

box up - private case
599 F.2d 1247

NATIONAL ASSOCIATION FOR the ADVANCEMENT OF COLORED PEOPLE, 107 East Ninth Street, Wilmington, Delaware, Puerto Rican Civil Rights League, Inc., 1030 West Third Street, Wilmington, Delaware, Older Americans Coalition, 1300 North Broom Street, Wilmington, Delaware, Brandywine Trinity United Methodist Church, Twenty-Second and Market Streets, Wilmington, Delaware, on behalf of their members and others similarly situated, Appellants,

v.

The MEDICAL CENTER, INC., David Matthews, U. S. Secretary of Health, Education, and Welfare, Amos Burke, Director of the Bureau of Comprehensive Health Planning, William C. Gordon, Director of the Health Planning Council, Inc., The Wilmington Medical Center, Inc. and Crawford H. Grenwalt, as Chairman of the Board of Trustees, and Joseph A. Dallas, as Chairman of the Board of Directors.

No. 80-1893.

United States Court of Appeals,
Third Circuit.

Argued November 3, 1980.

Opinion Filed June 29, 1981.

As Amended July 20, 1981.

Organizations and individuals representing minority and handicapped persons residing in Wilmington, Delaware, brought suit against medical center and government officials claiming that federal statutes were violated by planned relocation of medical facility from inter city to outlying suburban location. The United States District Court for the District of Delaware, 453 F.Supp. 280, James L. Latchum, Chief Judge, ruled that plaintiffs did not have private cause of action under certain federal statutes, and they appealed. The Court of Appeals, 599 F.2d 1247, remanded. On remand, the United States District Court for the District of Delaware, 491 F.Supp. 290, refused to

enjoin implementation of proposed relocation and reorganization plan, and appeal was taken. The Court of Appeals, Weis, Circuit Judge, sitting en banc, held that: (1) disparate impacts of a neutral policy may be adequate to establish discrimination under Title VI of the Civil Rights Act of 1964, and (2) medical center produced adequate evidence to justify its relocation and reorganization plan, even assuming that plaintiffs presented prima facie case of discrimination.

Affirmed.

Adams, Circuit Judge, filed a concurring opinion.

Gibbons, Circuit Judge, concurred and dissented and filed opinion.

1. Civil Rights $\S$ 13.13(1)

Under Title VI of the Civil Rights Act of 1964, plaintiffs need not establish intent to discriminate, but, rather, disparate impacts of a neutral policy may be adequate to establish unlawful discrimination. Civil Rights Act of 1964, $\S$ 601 et seq., 42 U.S.C.A. $\S$ 2000d et seq.

2. Courts $\S$ 96(3)

Prerogative of overruling Supreme Court cases rests with Supreme Court and not with Court of Appeals.

3. Civil Rights $\S$ 44(1)

Plaintiffs failed to establish violation of section of Rehabilitation Act arising out of medical center's relocation and reorganization plan, in view of plaintiffs' failure to produce any credible evidence establishing residential distribution of handicapped persons within county. Rehabilitation Act of 1974, $\S$ 504, 29 U.S.C.A. $\S$ 794.

4. Civil Rights $\S$ 44(1)

Where situation is such that something must be done or all will suffer, to establish a prima facie case of discrimination under Title VI, some definite, measurable disparate impact is required, for otherwise needed and worthwhile efforts for improvement will be paralyzed. Civil Rights Act of 1964, $\S$ 601 et seq., 42 U.S.C.A. $\S$ 2000d et seq.

NO intent
1328/1331

1328 intent

5. Civil Rights ⇐43

Ultimate burden of persuasion on issue of illegal discrimination always remains with the plaintiff. Civil Rights Act of 1964, §§ 601 et seq., 701 et seq., 42 U.S.C.A. §§ 2000d et seq., 2000e et seq.

6. Civil Rights ⇐44(1)

In an intentional discrimination case, if plaintiff produces evidence sufficient to meet standards of prima facie case under *McDonnell Douglas* decision, inference of discrimination is raised, and effect of such a prima facie case is only to put in issue whether employer's conduct was based upon legitimate, nondiscriminatory reasons and therefore permissible. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Civil Rights ⇐44(1)

Prima facie case does not necessarily constitute proof of ultimate fact of discrimination under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐43, 44(1)

To meet *McDonnell Douglas* decision prima facie case of intentional employment discrimination, defendant must produce evidence of an acceptable reason but is not required to show absence of discriminatory motive; burden of persuasion on ultimate fact of discrimination remains with plaintiff who may show that proffered legitimate reason was a pretext. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights ⇐44(1)

Disproportionate impact or effect is simply an additional method of demonstrating impermissible discrimination under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Civil Rights ⇐44(1)

In unemployment discrimination suit brought under Title VII, showing of disproportionate effect or impact alone may not establish violation; to be proscribed, challenged practice must not only affect disproportionately, it must do so unnecessarily.

Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Civil Rights ⇐43

To establish prima facie case of discrimination arising out of showing of disproportionate effect or impact, plaintiff may rely on inferences to show that practice was unnecessary; if defendant presents no evidence of business relatedness in his case, court may assume that there was no permissible reason for the impact, and if defendant does come forward with evidence to meet inference of discrimination raised by prima facie case, plaintiff may still carry his burden of persuasion by demonstrating that feasible, yet less onerous, alternative exists. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. Civil Rights ⇐43

In a discrimination suit brought under Title VI on theory that neutral policy resulted in disparate impact, burden on defendants of producing evidence to meet inference of discrimination raised by prima facie case is the same as in a Title VII disparate impact case. Civil Rights Act of 1964, §§ 601 et seq., 701 et seq., 42 U.S.C.A. §§ 2000d et seq., 2000e et seq.

13. Civil Rights ⇐44(1)

District court did not err in concluding that, even assuming that plaintiffs presented prima facie case of disparate impact arising out of medical center's proposed relocation and reorganization plan, plaintiffs carried their burden of meeting prima facie case. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

14. Civil Rights ⇐46

In civil rights suit brought against medical center under Title VI, district court did not err with respect to its treatment of financial feasibility of medical center's proposed relocation and reorganization plan. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

Marilyn G. Rose (argued), Sanford Newman, Center for Law and Social Policy,

Washington, D. C., Douglas Shachtman, Jeffrey S. Goddess, City Sol., City of Wilmington, Wilmington, Del., for appellants; Thomas I. Atkins, Gen. Counsel, James I. Meyerson, N.A.A.C.P., New York City, of counsel.

William J. Wade (argued), Rodney M. Layton, Richards, Layton & Finger, Wilmington, Del., for Wilmington Medical Center, Inc.

Drew S. Days, III, Asst. Atty. Gen., Jessica Dunsay Silver, Irving Gornstein, Dept. of Justice, Washington, D. C., for United States as amicus curiae.

Before GIBBONS and WEIS, Circuit Judges, and BECHTLE,* District Judge.

Reargued In Banc May 11, 1981.

Before ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.

The Wilmington Medical Center has been embroiled in litigation for the past five years because of its proposal to construct a new building in the suburbs and renovate one of its buildings in downtown Wilmington, Delaware. In this latest appeal, we hold that disparate impacts of a neutral policy may be adequate to establish discrimination under Title VI of the Civil Rights Act of 1964. Assuming, without deciding, that the plaintiffs presented a prima facie case, we conclude that the Medical Center produced adequate evidence to justify its relocation and reorganization plan. Accordingly, we will affirm the action of the district court in refusing to enjoin implementation of the proposal.

Ects
Alleging unlawful discrimination, the plaintiff organizations, representing minority, handicapped, and elderly persons, sought an injunction against the relocation and reorganization of the Medical Center. Af-

ter we held that the plaintiffs had private rights of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1976), and § 504 of the Rehabilitation Act of 1975, 29 U.S.C. § 794 (Supp. II 1978), see *NAACP v. The Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979), the district court brought the matter to trial. The City of Wilmington was added as a party plaintiff, and the complaint was amended to include allegations that the Age Discrimination Act, 42 U.S.C. §§ 6101-6107 (1976 & Supp. II 1978) had been violated. In addition, plaintiffs charged the defendant with intentional discrimination as well as conduct that had a disparate impact on the classes represented by the plaintiffs.

Following a bench trial lasting more than a month, the district court filed a comprehensive and detailed opinion, concluding that the plaintiffs had failed to prove discrimination under any of the three statutes. Judgment was accordingly entered for the defendant. *NAACP v. Wilmington Medical Center, Inc.*, 491 F.Supp. 290 (D.Del.1980).¹ The plaintiffs' appeal was heard initially by a panel and then, because of the nature of the issues, was reheard by the court in banc.

The Wilmington Medical Center (WMC) was organized in 1965 by the merger of three non-profit hospitals, General, Memorial, and Delaware, in different areas of Wilmington. WMC furnishes general medical and surgical services, as well as secondary and tertiary hospital care. It provides 1,104 of the 1,471 non-profit, acute general hospital beds in New Castle County. Other institutions in the county include St. Francis Hospital, which has approximately 290 beds, and Riverside Osteopathic Hospital, with a capacity of 100. The concentration of hospital beds in Wilmington proper is higher than is desirable under national standards, while at the same time the southwestern part of the county surrounding Newark, Delaware, is quite underserved.

* Honorable Louis C. Bechtle, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1. The Department of Health, Education and Welfare, the Bureau of Comprehensive Health Planning, the Health Planning Council, and the directors of the latter two organizations were dismissed before trial.

WMC is the only hospital in the county with a teaching program approved by the American Medical Association. Medical students and residents are important to WMC's delivery of health care to the community. Without their assistance, current levels of care could not be maintained.

Because its physical structures are aging and are not in compliance with Delaware's licensing law, WMC has encountered serious problems. Recruitment for its residency program has been hindered by the fragmenting of its plants, as well as by a lack of conference space and adequate research facilities. The surgical residency program has been placed on probation by its accrediting body and WMC itself is also in danger of losing its certification by the Joint Commission on Accreditation of Hospitals. On two recent occasions, only "probational" accreditation was granted. Loss of accreditation could result in denial of Medicare and Medicaid reimbursements, a situation which would be disastrous to WMC financially, since it relies on these funds for more than one third of its total budget.

WMC has other monetary problems. It provides the largest amount of free care in the county—approximately \$8,000,000 annually. Because Medicare and Medicaid do not reimburse it for any portion of fees attributable to subsidization of free care, WMC must depend upon its endowment and the fees assessed upon paying patients and private insurers.

The population shift to the southwestern suburbs and the possibility that another health care institution might be established

in that area present another threat to WMC. If it should lose the patronage of people there, most of whom pay for services or are privately insured, the subsidization of a higher percentage of unreimbursed care would become an even more serious drain on its financial resources.

Recognizing the need for remedial action, the WMC Board canvassed the options open to it. After studying about 50 plans for relocation and consolidation, it decided upon Plan Omega. Essentially, this proposal would close the General and Memorial facilities, renovate the Delaware one, and reduce the number of downtown beds to 250. In addition, a new facility of 780 beds would be built in the suburban area 9.35 miles southwest of the Delaware plant. A division of services between the two locations was part of the arrangement.²

After the district court ordered a departmental review, HEW found discriminatory effects in the plan. To ensure that Omega would comply with Title VI and the Rehabilitation Act, WMC contracted to make a number of modifications. Because no public transportation to the southwest site is available, WMC agreed to provide shuttle bus service between the Delaware and Southwest divisions for the convenience of patients, visitors, and employees. In addition, WMC committed itself to renovate the Delaware plant, devise inpatient service plans for the two branches to prevent racial identifiability at either location, and operate the two facilities on a unitary basis.

Upon acceptance of these conditions, HEW withdrew its objections to Omega.³

2. Both locations would provide the following services: allergy, cardiology, dermatology, endocrinology, internal medicine, rheumatology, physical medicine, chest diseases, infectious disease, general surgery, proctology, otology, and vascular. At the Southwest division, the following services would be provided: gastroenterology, nephrology, neurology, oncology, radiation therapy, neurosurgery, orthopedic surgery, plastic surgery, thoracic surgery, urology, obstetrics, gynecology, pediatrics, newborn, and premature. At Delaware, the following additional services would be provided: psychiatry, family practice, rhinology, dentistry, and ophthalmology.

In addition, some clinic, outpatient, and support services will also be located exclusively at the Southwest division, including the high-risk prenatal and specialty pediatric and gynecological clinics, and the specialty cardiac, radiation therapy, and hemodialysis support services. The Delaware division will exclusively house the psychiatry, ear, eye, and nose, and dentistry specialties. The primary care clinics will be consolidated and located exclusively at the Delaware division.

3. The district court held that HEW's decision was not arbitrary or capricious. *NAACP v. The Medical Center, Inc.*, 453 F.Supp. 280 (D.Del. 1978), and that the plaintiffs had no private

Plaintiffs, however, continued their opposition, contending in the district court that the relocation would subject members of the class to inferior health care and disproportionate travel burdens. Moreover, it was alleged that there has been a misallocation of services between the two divisions.

