant's name must be put at the bottom of the waiting list.

(5) Under any tenant selection plan, the PHA must maintain a record of the units offered, including location, date, and circumstances of each offer, and each rejection or acceptance. The PHA must note the reason for any rejection.

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The New York City Housing Authority's Tenant Selection and Assignment Plan

[Revised]

[All bold, strikeouts, and italics in original]

Bold = New text to be added.
~~Strikeout~~ = Old text to be deleted.
Italics = Old text that has been moved.

* * *

III. PRIORITIES FOR APPLICANTS

A. Method of Assigning Priorities

In accordance with federal regulations, the Housing Authority has adopted priorities by which it ranks each applicant based upon **information** ~~the need for housing as expressed~~ in the application. **If an applicant qualifies for both a Local Preference priority and a Federal Preference priority (discussed below), the Housing Authority shall assign both priorities to the application, and the applicant's ultimate priority shall be that one which first gains the applicant an eligibility interview.**

Upon entry of the application information onto the computer **system** ~~database~~, the Housing Authority shall notify the applicant of the priority **or priorities** ~~which has been~~ assigned to the application and the procedures by which the applicant may obtain review of the decision. At any stage prior to rental, the Housing Authority may change the priority code if it is notified that an applicant's priority qualifications have changed. If the priority code is changed, the applicant will be so notified.

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B. The Priority Codes

The priority codes adopted by the Housing Authority are:

LOCAL PREFERENCES

Code L1

Applicants in Income Tier III. (For the Forest Hills Coop, applicants in Income Tier IV also receive Code L1.)

Code L2

Applicants in Income Tier II.

Code L3

Applicants in Income Tier I who are also "working families." A "working family" shall mean: Where income is based on actual employment or if the head and spouse, or sole member, are age 62 or older or are receiving social security disability, supplemental security income disability benefits, or any other payments based on an individual's inability to work.

For the purposes of this Plan, "Income Tier" shall be defined as the income level of each applicant which, to the extent permitted by federal law and regulations, the Housing Authority uses to advance its goal of economic integration and of avoiding concentrations of low-income families in any one or all of the Housing Authority projects.

The Housing Authority divides applicants into ***four*** ~~*three*~~ *Income Tiers: Applicants in Tier I have family incomes ranging*

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from none up to ***30% of area median income*** ~~*the level of maximum public assistance*~~*; applicants in Tier II have family incomes ranging from* ***31%*** ~~*the maximum assistance level of public assistance payments*~~ *to 50% of area median income; applicants in Tier III have family incomes* ***ranging from*** ~~*of between 50%*~~ ***51% to*** ~~***and***~~ ***80% of the area median income;*** **and applicants in Tier IV have family incomes ranging from 81% to 95% of area median income.** *The dollar amounts for each tier vary by family size and are revised periodically to reflect economic data and income levels for admission to public housing as established by federal guidelines.*

Applicants in Tier IV are eligible only for the Forest Hills Coop. Applicants in Tier III are not eligible for Section 8 projects.

FEDERAL PREFERENCES

Code **F0**

- Applicants who meet any of the requirements of Code **F2** and who are referred to the Housing Authority by the New York City **Department of Homeless Services ("DHS")** ~~Human Resources Administration ("HRA")~~ or by the New York City Department of Housing Preservation and Development ("HPD"), pursuant to an agreement with the Housing Authority. These applicants **and those in the next category below** are hereafter referred to as "City-Referred Emergency Applicants."

- Applicants about to be discharged from a hospital operated by the New York City Health and Hospitals

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Corporation, who would become homeless upon discharge and who are referred to the Housing Authority by HPD. **These applicants are included within those referred to hereafter as "City-Referred Emergency Applicants."** Homeless applicants shall be defined as in 24 C.F.R. § **960.214(b)(2)** ~~960.211(f)(3)~~.

Code F1

- *Applicants with a family member cooperating in a criminal investigation/prosecution, where a member of the household has been threatened by a defendant in that investigation/prosecution, or by a person associated with a defendant. To qualify for this category, the prosecutorial or police agency involved in the case must certify to the Housing Authority that:*
  - *a. the threat was made and was in retaliation for past or present cooperation with a prosecutorial or police agency;*
  - *b. The threat poses a serious risk to a member of the household; and*
  - *c. It is likely that the defendant or the defendant's associates know the family's current home address.*

Code F2

- Applicants who have left their residences (and are not living in standard, permanent replacement housing) due to recent or continuing actual or threatened violence against them or their families by a member of their household, or applicants who live with someone who engages in such violence.
- Applicant families with one or more persons suffering from an illness or disability living in housing conditions that constitute a direct threat to such persons' lives due to their illness or disability.

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- Applicants who live in hotels used by the City or shelters or whose primary nighttime residence is a place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

- Applicants about to be displaced due to action taken by a landlord, including but not limited to eviction orders, unless the displacement is due to a rent increase or the applicant's failure to meet all the conditions of occupancy.

- Applicants living in housing declared uninhabitable by HPD or another government agency, or already displaced due to such a government order and not living in standard permanent replacement housing.

- Applicants about to be displaced by a government order from a site to be used for a public housing project or other public improvement.

Code F3

All other "working families" who are entitled to at least one of the three Federal Preferences (involuntarily displaced, living in substandard housing, or paying more than 50% of family income for rent, defined in Section C below).

Code F4

All other families who are entitled to at least one of the three Federal Preferences (involuntarily displaced, living in substandard housing, or paying more than 50% of family income for rent, defined in Section C below).

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NEITHER LOCAL [N]OR FEDERAL PREFERENCE

Code 8

Families who qualify for neither a local nor a federal preference and are not now renting either a public housing or a Section 8 apartment.

Code 9

Families who qualify for neither a local nor a federal preference and are now renting either a public housing or a Section 8 apartment.

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24 C.F.R. § 960.203 Standards for PHA tenant selection criteria.

(a) The tenant selection criteria to be established and information to be considered shall be reasonably related to individual attributes and behavior of an applicant and shall not be related to those which may be imputed to a particular group or category of persons of which an applicant may be a member. The PHA may use local preferences, as provided in §§ 960.206.

Fed. R. Civ. P. 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. * * * Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

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