The district court analyzed the case under alternate theories of intentional discrimination and unintended discriminatory effects. The court first determined that there was no evidence of discriminatory purpose. It then applied a disparate effect standard, but concluded after a lengthy review of the evidence that plaintiffs had failed to present a *prima facie* case.

Rather than ending the inquiry at that point, the court assumed *arguendo* that a showing of disparate impact had been made. The record was then scrutinized to determine if the defendant had successfully rebutted the plaintiffs' contentions. The court concluded that even if disparate impact had been shown, WMC had demonstrated it had bona fide needs that could not be satisfied by any less discriminatory plan. Finally, the court determined that plaintiffs did not prove that a feasible alternative to Omega was available.

Consideration of the alleged disparate impact was divided into several general categories—access, quality of care, linguistic discrimination, and racial identifiability. Initially, the court found that Plan Omega would bring about vast improvements in the quality of care for all patients, including the classes represented by the plaintiffs. The detrimental effects to minorities and the elderly were determined to be minor and insignificant. With respect to the handicapped, plaintiffs failed to show any adverse impact.

The first issue considered was the plaintiffs' contention that they will lack access to the Southwest facility and, consequently, will suffer a diminution in health care. The court found that WMC would meet its obligation under the HEW agreement to pro-

vide adequate shuttle bus and ambulance service. Furthermore, the court concluded that the increased travel time would generally not deter patients from seeking treatment for serious illness at the Southwest division.

A possible exception was a group of women in need of services at the high risk obstetrical clinics at the Southwest division. It was acknowledged that minority women have a greater incidence of high risk pregnancies and that patients seeking prenatal care are more likely to be deterred from seeking medical attention than others. However, the court found that the plaintiffs had overestimated minority usage of the high risk clinics in the Southwest facility and that utilization by whites would be slightly less proportionately.

The plaintiffs' expert erroneously included in her high risk category minority teenagers who are poor users of health care and statistically more likely to have pregnancies with complications. Omega, however, included special clinics at the Delaware division for teenagers and Hispanics. Thus, the group affected by the location of high risk clinics at Southwest division would be much smaller than plaintiffs projected. In addition, the WMC director of obstetrics testified that if a large number of high risk patients appeared at the Delaware division, a clinic would be created at that location, although some patients might have to be referred to Southwest where the most sophisticated equipment would be placed.

Plaintiffs also were concerned with the fact that because obstetrical services would be offered at the Southwest division, emergency room treatment of those cases at Delaware would be inferior. The court, however, found that the vast majority of women about to deliver and those with obstetrical problems would go directly to Southwest. In only exceptional instances would the absence of inhouse obstetricians affect emergency room treatment, because an obstetrical resident would be assigned to

cause of action under Title VI or the Rehabilitation Act. We reversed the latter action, 599

F.2d 1247 (3d Cir. 1979).

the clinics and obstetricians would be on call. The court opined that the cases where treatment would be impaired would be extremely rare, assuming that any at all would occur. In this context, therefore, the possibility of detrimental effects was insignificant, particularly when contrasted with the improvement in quality of care Omega would provide.

The other adverse impact that plaintiffs attributed to travel difficulties is a possible decrease in the number of minority and elderly visitors to inpatients at the Southwest facility. Plaintiffs suggested that visitors would be discouraged by the longer ride to unfamiliar surroundings. Evening visits would be further hindered because the proposed shuttle bus service would stop at 7:00 p. m.

The district judge found that elderly inpatients might have fewer visitors at the Southwest division. While this might result in some detriment to the health of elderly patients, the district court characterized the level of harm as "very minor." 491 F.Supp. at 332. The court similarly concluded that the negative impact on obstetrical patients would be "insubstantial." *Id.*

Plaintiffs also argued that another group, minority pediatric inpatients, would be adversely affected by a decrease in the number of visitors caused by the location of services at Southwest. Recognizing the importance of family visits to the health of a child, the court determined that steps would be taken under Omega to provide those visits. Parents would be encouraged, and in some cases required, to spend the night with their children. When parents of infants could not stay, the hospital would assign staff members to give special attention to those children.⁴

With respect to plaintiffs' second major contention—that treatment at the Delaware division would be inferior—the court stated, "[T]he general medical and surgical care that will be rendered at the Delaware

Division under Omega will be entirely equal to that rendered at the Southwest Division and superior to that which is now rendered by WMC." 491 F.Supp. at 325.

Plaintiffs asserted that the Delaware division would be housed in an inferior building and even after the proposed renovations, the two facilities would not be comparable. Moreover, it was questioned whether WMC would be financially able to meet its commitment to rehabilitate the Delaware plant. The court described these contentions as "purely speculative and wholly unsupported on the record." 491 F.Supp. at 325. In addition to assuming an obligation under the HEW agreement to refurbish, WMC had allocated more than \$12,000,000 for that purpose up to the time of trial. This amount, coupled with projected commitments and funds to be set aside under the agreement, produced a total of \$18,000,000 committed to renovation. The judge concluded that the additional \$4,000,000 needed to complete the work could be raised from either the operating budget or unrestricted funds.

Furthermore, the court was convinced that shuttle bus service would, in fact, be provided. The cost would be minimal in comparison with WMC's annual budget and could be absorbed with no strain on the institution's financial resources.

After their expert suggested that operating deficits might occur in the years following completion of construction, plaintiffs questioned whether the high cost of Omega would cause WMC to discontinue the remodeling and free care. The court found such evidence irrelevant and believed that financial feasibility of Plan Omega would be determined by bond market forces: "[T]he Court refuse[d] to construe the civil rights statutes as a license . . . to act as a financial overseer to those who provide services to minorities." 491 F.Supp. at 328.

Finally, the district court rejected the claims that Omega would create linguistic

tals in Wilmington proper.

4. In addition, pediatric inpatient services are offered at the St. Francis and Riverside hospi-

discrimination or racial identifiability. Plaintiffs' fear of a shortage of interpreters for Hispanics at the Southwest division was rejected. The trial judge found no present shortage of WMC personnel capable of acting as interpreters for Hispanics and expected that none would arise under Plan Omega. Additionally, the court held that Plan Omega as drafted would not create two racially identifiable facilities but if, in practice, problems arose, remedial measures would be taken. All other arguments raised by the plaintiffs were found to be frivolous, and the court concluded that they had failed to present a *prima facie* case of disproportionate impact.

Recognizing that review in this lengthy and hard-fought litigation was inevitable, however, the trial judge assumed *arguendo* that a *prima facie* case had been established and discussed the defendant's burden. Concluding that the defendant was required to go forward with rebuttal evidence, the court found that WMC had met its burden of showing that it had *bona fide* needs, that Omega would satisfy them, and that other, less discriminatory plans would not.

The court recognized that WMC's immediate need to preserve its educational program and accreditation, as well as improve its quality of care, made it obvious that something had to be done. WMC was aware that to insure its financial stability, and at the same time care for those dependent on its services, it had to provide facilities both in the city and on the outskirts. Omega met these requirements, and the court found "Omega can be completed within WMC's means and will allow WMC to hold its costs down." 491 F.Supp. at 340.

Although the WMC Board had investigated many different plans, six alternatives were discussed. Assuming that any plan which had all or substantially more beds in Wilmington would be less discriminatory, the court found that these plans would not meet WMC's needs. Some were financially infeasible, as in the example of a single large hospital in the city. Rehabilitation of all existing structures within the city was

objectionable because it would perpetuate excessive fragmentation. A more even division of services between the Delaware and Southwest facilities (450 beds at Delaware, 570 at Southwest) was rejected by the medical staff as failing to meet the goal of consolidation. Thus after reviewing the options, the court concluded, "WMC has met its burden upon rebuttal by showing that even if Omega may have some meager disparate impacts, those impacts are justified by *bona fide* needs which could not be accomplished by any less discriminatory plan." 491 F.Supp. at 343.

In turn, plaintiffs attempted to show that "Reverse Omega" (800 beds at Delaware and 200 at Southwest) was a feasible alternative. The court, however, found that cost estimates of reverse Omega given by plaintiffs' expert were unreliable, and concluded that this plan would be "prohibitively expensive." 491 F.Supp. at 342. The court determined, therefore, that "plaintiffs have failed to meet their burden of persuasion of showing a feasible, less discriminatory alternative." 491 F.Supp. at 345.

I

[1] The lengthy recitation of the background makes it clear that this case turns largely on factual matters. There are, however, several discrete legal issues essential to a resolution of the dispute. The first that we shall discuss implicates the nature of the evidence necessary to show a violation of Title VI. If the plaintiff must show intent to discriminate, then our task is a simple one because the trial court found no such evidence and that holding is not contested. We are persuaded, however, that intent is not required under Title VI and proof of disparate impact or effects is sufficient. Our conclusion applies to the other two statutes that have been invoked as well.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), bans discrimination based on race, color, or national origin in any program receiving federal financial

assistance.⁵ WMC concedes that Medicare and Medicaid payments made to it call Title VI into play.

In Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), the Supreme Court was confronted with a racial discrimination charge growing out of a school system's decision not to provide English language instruction to students of Chinese ancestry.

The Court declined to reach an equal protection argument but chose instead to rely on Title VI, interpreting it as follows:

"Discrimination is barred which has that effect even though no purposeful design is present: a recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination' or have 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.'"

Id. at 568, 94 S.Ct. at 789 (emphasis the Court's), quoting HEW regulation, 45 C.F.R. § 80.3(b)(2).

Lau makes it clear that discriminatory impact is enough to constitute a violation of Title VI. WMC, however, argues that *Lau* was overruled by *Board of Education v. Harris*, 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979), and *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).⁶ We are not convinced, however, that either case did so.

In Bakke, the question was whether a state school could properly adopt an admissions policy clearly intended to prefer minorities. It is true, as WMC notes, that five justices expressed reservations in Bakke

about the holding in *Lau*. In the opinion written by Justice Brennan, in which Justices White, Marshall, and Blackmun joined, it was said, "[W]e have serious doubts concerning the correctness of what appears to be the premise of [*Lau*]." 438 U.S. at 352, 98 S.Ct. at 2779.

The issue did not have to be resolved, however, because "even accepting *Lau's* implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent in the least." 438 U.S. at 352-53, 98 S.Ct. at 2779. It did not matter, the group wrote, whether Title VI proscribed some acts, such as those at issue in *Lau*, that would survive constitutional scrutiny. As the group read the legislative history of the Civil Rights Act, Congress did not intend to proscribe the particular type of practice challenged by *Bakke*—preferences designed to remedy past discrimination. As stated in another portion of the opinion, "[A]ppplied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself." 438 U.S. at 325, 98 S.Ct. at 2766 (emphasis supplied).

In a separate opinion, Justice Powell used language that may be inconsistent with *Lau*, but he stopped short of advocating that the case be overruled. He wrote, "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 U.S. at 287, 98 S.Ct. at

5. The antidiscrimination provision of Title VI states:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. § 2000d (1976).

6. Whether intent or impact is sufficient to state a claim under Title VI and the issues surrounding hospital closings and relocations have been

the subject of scholarly commentary. See, e.g., Note, The Prima Facie Case and Remedies in Title VI Hospital Relocation Cases, 65 Cornell L.Rev. 689 (1980); Note, Maintaining Health Care in the Inner City: Title VI and Hospital Relocations, 55 N.Y.U.L. Rev. 271 (1980); Note, Title VI: The Impact/Intent Debate Enters the Municipal Services Arena, 55 St. John's L.Rev. 124 (1980); Note, NAACP v. Medical Center, Inc.: The Evidentiary Hearing Under Title VI, 24 St. Louis U.L.J. 579 (1980).

facts
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2746. He then went on to distinguish *Lau*, saying significantly, "[T]he 'preference' approved [in *Lau*] did not result in the denial of the relevant benefit—'meaningful opportunity to participate in the educational program'—to anyone else." 438 U.S. at 304, 98 S.Ct. at 2755.

In determining what weight is to be given to these separate statements, it is important to recognize that the issue presented to the Court in *Bakke* differs substantially from that in the case at bar. It was clear in *Bakke* that whatever the reach of Title VI, the plaintiff had established a prima facie case by showing intentional discrimination. The question facing the Court, then, was whether some forms of intentional discrimination were nevertheless permissible. A majority of the Court concluded that those forms of intentional discrimination that would survive constitutional analysis also were exempt from Title VI. Congress, in enacting the Civil Rights Act of 1964, did not intend to prohibit those racial preferences that are permitted under the Constitution.

It does not inexorably follow, however, that Congress also intended the constitutional standard to control every allegation of discrimination. It would be consistent with Congress's expansive, remedial intent to interpret Title VI as prohibiting acts that have the effect of discrimination yet permitting patent preferences designed to remedy past discrimination.

The Powell-Brennan opinions, therefore, may be read as expressing the theory that at least when the charge is intentional discrimination in the nature of a governmental preference, Title VI incorporates the constitutional standard. The case sub judice, however, is not one of a discriminatory governmental preference but one of a neutral program with disparate impact. As we see it, it is still permissible to hold that when the charge is disparate impact, a prima facie case can be established without proof of intent.

The other case on which defendant relies, *Board of Education v. Harris*, *supra*, held

that § 702(b) of the Emergency School Aid Act (ESAA) prohibits school districts from maintaining racially identifiable faculties even when the segregation is unintentional. The Court upheld the power of Congress in the exercise of its authority under the spending clause to require the recipients of federal funds to go further in eliminating discrimination than mandated by the Constitution. *Lau v. Nichols* was not cited.

In dissent, Justice Stewart argued that since five justices in *Bakke* had stated Title VI prohibited only intentional discrimination, the same premise should govern claims under the ESAA. 444 U.S. at 160, 100 S.Ct. at 379. In this argument, however, he was joined only by Justice Powell. The majority expressly disclaimed any necessity to pass on the standard applicable to Title VI. *Id.* at 149, 100 S.Ct. at 373.

Fullilove v. Klutznick, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), is another case that considered the constitutionality of a statutory preferential program. A plurality of the Court cited with approval *Lau's* validation of the HEW regulation proscribing actions "*which have the effect*" of discriminating. 448 U.S. at 479, 100 S.Ct. at 2775 (emphasis supplied by Court). Joining in the opinion were Justices White and Powell, who in *Bakke* had taken the position that intent was necessary to establish a Title VI violation.

[2] Although there is ample ground for argument that the Supreme Court has doubts about *Lau's* continued viability, a requiem may be premature and, in any event, should not be sung by this choir. The prerogative of overruling its cases rests with the Supreme Court, and not with us. *Americans United for Separation of Church and State, Inc. v. HEW*, 619 F.2d 252, 271 (1980) (Weis, J., dissenting), cert. granted, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 450 U.S. 909, 101 S.Ct. 1345, 67 L.Ed.2d 332 (1981); *United States ex rel. Gockley v. Myers*, 450 F.2d 232 (3d Cir.

1971), *cert. denied*, 404 U.S. 1063, 92 S.Ct. 738, 30 L.Ed.2d 752 (1972).⁷

The question is not one of congressional power but rather of intent. Providing federal funding conditioned on an even-handed application is a positive measure to discourage all forms of discrimination, intentional or not. The use of an effects test, therefore, is consistent with the legislative aim of eliminating discrimination and is in harmony with Title VII of the same Act, and Title VIII, *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1457, 55 L.Ed.2d 499 (1978), as well as our previous reference to Title VI in *Shannon v. United States Department of Housing & Urban Development*, 436 F.2d 809, 816, 820 (3d Cir. 1970) (Title VI provides redress for discriminatory effects of local housing plans). Moreover this approach parallels regulations adopted by HEW and other departments charged under § 602 of the Civil Rights Act, 42 U.S.C. § 2000d-1, with enforcing the statute.⁸

With due deference to *Lau v. Nichols* and congressional intent as we perceive it, therefore, we conclude that plaintiffs in a Title VI case alleging discrimination in the application of federal funds in a facially

neutral program need only establish disparate impact. The Rehabilitation Act and the Age Discrimination Act of 1975 provide equally strong cases for application of an impact test since both are patterned after Title VI.⁹ We therefore use the same standard.

II

The next inquiry is whether, applying an effects test, the plaintiffs have established a prima facie case. Before addressing this issue, it is helpful to review the provisions of the agreement between WMC and HEW. Included in the early paragraphs is a statement that the Secretary of HEW desires assurances that operation of the hospital facilities under Plan Omega will be in compliance with Title VI and the Rehabilitation Act.

The agreement obligates WMC to provide free transportation between the Delaware and Southwest divisions, to designate an ombudsman to receive and act upon complaints of discrimination, to adopt a system of inpatient utilization control, and to prevent either division from becoming racially identifiable. It is additionally required that both divisions be operated on a unitary ba-

munity Services Administration); 49 C.F.R. § 21.5 (1980) (Transportation Dep't).

9. Section 504 of the Rehabilitation Act provides:

"No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."

29 U.S.C. § 794 (Supp. II 1978).

Section 303 of the Age Discrimination Act provides:

"Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance."

42 U.S.C. § 6102 (1976).

7. But see *Cannon v. University of Chicago*, 648 F.2d 1164 (7th Cir. 1981), where it was held that disproportionate impact alone does not establish a violation of Title VI. In *Guardians Ass'n of New York City Police Dep't, Inc. v. Civil Service Commission*, 633 F.2d 232, 254 (2d Cir. 1980), a panel of the Court of Appeals for the Second Circuit concluded that only intentional discrimination is actionable under Title VI. An earlier panel of the same court disagreed, however, citing *Lau's* impact test as authority after *Bakke*. *Board of Education v. Califano*, 584 F.2d 576, 589 (2d Cir. 1978), *aff'd on other grounds*, *Board of Education v. Harris*, 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979). Still other panels have either acknowledged that *Bakke* did not expressly overrule *Lau*, see *Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 716 (2d Cir. 1979), or have argued in dicta why an effects test probably retains validity. See *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980).

8. See, e.g., 7 C.F.R. § 15.3 (1980) (Agriculture Dep't); 14 C.F.R. § 1250.103-1 (1981) (NASA); 18 C.F.R. § 1302.3 (1980) (Tennessee Valley Authority); 45 C.F.R. § 1010.10-2 (1980) (Com-

sis, with a single Board of Directors, Executive Committee, medical staff, teaching program and accounting procedure. Any proposed expansion of services at Southwest or reduction at Delaware must be first submitted to HEW for approval. WMC agreed to set aside \$2,800,000 for use exclusively in renovating the Delaware facility. WMC also agreed to recognize the need for employment by minority groups, "including in particular urban minority groups." As noted earlier, the court found that WMC would carry out its categorical obligations under this agreement.

A. THE HANDICAPPED

[3] There is no evidence that either facility will not comply with the structural requirements of the Rehabilitation Act. Indeed, the provisions for handicapped with respect to barriers, entry, and free movement within the buildings will be an improvement over existing conditions. The alleged disparate impact upon the handicapped, therefore, rests upon the location of major portions of hospital services and jobs in the Southwest division. The plaintiffs produced no credible evidence, however, establishing the residential distribution of handicapped persons within the county. In the absence of such information, we cannot tell what effect, if any, Plan Omega will have upon disabled persons in the area, and thus agree with the district court that plaintiffs did not establish a prima facie case under § 504.

B. THE AGED AND MINORITIES

Unlike the evidence with respect to the handicapped, there was testimony that most of the elderly and minorities who would be served by the Wilmington Medical Center

live closer to the Delaware than the Southwest division some nine miles away.¹⁰ Since many of the medical services would be located at the suburban building, transportation to the new facility would be required, and hence treatment would not be as convenient as if provided at Delaware. Although the trial court did find that there would be some effect upon the elderly and minorities because of the travel aspects, those impacts upon patients were described as "de minimis," "insignificant," and "minor."¹¹ We agree with these characterizations and have serious doubts that such effects are enough to establish a prima facie case of discrimination.

The nine mile trip in an area like Wilmington does not impose a significant hardship. Changes to alleviate some problems, even though resulting in improvement, often impose other burdens or confer unequal benefits. Whatever was done here could not possibly distribute the inconveniences and benefits with precise equality, but inaction would have a profound adverse impact upon all who depend upon the medical center.

[4] All concede that something must be done or all will suffer. To establish a prima facie case under Title VI in these circumstances, some definite, measurable disparate impact is required, otherwise needed and worthwhile efforts at improvement will be paralyzed. Reasonable accommodations must be made, but when they have been reached, new programs must be allowed to proceed. Although all of us are not completely persuaded that plaintiffs met their burden here, we will assume *arguendo*, as

that this would exacerbate the racial identifiability of the Delaware division caused by discriminatory patient assignments. The argument was never made, however, that assignment of employees would itself result in racial identifiability violative of Title VI. Given our affirmance of the district court's finding that patient assignment would not result in racial identifiability, it is not necessary to consider plaintiffs' other argument.

10. Over 87% of the minority residents and 76.3% of the elderly residents of New Castle County live in the northeast area. Elderly and minority families near the Delaware facility are more likely than other families in the area to be without a car. 491 F.Supp. at 302-03.

11. The district court, relying on 42 U.S.C. § 2000d-3, did not consider the impact of Omega on minority service employees. The plaintiffs had contended that these employees would be assigned in a discriminatory fashion and

did the district court, that a prima facie case was presented.¹²

III

The next step, therefore, is to determine what burden is placed upon the defendant and whether it was met in this case. The district court concluded that once the plaintiffs had met their initial burden, the defendant had to go forward with evidence to "rebut [that] prima facie case." 491 F.Supp. at 315. The plaintiffs argue that the defendant's burden is a heavier one, that of persuasion.

The parties agree that the decisional law allocating the burdens of production and persuasion under Title VII is instructive in this case, but disagree as to the proper interpretation of the opinions. It is not disputed that when a prima facie Title VII case of discriminatory intent is established, the defendant must go forward with evidence of a legitimate, nondiscriminatory reason for its action. The plaintiff may rebut by showing that the stated reason is mere pretext.

[5] The ultimate burden of persuasion on the issue of illegal discrimination always remains with the plaintiff. Whatever doubt may have existed on that score has been resolved in recent years by a series of cases in the Supreme Court and this court. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); *McNeil v. McDonough*, 648 F.2d 178 (3d Cir., 1981); *Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532, 543 n.3 (3d Cir. 1980); and *Whack v. Peabody & Wind Engineering Co.*, 595 F.2d 190 (3d Cir. 1979). See also *Resident Advisory Board v. Rizzo*, *supra* at 149 n.37 (Title VIII); *Rodriguez v. Taylor*, 569 F.2d 1231, 1239 (3d Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2254, 56

L.Ed.2d 414 (1978) (Age Discrimination in Employment Act).

The plaintiffs contend that there should be a difference in the defendant's burden when the charge is discriminatory impact rather than discriminatory intent. Their theory is that in countering a prima facie case of discriminatory impact, the defendant is presenting something in the nature of an affirmative defense that requires shouldering the burden of persuasion. See *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 703 n.5 (8th Cir. 1980) (opinion of one judge, others not joining).

That reasoning is not convincing. One could just as readily say in an intent case that the necessity to prove a nondiscriminatory reason is an affirmative defense carrying a burden of persuasion. Holdings of the Supreme Court and this court, however, are to the contrary.

[6, 7] In *Furnco Construction Corp. v. Waters*, *supra*, the Supreme Court explained its allocation of the burden of proof in intentional discrimination cases. If the plaintiff produces evidence sufficient to meet the standards of a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), an inference of discrimination is raised "because we presume [the complained of] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. at 577, 98 S.Ct. at 2949. The effect of such a prima facie case is only to put in issue whether the employer's conduct "was based upon legitimate, nondiscriminatory reasons and therefore permissible." *Id.* at 576 n.8, 98 S.Ct. at 2949, n.8. A prima facie case does not necessarily constitute proof of the ultimate fact of discrimination under Title VII. *Id.* at 576, 98 S.Ct. at 2949.

[8] To meet a *McDonnell Douglas* prima facie case, a defendant must produce evidence of an acceptable reason but is not required to show an absence of discriminatory motive. *Board of Trustees of Keene*

12. Judge Higginbotham would hold that plaintiffs did establish a prima facie case.

State College v. Sweeney, *supra*, 439 U.S. at 24, 99 S.Ct. at 295. The burden of persuasion on the ultimate fact of discrimination remains with the plaintiff who may show that the proffered legitimate reason was a pretext. *Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. at 578, 98 S.Ct. at 2950; *McDonnell Douglas Corp. v. Green*, *supra* 411 U.S. at 804, 93 S.Ct. at 1825.

[9] Disproportionate impact or effect is simply an additional method of demonstrating impermissible discrimination under Title VII. *Teamsters v. United States*, 431 U.S. 324, 336 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977). In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the Court held that a prima facie case could be established under the impact theory if the plaintiff demonstrated that a facially neutral policy disproportionately affected persons protected by Title VII. If the plaintiff meets his initial burden, the defendant must show "that any given requirement [has] . . . a manifest relationship to the employment in question." *Id.* at 425, 95 S.Ct. at 2375, quoting *Griggs v. Duke Power Co.*, *supra* 401 U.S. at 432, 91 S.Ct. at 854. In formulating this approach, the Court referred to the related test it had devised in *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 425, 95 S.Ct. at 2375, and went on to include a similar third step: "it remains open to the complaining party to show that other . . . selection devices, without a similarly undesirable . . . effect, would also serve the . . . legitimate interest." 422 U.S. at 425, 95 S.Ct. at 2375.

13. The distinction between establishing a prima facie case and prevailing on the ultimate issue is discussed in IX J. Wigmore, Evidence § 2487 (3d ed. 1940). There Professor Wigmore quotes extensively from *Speas v. Merchants' Bank & Trust Co.*, 188 N.C. 524, 125 S.E. 398 (1924):

"A 'prima facie' case . . . does not change the burden of proof. It only stands until its weight is met by evidence to the contrary . . . [A] 'prima facie' case . . . need not be overcome by a preponderance of the evidence, or by evidence of greater weight; but the evidence needs only to be balanced, put in equipoise . . . ; and if this be done, the burden of the evidence has been met and the duty of

In characterizing the defendant's obligation to show a manifest relationship as an affirmative defense, the plaintiffs here apparently assume that making out a prima facie case of disproportionate impact is the equivalent of establishing a Title VII violation by a preponderance of the evidence. This assumption cannot stand because the *Furnco* analysis should control impact, as well as intent, cases.¹³

[10] When the Supreme Court first held that Title VII prohibited some facially neutral practices, it described the congressional purpose as "the removal of artificial, arbitrary, and unnecessary barriers . . . when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 431, 91 S.Ct. at 853. A showing of disproportionate effect or impact alone may not establish a violation. "The touchstone is business necessity. If an employment practice which operates to exclude . . . cannot be shown to be related to job performance, the practice is prohibited." *Id.* To be proscribed, then, the challenged practice must not only affect disproportionately, it must do so unnecessarily.

[11] To establish a prima facie case the plaintiff need not show that the practice was unnecessary but may rely on inferences. If the defendant presents no evidence of business relatedness in his case, the court may assume that there was no permissible reason for the impact.¹⁴ In the event that the defendant does come forward with evidence to meet the inference of discrimina-

producing further evidence shifts back to the party having the burden of proof."

14. As the Supreme Court noted in *Teamsters v. United States*, *supra*, 431 U.S. at 358, 97 S.Ct. at 1866.

"The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."

tion raised by the prima facie case, the plaintiff may still carry his burden of persuasion by demonstrating that a feasible, yet less onerous alternative exists. *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 425, 95 S.Ct. at 2375.

[12] The contention plaintiffs make here, that business relatedness constitutes an affirmative defense, is incompatible with the third step of *Albemarle*. Plaintiffs would have WMC bear the burden of persuasion on this issue by showing a dearth of less objectionable alternatives. But in *Albemarle*, this burden was imposed on the complaining party. As the Court explained in an analogous context, if the plaintiffs were correct in their assessment of the various burdens of production and persuasion, the third step in the analysis would be rendered "entirely superfluous . . . , since it would place on the [defendant] at the second stage the burden of showing that the reason . . . was not a pretext, rather than requiring such proof from the [plaintiffs] as a part of the third step." *Board of Trustees of Keene State College v. Sweeney*, *supra* 439 U.S. at 24-25 n.1, 99 S.Ct. at 295-296 n.1.

The Supreme Court has not given any indication that it requires a shifting of the burden of persuasion in effects cases. To the contrary, the Court stated in *New York Transit Authority v. Beazer*, 440 U.S. 568, 587 n.31, 99 S.Ct. 1355, 1366 n.31, 59 L.Ed.2d 587 (1979), that the ultimate burden of proving discriminatory impact is the plaintiff's. *Albemarle Paper Co. v. Moody*, *supra*, was an impact case, yet in referring to the employer's burden to meet the plaintiff's prima facie showing, the Court cited *McDonnell Douglas Corp. v. Green*, *supra*, an intent case. As other examples of cross-references to *McDonnell Douglas* in effects

cases, see *Dothard v. Rawlinson*, 433 U.S. 321, 329, 339, 97 S.Ct. 2720, 2726, 2731, 53 L.Ed.2d 786 (1977), and *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144, 98 S.Ct. 347, 352, 54 L.Ed.2d 356 (1977). See also *Teamsters v. United States*, 431 U.S. 324, 336, 358, 360, 97 S.Ct. 1843, 1855, 1866, 1867, 52 L.Ed.2d 396 (1977).¹⁵

The plaintiffs have cited no current authority for their position. Precedents antedating *Board of Trustees of Keene State College v. Sweeney*, *supra*, have little persuasive effect since that case settled the confusion that surrounded this issue. Although the facts and inferences required to prove a case vary between intent and effect situations, that factor does not call for the shifting of the burdens of production and persuasion depending on the theory advanced.¹⁶

Moreover, it is illogical to impose a heavier burden on a defendant in a case where a neutral policy results in disparate impact than in one where the charge is unlawful animus. Indeed, if there is to be a difference, quite the opposite result should follow. The defendant who intentionally discriminates should not fare better than the one whose conduct may be subjectively blameless, but because of its effects may require remedial action.

As a practical matter, a procedural distinction between the impact and intent cases would cause unnecessary confusion in the trial courts, particularly so in cases like the one at hand in which both theories are advanced. See, e. g., *Whack v. Peabody & Wind Engineering Co.*, *supra*. It is difficult to understand what important interests would be served by imposing two different burdens on the defendant in a case of this nature. Certainly the multiplication of procedural devices is not a desirable development in trial practice.

15. In *Texas Dep't of Community Affairs v. Burdine*, *supra*, the Court commented that the factual issues and therefore the "character of the evidence presented" differ in effects cases but did not give any indication that a different burden would be imposed on the defendant. 450 U.S. at 252, at n.5, 101 S.Ct. at 1093 n.5.

16. See generally, Hillman, *Teamsters, California Brewers, and Beyond: Seniority Systems and Allocation of the Burden of Proving Bona Fides*, 54 St. John's L.Rev. 706, 711-16 (1980).

All things considered, uniformity in the procedural aspects of impact and intent cases is highly desirable and should not be sacrificed on the dubious theory that plaintiffs advance here. Although we need not worship at its shrine, symmetry is not always sinful. Just as we permit plaintiffs to establish discrimination through effects under both Title VI and VII, so should there be a consistent burden on defendants.

The district court determined that WMC should go forward "with evidence that Omega will 'in theory and practice' serve 'a legitimate bona fide interest of [WMC] . . . and . . . show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.'" 491 F.Supp. at 315-16, quoting *Resident Advisory Board v. Rizzo*, *supra* at 149.

Following this, plaintiff was allowed to produce further evidence consistent with the third step of demonstrating pretext that the Supreme Court has mentioned in both intent and impact cases brought under Title VII.¹⁷ *McDonnell Douglas Corp. v. Green*, *supra*; *Albemarle Paper Co. v. Moody*, *supra*; *Teamsters v. United States*, *supra*.

In *Resident Advisory Council v. Rizzo*, *supra*, we held that under Title VIII of the Civil Rights Act of 1964, a plaintiff retains the burden of persuasion on the existence of less discriminatory alternatives. Requiring plaintiffs to meet that obligation by demonstrating that feasible, less discriminatory alternatives exist is neither unjust nor impractical in view of the extensive discovery material that was available in this case.

The district court's test is actually more stringent than that suggested in *Jefferson*

v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972). There, the Supreme Court found that application of a percentage reduction factor to determine reduced needs of welfare recipients was rationally related to the purpose of the separate welfare programs and, consequently, did not violate the equal protection clause. For similar reasons, the Court also concluded that the challenged system would not contravene Title VI. The relationship of the reduction factor to the purposes of the State's welfare programs distinguished *Jefferson* from *Griggs*:

"In *Griggs*, the employment tests having racially discriminatory effects were found not to be job-related, and for that reason were impermissible under the specific language of Title VII of the Civil Rights Act. Since the Texas procedure challenged here is related to the purposes of the welfare programs, it is not proscribed by Title VI simply because of variances in the racial composition of the different categorical programs."

Jefferson v. Hackney, *supra* at 550 n.19, 92 S.Ct. at 1733 n.19. In *Jefferson*, the state was not required to produce evidence that alternate formulae for computing need would not have served the purposes of the program with less of a disparate impact.

In *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980), the Court of Appeals for the Second Circuit was confronted with a Title VI challenge to the closing of a city hospital. The court said that Title VI did not require consideration of alternatives beyond "an assessment of all the municipal hospitals in order to select one or more for closing." *Id.* at 619. Since the appropriateness of the

17. In intent cases, if the reasons put forth by the defendant are not his real ones and in fact mask his plan to discriminate, the plaintiff may show the pretext. In impact cases, where no intent is alleged, the pretext may sometimes consist of a defendant's assertion of a bona fide interest in order to conceal another nondiscriminatory reason for not adopting a less discriminatory plan. In other situations, business justification may be the only reason for the decision. It nevertheless remains open to the

plaintiff to show that other devices exist which also serve the defendant's legitimate interest but which do not manifest a similarly prejudicial effect. Indeed, "[s]uch a showing would be evidence that the [defendant] was using its [device] merely . . . as a 'pretext' for discrimination." *Albemarle Paper Co. v. Moody*, *supra* 422 U.S. at 425, 95 S.Ct. at 2375. It may also be substantive evidence to support plaintiff's case.

city's choice had been sufficiently demonstrated, the court's role ended. Expressing doubt about the feasibility of a more open ended judicial evaluation of alternative means of economizing, the opinion stated,

"Once a court is drawn into such a complex inquiry, it will inevitably be assessing the wisdom of competing political and economic alternatives. Moreover, such policy choices would be made without broad public participation and without sufficient assurance that the alternative selected will ultimately provide more of a benefit to the minority population."

Id. The court added that its skepticism extended even to requiring courts to consider "alternative locations for placement ... of facilities." *Id.*, citing *NAACP v. The Wilmington Medical Center, Inc.*, 491 F.Supp. 290 (D.Del.1980).

By contrast, the district court in the case at hand did evaluate the alternatives. It required WMC to go "forward with evidence showing that it has chosen the least discriminatory alternative." 491 F.Supp. at 340. That is a stringent standard which more than adequately serves Title VI aims.¹⁸ The court discussed six possible, less discriminatory alternatives to the Omega Plan, including the plaintiffs' "Reverse Omega" proposal and found that none of the plans would serve WMC's needs. The court also said that WMC had "investigated approximately 50 different plans, all of which it rejected for *bona fide* reasons." *Id.* at 340 n.314. Indeed, the court found that "Omega is the only plan which can adequately meet WMC's needs." *Id.* at 340.

[13] On this record, we conclude that the district court did not err in concluding that the defendant had carried its burden of meeting the plaintiffs' *prima facie* case.¹⁹

IV

[14] The plaintiffs also argue that the district court erred in refusing to assess the

financial feasibility of Plan Omega and in deferring instead to the judgment of the bond market. But as noted earlier, the court did make specific findings with respect to WMC's financial ability to complete the renovation at Delaware and pay for whatever shuttle bus service is required. When the court referred to the sanction of the bond market for the financial consequences of Plan Omega, it apparently was referring to the question whether WMC was wise in undertaking such an extensive project.

As we read the district judge's opinion, whether funds could be obtained was not a matter which he could confidently predict, but was a circumstance subject to market forces. If the bonds were not sold, Omega could not proceed. Obviously an undertaking of this magnitude involves some element of financial risk and predicting the ultimate outcome is not a field in which the courts have a special competence. The district judge's hesitancy to wander into this area of uncertainty is understandable. On the record we do not find it to be reversible error.

In fact, it would have been pure speculation for the court to accept the plaintiffs' argument. Even if it could be demonstrated that WMC was overly optimistic, there is no way of knowing with any certainty what remedial measures would be taken. It is far from clear that WMC would take the path suggested by plaintiffs and reduce free care and renovations of the Delaware division. Not only would this breach the HEW contractual obligations but it would also place WMC in jeopardy of losing its Medicare-Medicaid reimbursements. A facility already in financial difficulty is not likely to risk forfeiting federal funding that makes up 30 percent of its budget.

It must be remembered that the Omega Plan was submitted for administrative re-

18. Judges Higginbotham and Sloviter would adopt the standard used by the district court that the discriminatory impacts must be "justified by *bona fide* needs which could not be accomplished by any less discriminatory plan." 491 F.Supp. at 343.

19. The record contains ample evidence supporting justification for such disparate effects as may exist as well as demonstrating that other impacts asserted by plaintiffs will not take place.

view to hospital planning organizations and to HEW. After some changes had been made, the proposal was approved by HEW as being in compliance with Title VI. We are not called upon to appraise the wisdom of Omega but are limited to reviewing the decision of the district court by appropriate appellate guidelines. From that perspective, we do not find legal error in the standards the district court utilized nor can we say that the factual findings are clearly erroneous. Accordingly, the judgment of the district court will be affirmed. The mandate will issue forthwith.

ADAMS, Circuit Judge, concurring.

I arrive at the result reached by the majority but, because I do so by a somewhat different route, I find it necessary to write separately.

The record here reveals a problem confronting American hospitals with increasing frequency: an aging physical plant, escalation of health care costs and maldistribution of services have combined to create a health care crisis.¹ Deteriorating physical facilities threatened the Wilmington Medical Center with a loss of accreditation. Such a loss would further erode the quality of the hospital's medical care and its financial foundation by triggering a loss of qualification for the Center's teaching program and a termination of Medicare and Medicaid funds. In addition, without the construction of new facilities, the community would suffer a shortage of acute care beds. See *NAACP v. Wilmington Medical Center, Inc.*, 491 F.Supp. at 290, 297-98 (D.Del. 1980).

Faced with these demographic and fiscal pressures, the Center concluded that rehabilitation of some of its facilities in downtown Wilmington and construction of new facilities in the suburban area, to prevent

paying patients from gravitating to a potential competitor, would most appropriately fulfill the hospital's needs. See 491 F.Supp. at 310. The Center considered approximately 50 proposals before arriving at a final plan that was denominated "Omega." Plan Omega was approved first by a state designated planning agency, which ensured that the project conformed to local needs for adequate health care, and then by the federal Department of Health, Education and Welfare (now Health and Human Services). See *Wilmington United Neighborhoods v. United States Dept. of Health, Education and Welfare*, 615 F.2d 112, 124-25 (3d Cir. 1980).

Under Plan Omega, the Center proposed to invest approximately \$18-24 million in the rehabilitation of certain of the inner city facilities; to make a substantial investment in facilities in the suburbs; and to provide transportation for center city residents in need of specified services located at the suburban installation. See 491 F.Supp. at 325-27, 343, 319. The plaintiffs maintain that the proposed program violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, because it adversely affects the quality of care and access to that care for the handicapped, the elderly and certain minority groups.² The Center, however, contends that, as a whole, the physical rehabilitation, new construction and consolidation of services will result in improved care for all patients, and that the availability of a shuttle service will minimize any transportation barriers for the handicapped, elderly and minority groups.

Because I would affirm the district court on different grounds than the majority, I find it unnecessary to decide whether *Lau*

1. For a history and critique of health care planning, see Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 Yale L.J. 243 (1978).

2. The majority and I agree with the district court that the plaintiffs did not establish a prima facie case with respect to the handicapped under section 504. See *majority opinion supra* at 1331, 1332.

v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), in which the Supreme Court construed Title VI to prohibit disparate impacts, is still the relevant governing law. Although the Supreme Court has recently suggested in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and *Board of Education of New York City v. Harris*, 444 U.S. 130, 147 n.10, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979), that Title VI might incorporate the constitutional standard of specific intent to discriminate, it should be noted that, because of the wide range of activities and conduct that Title VI covers, the concerns raised in those two cases do not parallel the issues here. As the majority explains, *Bakke* focused on the *intentional* use of racial criteria in the context of voluntary remedial actions. The Supreme Court did not deal with the type question present in this case, namely whether Title VI may impose requirements on recipients of federal funds that are broader than the Constitution demands when faced with disparate impacts resulting from *facially neutral* actions. Moreover, the concern voiced in *Harris*—that because a violation of Title VI may result in a cutoff of funds, it is likely that Congress desired this drastic sanction only when discrimination is intentional—would also appear to be inapplicable here. The plaintiff's private cause of action against the Center, seeking an injunction to prevent future discrimination, involves no immediate prospect of a fund cutoff. In fact, it is attempting to ensure against such a possibility.³

Nonetheless, whether hospital relocations and renovations such as the present one

should be subjected to judicial scrutiny aimed not only at preventing intentional discrimination but also at forestalling any relocation which may occasion unintentional, adverse effects on protected groups is, from my perspective, a troublesome question. Courts may not be the most competent forums for determining the effects of hospital relocations on racial minorities. Admittedly, we earlier acknowledged the desirability of judicial review by finding a private cause of action under Title VI. See *NAACP v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1254 (3d Cir. 1979). And courts are often well-situated to address the concerns of relatively unorganized, politically weak consumer groups whose interests may be insufficiently recognized in administrative proceedings. But I would defer deciding until a later day, the level of scrutiny, and the extent to which courts consequently might intrude upon a better-informed regulatory process.

As the district court held, and the majority here agrees, the record is devoid of proof of intentional discrimination. But, even assuming that a disparate impact test is an appropriate one under Title VI, I believe that a fair reading of the evidence in this case, and especially of the extensive findings made by the trial court, indicates that the plaintiffs failed to make out a prima facie case under any of the statutes involved. A plethora of findings underlies the trial judge's ultimate conclusion that the plaintiffs have shown only a slight disparate increase in travel time, a modest decrease in the ability of inner city residents to visit patients at the suburban site, and consequently a minimal negative effect

3. The broad spectrum of federally funded programs in which Title VI challenges occur may account for the divergent resolutions of the intent vs. impact question among and within the circuits. See *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir. 1981) (based on belief that a violation of Title VI requires an intentional discriminatory act, the court adopted the intent standard for Title IX); *Guardians Association of the New York City Police Dept., Inc., etc. v. Civil Service Commission of the City of New York*, 633 F.2d 232 (2d Cir. 1980)

(intent required for Title VI); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (unnecessary to decide whether intent or effects standard applies to Title VI); *Board of Education v. Califano*, 584 F.2d 576, 589 (2d Cir. 1978) (effects test for Title VI), *aff'd on other grounds*, 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979); *Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022, 1029 n.6 (9th Cir. 1978) (impact is proper standard for Title VI).

which the decrease in visitors may have upon the quality of care for the elderly. 491 F.Supp. at 333. The district court also determined that the possibility of a few minority high risk patients missing an appointment at the speciality clinics, and the extremely rare chance of an obstetrical emergency patient receiving inadequate treatment in the inner city division constituted such unlikely effects that they failed to establish a prima facie case under Title VI. 491 F.Supp. at 337. I cannot find that the trial court clearly erred in holding that plaintiffs "failed to meet their initial burden of proving disparate impact under the civil rights statutes invoked." See 491 F.Supp. at 339.

Moreover, these specific findings are part of a larger mosaic: the trial court's overarching finding that the level of care for all population groups will improve as a result of the benefits that greater consolidation, better-trained residents and upgraded facilities will confer. Measured against HEW regulations which define Title VI violations as actions which have "the effect of *defeating or substantially impairing* accomplishment of the objective of the program as respect [sic] individuals of a particular race, color, or national origin," 45 C.F.R. § 80.3(b)(2) (emphasis added), these *de minimis* impacts simply do not pass muster. Unless a threshold is created for prima facie cases under Title VI, questions regarding hospital relocations and similar, complex socioeconomic decisions will be open to protracted court challenge, for each significant community undertaking affects slightly differently the various protected population subgroups in our country's localities.

Because I am unable to find that the plaintiffs established a prima facie case, it is unnecessary for me to resolve whether the defendants carried a burden of production or burden of proof in rebutting an initial showing of disparate impact with evidence of legitimate medical needs.

GIBBONS, Circuit Judge, concurring and dissenting.

I join in Part I of the opinion of the court, which holds, contrary to the position

advanced by the Wilmington Medical Center (WMC), that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1976), Section 504 of the Rehabilitation Act of 1975, 29 U.S.C. § 794 (Supp. II 1978) and the Age Discrimination Act, 42 U.S.C. § 6101 *et seq.* (1976 & Supp. II), prohibit not intentional discrimination alone, but also disparate impact upon the classes those acts protect. Only an effects standard will encourage decision-makers to consider possible discriminatory consequences of a proposal *before* its implementation. I also join in Part II A of the opinion of the court, holding that the plaintiffs did not establish a prima facie case of violation of Section 504 of the Rehabilitation Act. I do not join in Part II B of the opinion, which assumes *arguendo* that the plaintiffs established a prima facie case of disparate impact against the aged and minorities. My view is that the plaintiffs quite clearly proved a prima facie case of disparate impact against both classes in significant respects. I dissent from Part III of the opinion of the court, which is entirely inconsistent with the intention which the court correctly attributes to Congress in its discussion of the federal funding statutes in Part I.

I.

In describing the requirements for a prima facie case the majority opinion states:

To establish a prima facie case under Title VI in these circumstances, *some definite, measurable impact is required*, otherwise needed and worthwhile efforts at improvement will be paralyzed. Reasonable accommodations must be made, but when they have been reached, new programs must be allowed to proceed.

Maj. op. p. 1332 (emphasis supplied). If the court ended its discussion with the italicized language, I would agree with its test. But the addition of the following sentences shows that the court is confusing the requirements of a prima facie case—definite, measurable impact on the protected class—with justification for the imposition of such

an impact. Medical and financial necessities may justify the adverse effects, but do not make them any less substantial. The distinction is critical. It is illogical to proceed, as the majority does, to the issue of justification, without first identifying the specific impacts which will occur, since what amount of accommodation is reasonable depends on the size of the impact.

On this record there is no question but that, contrary to the district court's alternative holding, a definite, measurable impact on the protected classes has been shown. It need not be assumed *arguendo*. It is plain. The district court's contrary conclusion is the result of several fundamental legal errors, which the majority opinion ignores.

A. *Factual Background*

Before reviewing the lower court's ultimate findings, I summarize the background facts about Plan Omega which are common ground. The plan was the culmination of a long period of planning by WMC for the improvement of its ability to offer quality medical care. WMC is a private nonsectarian hospital which evolved from the merger in 1965 of three acute care general hospitals in the City of Wilmington, which after the merger maintained three separate physical facilities containing approximately 55 percent of the available acute care beds in the State of Delaware. Although the three separate facilities are located in different areas of the city, they are all well served by bus routes which run throughout heavily populated areas of New Castle County, as would be true of any new consolidated facility if it was located in Wilmington. The primary reasons for the merger were reduction of duplicate facilities and improvement of clinical experience for a resident program in order to attract residents who would serve the Delaware community. Thwarting this purpose is the fact that WMC's physical facilities are aging and in various states of disrepair; their inadequacies have resulted in only probational accreditation by the Joint Commission on Ac-

creditation of Hospitals. Loss of accreditation would mean ineligibility for participation in residency programs approved by the American Medical Association. Thus plant improvement is essential.

It has always been the judgment of the WMC medical staff that achievement of the hospital's objectives could best be served by placing all medical and surgical services under one roof. However, by the time planning for a new facility commenced, Delaware, like other states, was experiencing a substantial shift in population growth from older urban to newer suburban locations. In New Castle County that shift in the growth pattern produced a rapid increase in its southwestern portion, around Newark, Delaware. That area is now served only by an emergency room, and the need for some hospital beds in the vicinity of Newark is widely recognized. The Delaware Health Planning Council, a state agency, has recommended that such beds be provided. If an institution other than WMC were to do so, the latter would be adversely affected. WMC is the largest provider of free care in the County to those unable to pay for care themselves and unable to qualify for government assistance. Partly as a result of subsidization of this free care, WMC's hospital rates are the highest in the State of Delaware. Since the population in the southwestern suburbs is generally more affluent than that in the urban northern part of the County, diversion of patients from WMC to a new suburban institution would have the effect of increasing the percentage of free care patients in WMC's patient mix, and thus of adversely affecting its financial stability.

The combination of undisputed facts outlined in the preceding paragraph limited the choices available to WMC. It could build a new hospital under a single roof in the suburbs, closing the Wilmington units, or it could build a new hospital in Wilmington, running the risk that another institution would build in the suburbs, or it could attempt, with separate facilities, to serve both

areas. When the third course was decided upon it became necessary to determine the mix of facilities in the two locations. In Plan Omega WMC opted for the erection of a new 780-bed hospital, the Southwest Division, in a rural location at Stanton, the closing of two of the three Wilmington divisions, and the reduction in bed capacity of the third, Delaware Division, from 480 to 250 beds. The Stanton location is not now and will not be in the foreseeable future served by public transportation, although it is on an interstate highway. The Plan involves more than allocating beds, however, for some major hospital services will be located exclusively at the larger Southwest Division, others exclusively in the smaller Delaware Division, and some in both places.¹

As a result of the order of the district court that the Department of Health, Education and Welfare perform an investigation of Plan Omega's compliance with Title VI,² proceedings took place before that agency which resulted in a finding that, as originally conceived, Plan Omega would violate Title VI. A Supplemental Agreement between the agency and WMC was then made for the purpose of assuring that the

plan would not violate the statute.³ The fact, though not the legal significance, of the Supplemental Agreement is undisputed.

The plaintiffs contend that the effect of Plan Omega is to impose on protected classes in New Castle County a disproportionate burden of decreased availability of medical services and of employment opportunities when compared to the rest of the population. That disparate impact, they contend, will result because the housing patterns in New Castle County concentrate greater numbers of the protected classes in those parts of the County nearer to the present WMC divisions, which under Plan Omega would be scaled down considerably. The travel burden imposed by the proposed Southwest Division would allegedly be exacerbated by the fact that the new facility would not be served by public transportation. The burden would, therefore, fall disproportionately on minorities, the handicapped, and the elderly, who, plaintiffs urge, have far less access to private transportation than does the rest of the population. Moreover, they predict that because the more significant inpatient medical services will be at the Southwest Division, the quality of care at the Delaware Division

1. Placement of inpatient services under Plan Omega would be as follows:

Department	Section	Location
Medical:	Allergy	Both
	Cardiology	Both
	Dermatology	Both
	Endocrinology	Both
	Gastroenterology	Southwest
	Internal Medicine	Both
	Nephrology	Southwest
	Rheumatology	Both
	Physical Medicine	Both
	Chest Diseases	Both
	Infectious Disease	Both
	Neurology	Southwest
	Oncology	Southwest
Psychiatry		Delaware
Radiation Therapy		Southwest
Family Practice		Delaware
Surgical:	General	Both
	Neurosurgery	Southwest
	Orthopedic Surgery	Southwest
	Plastic	Southwest
	Proctology	Both
	Thoracic	Southwest
	Otology	Both
	Rhinolaryngology	Delaware
	Vascular	Both
Dentistry		Delaware

Ophthalmology	Delaware
Urology	Southwest
Obstetrics/ Gynecology:	Obstetrics Gynecology
Pediatrics:	Pediatrics Newborn Premature
	Southwest Southwest Southwest Southwest

In addition, some clinic, outpatient, and support services will also be located exclusively at the Southwest Division, including the high-risk prenatal and specialty pediatric and gynecological clinics, and the specialty cardiac, radiation therapy, and hemodialysis support services. The Delaware Division will exclusively house the psychiatry, ear, eye, and nose, and dentistry specialties. The primary care clinics will be consolidated and located exclusively at the Delaware Division.

2. See *NAACP v. Wilmington Medical Center, Inc.*, 453 F.Supp. 280 (D.Del.1978).

3. The Supplemental Agreement is in the record as PX2.

will in many respects be inferior, and that division will ultimately become racially identified. These impacts would violate Title VI.

Before addressing the evidence supporting these contentions, it is worthwhile noting certain provisions of the Supplemental Agreement reached by WMC and the Department of Health, Education and Welfare. The agreement recites the Secretary's desire to receive assurance that the operation of WMC under Plan Omega as implemented will be in compliance with Title VI and the Rehabilitation Act. The agreement covers main areas of future WMC operation. First, it obliges WMC to operate its own transportation system between the Delaware and Southwest Divisions. Second, it requires the adoption of a system of inpatient utilization control aimed at preventing one or the other division from becoming racially identifiable. Third, it requires that both divisions be operated on a unitary basis, with a single Board of Directors and Executive Committee, a single medical staff, consolidated teaching programs, and consolidated accounting. Fourth, it requires improvements in the plant of the Delaware Division and approval by the Regional Civil Rights Director of the Department of Health, Education and Welfare before any reductions in services at that division or material expansion of the Southwest Division occur. The agreement is, however, "subject to amendment from time to time by written instrument executed by the parties, to reflect such changes in systems for delivery of hospital care and of changing community needs."⁴

In determining that the plaintiffs had failed to prove a case of disparate impact, the trial court canvassed the evidence on each of the ways Plan Omega could be expected to impact upon the three protect-

ed classes. Since I agree with the majority's disposition of the claim of disparate impact on the handicapped, I address the remaining claims of the aged and minorities.

B. *The Disparate Impacts Identified*

The plaintiffs' evidence suggests that minorities and the elderly are concentrated in or near the City of Wilmington, that of households lacking access to automobiles, 73.8% were in that part of the County, and that such public transportation as is available in the County other than taxicabs is concentrated in that part of the County as well. Moreover, a round trip taxicab fare from the Delaware Division to the Stanton site costs approximately \$15.00. 491 F.Supp. at 304-05. That evidence also suggested that minorities and the elderly have a disproportionately high incidence of need for those inpatient services which will be located exclusively at the Southwest Division.⁵ 491 F.Supp. at 306. The plaintiffs' evidence identified three classes of services falling in this category. First, services relating to childbearing and infant health are more likely to be needed by minorities. 491 F.Supp. at 306-07. Second, minorities are more likely than whites to need services for cerebral vascular diseases and for cancer. 491 F.Supp. at 307. Third, the elderly are more likely than the general population to need services relating to cerebral vascular and cardiovascular diseases, gastroenterology, thoracic surgery, and radiation therapy. 491 F.Supp. at 308. The evidence is clear, and virtually undisputed, therefore, that certain services will, under Plan Omega, be moved over nine miles further from the population that needs them most; a population that has least access to private transportation.

The evidence also discloses important differences between the Southwest and Dela-

thopedic surgery, plastic surgery, thoracic surgery, urology, obstetrics, gynecology and pediatrics, both newborn and premature.

4. Supplemental Agreement, Paragraph (14).
5. Services to be exclusively at Southwest include gastroenterology, nephrology, neurology, oncology, radiation therapy, neurosurgery, or-

ware Divisions, differences which plaintiffs predict will result in unequal quality of care. Almost all clinic (outpatient) care will be concentrated at the Delaware Division, and a majority of clinic patients are members of minority groups. Moreover, of 33 inpatient departments, only 5, psychiatry, family practice, rhinolaryngological surgery, dentistry and ophthalmology, will be exclusively at Delaware Division, while 15 will be exclusively at Southwest and only 13 at both facilities. There is evidence that the Delaware Division will be housed in a renovated facility, presently dilapidated, while the Southwest Division will be brand new. Plaintiffs also offered evidence tending to show that estimates of revenue on which Plan Omega was based, and upon which the proposed renovation of Delaware Division was dependent, were questionable, and thus that even a renovated Delaware Division may not materialize. 491 F.Supp. at 327. Plaintiffs contend that Delaware Division is destined to become a second-rate facility, racially identifiable, and rendering to the minorities and the elderly in its service area services inferior to those rendered at the Southwest Division. The inferior service will result, they contend, from unavailability of board-certified specialists for consultation at the Delaware Division in those important specialties exclusively at Southwest.

For various reasons the trial court rejected the significance of most of the evidence referred to, and concluded that no violation of either Title VI or the Age Discrimination Act was shown. The court analyzed the evidence under three categories: effects on accessibility, effects on quality of care, and racial identifiability. I will do likewise.

1. Accessibility

Patently the removal of a number of medical specialties from Wilmington to the suburbs will impose a disproportionate travel burden on minorities and the elderly who

are concentrated in the inner city and have less access to private transportation. But as amended by the Supplemental Agreement, Plan Omega includes a shuttle bus component intended to satisfy transportation demand. Plaintiffs produced the testimony of Dr. Marvin Manheim, a transportation expert, to the effect that the level of shuttle bus service specified in the Supplemental Agreement will be far less than the demand and will create for passengers prohibitively long waiting periods. The court discounted the relevance of Dr. Manheim's testimony, however, construing the Supplemental Agreement as a categorical undertaking by WMC to provide adequate free transportation for patients, visitors and employees. The court concluded, moreover, that even in the worst case hypothesized by the transportation expert, the additional cost of providing needed free transportation would be minimal in comparison with WMC's annual budget. 491 F.Supp. at 319.

Since the court did not discredit Dr. Manheim's testimony on the likely inadequacy of the minimum transportation requirements set forth in the Supplemental Agreement, they must for purposes of review be accepted in determining whether plaintiffs proved a prima facie case. Rebuttal of this case hinged on the testimony of James Tyler, a defense witness, assuring that WMC would have the financial ability to meet this projected need. However, it was plaintiffs' contention throughout trial that, regardless of WMC's good intentions, its future revenue projections were seriously flawed and that, as a consequence, it would be unable to satisfy the anticipated need for shuttle service. Elsewhere in its opinion the court conceded that plaintiffs had presented "strong evidence" that revenues were overestimated. 491 F.Supp. at 328 n.230. But it deemed such evidence "irrelevant" for purposes of weighing the prima facie case. As will be discussed in more detail later,⁶ this attack on the credibility of WMC's revenue projections was, to the contrary, high-

6. See Part 1(L)(2)(i) *infra*.

ly relevant, and the court's acceptance of Tyler's assurances, with no consideration given to their reliability, tainted its conclusion that WMC would be able to upgrade its planned shuttle service. For purposes of plaintiffs' prima facie case, we are left with undisputed evidence of a lack of public transportation from minority and residential areas to the Southwest Division, and of a planned private shuttle bus system which, as presently projected, will be inadequate.

Plaintiffs also produced evidence, and the trial court found, that even assuming adequate free shuttle service connecting the Delaware and Southwest Divisions, minority inpatients and visitors will still suffer a disproportionate increase in the amount of time spent traveling to reach WMC's facilities. 491 F.Supp. at 320. The same would appear, from the evidence, to be true of the elderly. This time the burden would fall particularly heavily on the poor for whom it might mean lost wages, and on minority mothers of small children. There is also evidence that because of the nature of the populations affected—the elderly and minorities—an increase in travel time may translate into some decrease in the use of health care. 491 F.Supp. at 321. The court discounted the significance of this evidence.

Relying on section 604 of Title VI,⁷ it declined to consider any transportation impact on employees. This omission was improper, for while it is true that medicaid and medicare funds are not appropriated to provide employment, and thus may fall within section 604, the impact on employees still was relevant to the claim, advanced on behalf of hospital patients, that the Southwest and Delaware Divisions will become racially identifiable. In measuring the plaintiffs' prima facie case, therefore, evidence about access to the Southwest Division by minority employees was highly relevant. The failure to consider it was error.

As to evidence of possible decrease in use of health care facilities, the court rejected it, noting that

7. Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any em-

[o]bviously, they will not be deterred from seeking care at any of the services located at the Delaware Division. Any deterrent . . . will only occur with services located exclusively at the Southwest Division. Moreover, increases in time and distance will usually only deter those seeking primary care and will have no effect upon those who will be inpatients, those who are terminally ill, or those who are referred by their doctor to a facility to receive specialized care. Since only doctor referred specialty clinics, inpatient facilities, and doctor referred specialty outpatient treatment facilities will be located at the Southwest Division, this deterrent factor should, for the most part, not apply.

491 F.Supp. at 322. While there was evidence from which another inference might have been drawn about the deterrent effect of distance upon minorities and the elderly seeking inpatient care at the Southwest Division, the above finding cannot be described as clearly erroneous.

The court went on to find, however, that in two respects which were treated as de minimis the added distance and travel time would have a deterrent effect on the statutorily protected classes. First, the location of all specialty obstetrical care at the Southwest Division, including specialty clinics and high-risk prenatal care, may deter a few minority women to skip appointments. Second, there will be a disproportionate decrease in the number of minority and elderly visitors to the Southwest Division. 491 F.Supp. at 322. The significance of these disparate impacts upon the protected classes is discussed in connection with quality of care.

2. Quality of Care

(i) Physical Facilities

Plaintiffs presented expert testimony that the cost of the features of Plan Omega

ployer . . . except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3.

which called for the renovation of the Delaware Division to make it physically and aesthetically equal to the Southwest Division was seriously underestimated by the defendants. Under the Supplemental Agreement WMC agrees to use its best efforts to take \$2,800,000 from the financing of Plan Omega and place it in escrow, to be expended on renovating the Delaware Division. However, plaintiffs' expert predicted the cost of renovations would be \$24,700,000. Plaintiffs also offered what the court described as "strong evidence" tending to show that the revenue projections upon which Plan Omega is predicated were overestimated, and thus that the improvements in the Delaware Division would not be carried out. 491 F.Supp. at 328. The court did not discredit this testimony, rather it disregarded the evidence as irrelevant, thus presenting us with a legal issue.

The evidence of underestimation of the cost of renovating the Delaware Division was held to be irrelevant because of the categorical requirements of the Supplemental Agreement. 491 F.Supp. at 325. Even leaving the Agreement aside, the court found that the needed renovations were of the type that could be met by use of money from the operating budget and unrestricted funds. 491 F.Supp. at 327. If, however, the revenue projections are underestimated as plaintiffs alleged, the operating budget will not be achieved and unrestricted funds will be invaded to meet opening deficits. Although it noted the "seriousness of the consequences," the court refused to "take a hard second look at the plan," holding instead that plaintiffs' evidence of overestimation of revenues—indeed the whole question of Plan Omega's financial feasibility—was irrelevant,

8. Paragraph 12(d) provides:

WMC agrees to complete renovation of the Delaware Division regardless of cost, within (3) years of the date on which construction of the Southwest Division is completed. Failure to complete said renovation within said period shall be deemed to be a violation of Title VI of the Civil Rights Act of 1964. The Supplemental Agreement does not, however, describe the nature or scope of the re-

because this question is better left for determination by the commercial market. The [bond] market will be able to apply sanctions as swiftly, surely and with greater accuracy than this court could apply.

491 F.Supp. at 328.

Such reliance on the Supplemental Agreement or the bond market as a basis for declining to consider plaintiffs' evidence on cost underestimation and revenue overestimation cannot withstand analysis. If Delaware Division were not to be renovated substantially, after erection of Southwest Division went forward, the case for disparate impact upon the protected classes would be overwhelming. It is no answer to say that substantial evidence of financial infeasibility is irrelevant because WMC has made a promise to HEW. In the first place the Supplemental Agreement does not appear to me as categorical as the trial court believed it to be.⁸ Moreover, the agreement is subject to amendment at any time.⁹ But more fundamentally, the court's deference to HEW enforcement of an agreement, in place of a decision on the merits of the plaintiffs' claims, is inconsistent with the mandate of this court in the prior appeal. When the case was last before us we considered both the ruling that the federal statutes relied on did not permit a private cause of action, and the ruling that HEW did not have to afford a trial-type hearing. We did not pass upon the merits of the appeal from the latter ruling, because we held that it was to the court that plaintiffs could look for relief. Reliance upon the Supplemental Agreement worked out between WMC and HEW, an agreement which antedated both of the orders we re-

visions, as the court itself conceded. 491 F.Supp. at 301 n.89.

9. Paragraph (14) provides:

This agreement shall be subject to amendment from time to time by written instrument executed by the parties, to reflect such changes in systems for delivery of hospital care and of changing community needs.

viewed in our earlier decision, is inconsistent with the clear purpose of our remand for a trial in the district court.¹⁰

Even less defensible from a legal standpoint is a rejection of the relevancy of plaintiffs' financial feasibility evidence on the ground that they could rely upon the certain wisdom of the bond market. That market may, for all we know, be perfectly confident that the balance between the interest rate it seeks and the security offered by WMC, even if a default occurs, is an acceptable risk. The one thing that is fairly predictable is that if three years after Southwest Division is completed WMC cannot afford to complete the renovations of Delaware Division, the bondholders will be far more interested in keeping the former rather than the latter in operation. Thus it was error to reject the relevancy of plaintiffs' evidence on financial feasibility as a part of their *prima facie* case. That evidence, if credited, casts serious doubt upon the likelihood of Delaware Division being a hospital plant equivalent to Southwest Division, since the renovation depends on the availability of an operating surplus. The district court did not discredit it, and we may not. If one projects the possibility that Delaware Division may not be renovated, the case for disparate impact upon the minorities and the elderly who are likely to be its patients is strong.¹¹

10. See *NAACP v. Wilmington Medical Center, Inc.*, 453 F.Supp. 280, 453 F.Supp. 330 (D.Del. 1978), *rev'd*, 599 F.2d 1247 (3d Cir. 1979). The plaintiffs' contentions, which the panel remanded for consideration, included *inter alia* "that the modified plan was based on erroneous and inadequate findings...." 599 F.2d at 1250.

In their brief on this appeal, plaintiffs point to inadequacies in the HEW investigation which, they claim, undermine the credibility of its acceptance of the Supplemental Agreement. HEW's chief investigator admitted, for instance, that the agency had not considered total patient days in accepting the patient assignment plan and thus did not consider the over-occupancy consequence prior to its acceptance of Plan Omega. It was also conceded that no health experts were consulted or involved in the drafting or revision of the letter of findings or the negotiations leading to the Supplemental Agreement (Joint Appendix (JA) 1243-6, 1250).

(ii) *Quality of Medical Service*

Aside from their general prediction that for financial reasons Delaware Division would be an inferior facility, the plaintiffs also offered evidence attempting to prove that the quality of care received by minorities and the elderly under Plan Omega will be poorer than that received by the general population.

Plaintiffs' first contention is that although both Divisions will offer some services in medicine and in surgery,¹² the services delivered at Delaware Division will be inferior, (1) because of the unavailability of board-certified specialists in some specialties for consultation at that division, and (2) because of the likelihood that, even when a specialty service is offered at both, a shortage of board-certified physicians at the Delaware Division will result from their abandonment of it out of preference for Southwest. The impact in either event upon minorities and the elderly would be considerably greater than upon the general population. The court discredited the evidence suggesting that this scenario will occur; it reasoned that under Plan Omega specialists at Southwest would be required to be on call for consultation at Delaware, that Delaware would be a fully equipped hospital in which such subspecialists could practice,¹³ and that under the Plan doctors would be

11. In a related context, the Court of Appeals in *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980), implied that plaintiffs challenging the shutdown of a municipal hospital had established a *prima facie* case of disparate impact where the City's estimates for alternative care "rest on projections made without sufficient assurance...." 627 F.2d at 617. Accordingly, the panel found it "appropriate" to complete an assessment of the plaintiffs' Title VI claim by examining the justification advanced by the City for closing the hospital.

12. See note 1 *supra*.

13. The court assumed, of course, that this would be financially feasible. See Part I(B)(2)(i) *supra*.

prohibited from limiting their practices to one division. In this instance, more than any other, the court was called upon to exercise intuition and judgment about human behavior in the future. While the district court's description of plaintiffs' evidence on this point as having "absolutely no merit" is hyperbolic, 491 F.Supp. at 330, one cannot say that the court erred in discrediting it. Its rejection is reinforced by the conclusion that in most cases patients in need of subspecialty services will be admitted directly to Southwest, and others can be transferred there. 491 F.Supp. at 329-30. But still, all depends on the assumption of financial feasibility.

Plaintiffs also attempted to prove that the quality of the resident staff at Delaware would be inferior in numbers and quality. The court concluded otherwise, because Plan Omega contemplates operating the residency program on a unified basis, with residents being rotated among floors in both facilities. They also challenged the quality of Emergency Room services, although the Plan calls for duplicate Class 1 emergency rooms with similar backup specialists. In both of these instances, as well, one is unable to say that the court erred in finding no disparate impact on the protected class, assuming financial feasibility of the entire program.

However, all of these findings favorable to WMC are tainted by the court's treatment of evidence of financial feasibility as irrelevant. All would probably have been determined otherwise if it were found that WMC could not afford to upgrade Delaware Division after the completion of Southwest Division. In that event, plaintiffs' case of disparate impact would be overwhelming.

In two respects the court found that plaintiffs had proved disparate impact in quality of care: access to a high risk prenatal clinic, and impact on visitors to inpatients.

As to prenatal care the evidence is clear that the incidence of high risk pregnancy is greater among minority women than in the

female population at large. Obstetrical service will be concentrated at Southwest. Because of the distance to that division, the court found that persons in need of prenatal outpatient care, especially teenagers, will be more likely than others to miss appointments and be deterred from seeking care. 491 F.Supp. at 335. In considering plaintiffs' prima facie case this finding was discounted because, the court concluded,

[t]he fact is, however, that the special clinics which WMC maintains for teenagers and Hispanics are not called "high risk clinics" and will be located at the Delaware Division under Omega.

491 F.Supp. at 335. If the quoted language was intended as a finding that there would be equivalent obstetrical clinic care at Southwest and Delaware, there is no support for it in the record. The evidence is that the only clinic at which an attending physician is present is the "obstetrical high risk clinic" (JA 525-6, 529), and that clinic will be at Southwest (JA 1002). Thus the finding of disparate impact on minority women with high risk pregnancies is un rebutted.

As to visitors, the court acknowledged that increased travel time will have a deterrent effect on minorities and the elderly. 491 F.Supp. at 332. Specialty services for which the elderly are particularly in need are concentrated at Southwest, for example, and the court acknowledged that a lack of visitors can have both psychic and physical deleterious effects on them. 491 F.Supp. at 332. All pediatrics inpatient services will likewise be at Southwest and the court conceded that visits from family members are extremely important for sick children. 491 F.Supp. at 338. Obstetrical inpatient services will be at Southwest, and OB inpatients were also found to have a great need for visitors. 491 F.Supp. at 334. But while conceding that elderly inpatients and minority users of WMC's pediatric and obstetrical services will be disproportionately impacted by the inhibiting effect of time and distance on visitors, the court disre-

garded those disparate impacts as insufficiently substantial to be taken into account in determining whether a prima facie case had been made out. The question of substantiality for purposes of Title VI and the Age Discrimination Act is a question of law. At least in the area of hospital care, where the marketplace typically affords few alternative facilities and impaired access may gravely affect health, I am reluctant to impose a very strict standard of substantiality. Therefore, I cannot agree with the court's conclusion that these disparate impacts are insubstantial.

3. Racial Identifiability

Finally, plaintiffs attack the Supplemental Agreement provision for inpatient utilization control, whereby patients needing services offered by both the Southwest and Delaware Divisions would be assigned to one or the other according to zip code. Expert testimony was presented suggesting that this method of allocation will fail to prevent the Delaware Division from becoming racially identifiable¹⁴ and will, in fact, cause overcrowding that can be alleviated only in such a way as to make the minority presence at the Delaware Division even more dominant. Noting that the assignment plan merely required the hospitals to offer beds to certain assigned patients, but did not compel the patients to take them, plaintiffs' experts testified that a multitude of factors would influence the choice of the more affluent, more mobile white population to go to the Southwest Division, while the poorer, less mobile minority population would await a bed at the Delaware Division. Further exacerbating the racial identifiability of the inner-city hospital, plaintiffs urge, would be the tendency for WMC's minority service employees to pre-

fer working there because of the greater travel time required for them to reach the Southwest Division.

In the face of such evidence and an admission by HEW that it had not considered the overcrowding consequence, the court again chose to disregard it as "simply irrelevant" because of the Supplemental Agreement which requires WMC to remedy any ensuing racial identifiability "by whatever means necessary." 491 F.Supp. at 300. In response to plaintiffs' concerns that WMC might somehow avoid this contractual obligation, the court noted that "HEW can monitor WMC's activities, thus assuring that, if WMC does not meet its obligations, sanctions will be applied." 491 F.Supp. at 300.¹⁵ I have already indicated that such reliance on the terms of the Supplemental Agreement cannot substitute for a decision on the merits of plaintiffs' concerns. Since no weight was given to their evidence, the court's finding that the threatened overcrowding or racial identifiability can be remedied by simply transferring four inpatients per day from the Delaware to the Southwest Division, 491 F.Supp. at 339, cannot be upheld, especially when the transfer of minority and elderly inpatients risks reducing the quality of their care because of the impact it would have on their access to visitors.¹⁶

In summary, after looking at the entire record, including the evidence which the court erroneously disregarded, and considering the disparate impacts which were actually found, I conclude that the judgment appealed from cannot be affirmed on the basis of a failure by the plaintiffs to prove a prima facie case of disparate impact of Plan Omega on minorities and the elderly.

14. Under Paragraph (6) of the Agreement, a division will be deemed racially identifiable if it shows "in excess of 25% minority inpatient utilization" based upon patient days.

15. However, reliance on the monitoring and enforcement capability of HEW, now HHS, may be unrealistic. See Wing, *Title VI and Health Facilities*, 30 *Hast.L.J.* 137 (1978).

16. See Part I(B)(2)(ii) *supra*.

II.

As the opinion of the court correctly indicates,¹⁷ when plaintiffs in a Title VI or Age Discrimination Act case have produced evidence of disparate impact, the defendants must at least come forward with evidence in rebuttal or justification to "meet" the plaintiffs' *prima facie* case. Unfortunately, however, the court never gets more specific and, hence, there is a large gap in its analysis. By assuming that the plaintiffs' unrebutted evidence established a *prima facie* case of disparate impact, without discussing that evidence in detail, the opinion fails to focus upon the nature and extent of the several different impacts on which evidence was offered. It then passes on to the quite separate issue of burden of persuasion, without first pausing to inform just what it is the factfinder must be persuaded of. The content of the rebuttal or justification evidence cannot be determined in the abstract. It must be related to the precise impacts suggested by the plaintiffs' evidence.

If we were dealing with an effort to prove intentional race or age discrimination by inference from the circumstantial evidence of disparate impact upon minorities or elderly persons, the content of the rebuttal evidence would be sufficiently self-evident that an opinion writer might safely assume it need not be referred to explicitly; evidence of a nondiscriminatory business purpose for the challenged actions supports an inference that accomplishing that purpose was the true motive. Notwithstanding the inference of improper motive which arguably arises from disparate impact, the existence of a proper business purpose places the evidence on motive at best in equipoise, such that the party with the burden of persuasion on that issue loses. The plaintiff can still carry this burden by demonstrating that the business purpose was a pretext, feigned in order to hide the actual discriminatory animus. If such a pretext is established, the defendant loses, for he can-

not ever justify action taken, regardless of pretext, for the purpose of discriminating.

In a case such as this one, however, where the plaintiffs do not rely upon an intent to discriminate, the legal standards for rebuttal or justification are much more complex. Part I of the opinion of the court is a welcome clarification of the analytical distinction between intent cases and disparate impact cases, and a proper recognition that spending power statutes such as Title VI and the Age Discrimination Act address both problems. Unfortunately, however, by ignoring the critical differences between the legal standards for rebuttal and justification in the two types of cases, the court leaves the law almost as confused as it was found.

When a member of a class protected by a funding statute's nondiscriminatory clause has produced evidence that a defendant's actions will impose a disparate impact on that class, there are two analytically separate kinds of evidence which may be offered. First, the defendant can *rebut* the evidence offered by plaintiffs, by evidence that the impacts complained of will not occur. For example, a defendant can show that steps will be or have been taken to effectively prevent their occurrence. Alternatively, a defendant can *justify* those impacts by showing that they must necessarily occur, if certain important objectives are to be accomplished, even though a defendant has chosen what it believes to be the feasible alternative having the least discriminatory impact. This distinction between rebuttal and justification is critical. Rebuttal is in essence a factual matter. Justification, on the other hand, while it involves factual matters which may be in dispute, also involves a legal standard, which the opinion of the court never supplies. It never decides the legal question presented by this case: what must defendants do before they may justify a redistribution of federal benefits away from a protected class. In my view, a plan imposing such an impact

17. Maj. op. pp. 1334, 1337.

can only be justified by a showing that defendant has valid needs essential to its business or service, that the proposed plan will feasibly meet those needs, and that other plans with lesser impact on the protected classes will not.¹⁸

In the trial court WMC offered evidence both in rebuttal and in justification. The trial court considered both, and decided in WMC's favor. If the court had weighed *all* the relevant evidence regarding potential impacts and the steps taken to remove or mitigate them, and concluded that the alleged impacts would not occur, it might be proper to affirm on the basis that such a finding was not clearly erroneous. Alternatively, if the court had identified specific impacts which will occur, but concluded after weighing all the relevant evidence that these impacts are inevitable, because Plan Omega is the only feasible method of meeting WMC's compelling needs, that finding might likewise be affirmed as not clearly erroneous. But neither of these courses is properly open to this court on the present record because of the errors referred to in Part I above. The district court's entire analysis is flawed by its interrelated holdings that evidence of financial infeasibility was irrelevant and that the Supplemental

Agreement would overcome all defects in Plan Omega bearing upon the vital issues of transportation, racial identifiability, and quality of service. By assuming favorable revenue projections and complete compliance with the Agreement, the court relieved WMC of the need to rebut those major impacts suggested by plaintiffs' experts.¹⁹ It also thereby narrowed the number and severity of the impacts which might have to be justified. Problems which would be major if WMC lacked the financial resources to make adjustments were made de minimis by the simple stroke of disregarding plaintiffs' financial evidence. Thus although the district court sought to apply the correct legal standards, both with respect to rebuttal and with respect to justification, it did so against a background of "meager" disparate impacts created by its own assumed factual matrix which cannot be relied upon. And because the majority opinion of this court addresses neither plaintiffs' impact evidence nor the appropriate legal standard for justification, the errors below go uncorrected.

The majority does attempt to put the trial court's ruling on financial feasibility in a favorable light, but in vain.²⁰ Evidence that Plan Omega is fiscally unsound goes to

18. The district court assumed that this was the legal standard for justification of disparate impact. 491 F.Supp. at 340. A plurality of this court, relying on *Jefferson v. Hackney*, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972), hint that any inquiry into alternatives at all may be inappropriate in Title VI cases. However, at the time that case was decided, the contours of Title VI's obligations had not been litigated, 406 U.S. at 577, 92 S.Ct. at 1746 (Marshall, J., concurring in part and dissenting in part), and the Court treated analysis under that statute and the fourteenth amendment as being equivalent. 406 U.S. at 549-50 n.19, 92 S.Ct. at 1733 n.19. Subsequently, it handed down its landmark opinion in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), deciding that Title VI, by itself, barred disparate effects. Since the announcement in *Lau* that Title VI can require affirmative action, the question of *how much* has remained open and is not controlled by *Jefferson v. Hackney*.

19. The effect of this was to short-circuit the process of reasonable accommodation which

Title VI is designed to foster. Recognition by the trial court of such specific, discrete impacts as the absence of a high risk prenatal clinic at the Delaware Division and consideration of plaintiffs' evidence of financial infeasibility might well have elicited from WMC more reassuring revenue projections or prompted it to fine-tune Plan Omega in ways which would remove or sufficiently mitigate the problems identified, without necessitating the inquiry into justification and the merits of Reverse Omega or some alternative site. Indeed, WMC might have decided to rebut the *prima facie* case by adjusting the mix of services at their preferred site, for example, or by replacing generalized promises of adequate shuttle transportation with specific allocations of funds for expanded service or a concrete contingency plan satisfying plaintiffs' concerns.

20. The opinion of the court contends that the district court did make findings with respect to the financial feasibility of the Delaware Division renovations. That contention misses the point. It is clear that the district court refused

the heart of the case, for it not only raises the threat of a racially identifiable facility and other adverse impacts, but also indicates that this burden placed on minorities and the elderly is unjustified. It is one thing to demonstrate, as defendants have done, that Plan Omega is designed to serve compelling objectives; whether it will accomplish them, however, is another, equally important question left open on this record. In light of the trial court's refusal to consider "strong evidence" that Plan Omega seriously overestimates future revenues and may therefore pose a drain on WMC's resources, I cannot find the consolation others have in the district court's "overarching" finding that the level of care for all population groups will improve. As suggested above, I concede that a substantial burden on the access of minorities and the elderly to federal benefits is nonetheless justified if the relocation is the only *feasible* alternative capable of meeting defendant's needs. Conversely, however, an infeasible plan is insufficient justification as a matter of law. Thus, to dismiss the issue of financial feasibility as completely irrelevant subverts the Congressional policy in favor of nondiscriminatory funding.²¹

The discussion so far has concerned the legal standards by which a defendant's actions should be measured, and not the matter of who bears the burden of persuasion. The point is that, regardless of where that burden is placed, the errors discussed in Part I above completely tainted the trial court's substantive analysis. That alone requires a reversal and remand.

III.

Equally troubling from a precedential standpoint, however, is the majority's deci-

to decide the broader question on which renovation depends: i. e., whether Plan Omega taken as a whole is financially sound.

21. The majority suggest that any financial inquiry is too speculative; yet they are willing to speculate, without any supporting evidence presented at trial, that the bond market will arrest a flawed project or that bondholders will abide by the terms of the Supplemental Agreement in the event a shortage of revenue befalls the project and threatens their security inter-

sion equating the defendant's burden in a case of disparate impact with that borne in a case of intentional discrimination. Today's holding achieves an artificial symmetry, but at considerable cost to the prospects of eliminating all forms of discrimination which, as the opinion of the court confirms, was the impetus behind Title VI and the Age Discrimination Act. I have no serious difficulty with leaving the burden of persuasion on the plaintiffs when what is brought forward by defendants is rebuttal—evidence that there will be no impact—rather than justification. However, since in many cases the means of proof of justification will not be within the reach of the protected class and allocation of the burden of persuasion will be dispositive, the only allocation consistent with the Congressional intention to protect the disadvantaged class from actions having discriminatory effects is to assign the burden of justifying the impact to the defendant who receives federal funds. The policy decision was made by Congress, and in filling in the gaps in the statute we should allocate the burden consistent with that policy.

The majority reaches its result without considering the interest in evenhanded access to the federal benefits Congress provides and without acknowledging the problems of proof. Instead, it looks to the one line of discrimination cases where burdens have been clearly spelled out, involving intentional employment discrimination, and argues that such rules must be uniformly applied in all cases brought under nondiscrimination statutes. The plea for symmetry has only the attraction of relieving courts from analyzing the substantive dif-

est. On the other hand, if such optimism should prove unfounded, and a racially identifiable hospital of inferior quality ensues, the only sanction available to federal authorities at that point will be a cutoff of further funding. This does not help matters when the hospital is already financially strapped. Nor is there any assurance that the effects of a cut-off would be felt equally by the Stanton and Delaware Divisions.

-ferences between two quite distinct statutory prohibitions. The defendant accused of discriminating intentionally stands in a very different position than one accused of actions which have unintended adverse effects. As noted before, the plaintiffs in this case are not asking that the factfinder draw from circumstantial evidence of disparate impact, an inference of discriminatory intent. Rather, the gravamen of the complaint is that the benefits of a federal program are being redistributed away from protected classes unnecessarily, and that racially identifiable facilities are being spawned with the help of federal funds. The object of the litigation is not so much to punish a wrongdoer, as to prevent indifference and correct for inadvertence. The presumption in a case which has proceeded to the point in litigation where definite impact is established is that defendant is subjectively willing to mitigate the impacts, but is constrained from further accommodation by other pressing needs and the lack of reasonable alternatives. Something akin to an affirmative defense makes sense logically in such a context; on the other hand, I reject the majority's proposition that "[o]ne could just as readily say in an intent case that the necessity to prove a nondiscriminatory reason is an affirmative defense. . . ." Maj. op. p. 1333. To the contrary, such reasons are offered to disprove the existence of discriminatory intent. They can never justify it.

The logic of requiring recipients of federal aid to justify the disparate impact caused by their actions was recognized by the Supreme Court in *Board of Education v. Harris*, 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979). Statistical proof of discriminatory effects in that case had established a prima facie violation of the Emergency School Aid Act. That inference could be rebutted, said the Court, adding

We conclude, however, that the burden is on the party against whom the statistical case has been made. See *Castaneda v.*

Partida, 430 U.S. 482, 497-98, and n.19 [97 S.Ct. 1272, 1281-1282 and n.19, 51 L.Ed.2d 498] (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 [91 S.Ct. 849, 855, 28 L.Ed.2d 158] (1971). That burden perhaps could be carried by proof of "educational necessity," analogous to the "business necessity" justification applied under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e et seq.; see, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329 [97 S.Ct. 2720, 2726, 53 L.Ed.2d 786] (1977); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 581-583 [98 S.Ct. 2943, 2952-2953, 57 L.Ed.2d 957] (1978) (dissenting opinion).

444 U.S. at 151, 100 S.Ct. at 375; cf., *Southeastern Community College v. Davis*, 442 U.S. 397, 407, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979) (§ 504). However much ambiguity surrounds the nature of the burden on a nonfederally-funded employer in Title VII impact cases, *Harris* represents a clear signal that burden-shifting on justification is called for where principles of nondiscrimination in funding are to be enforced.

Even within the context of Title VII, on which the majority focuses, appellate courts faced with having to clarify the nature of the employer's burden on the issue of business necessity have described it as "heavy" or labeled it as one of persuasion. See, e.g., *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1298 (8th Cir. 1978); *Smith v. Olin Chemical Corp.*, 555 F.2d 1283, 1286 (5th Cir. 1977); *Vulcan Society of N.Y. v. Civil Service Comm'n*, 490 F.2d 387, 393 (2d Cir. 1973). The majority's suggestion that the Supreme Court has since settled the issue of burden in such impact cases is belied by the Court's most recent pronouncement in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). That opinion implies that the allocation of burdens in a disparate treatment case does not

necessarily govern disparate impact cases.²² 450 U.S. at 252 n.5, 101 S.Ct. at 1093 n.5.

Citing intent and impact cases indiscriminately and recommending they be approached in the same way threatens to confuse the litigation process and lead to unfortunate misunderstandings such as may have occurred in the decision of the district court. It held that WMC had met its burden of producing some evidence, and that the plaintiffs failed to prove that the hospital's justification for Plan Omega was pretextual. 491 F.Supp. at 345. This misconceives what it was the court had to decide. The contention was not that the reasons advanced were not genuine, but that there were feasible alternatives with less disparate impact. That was the heart of the issue: whether Plan Omega with its dispro-

portionately adverse effects was unnecessary.²³

The majority's observation that a completed Title VI violation involves not disparate impacts per se, but only those that are unnecessary, may arguably make terminology such as "affirmative defense" unsuitable; but it does not answer the question of where the risk of non-persuasion on the issue of justification should be placed as a matter of public policy and from the viewpoint of who has the evidence. Indeed, the problems of developing evidence and assembling it in admissible form cannot be separated from the fulfillment of statutory policy flowing from Congressional intent.²⁴

Bringing such considerations to bear in this matter, I am concerned that allocating the risk of non-persuasion on justification

22. In *Burdine* the question for decision was the nature of an employer's burden in an intent case. The Court began its analysis by saying:

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), we set forth the basic allocations of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.⁵

⁵ We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes. [citations omitted].

49 U.S.L.W. at 4215. The footnote would seem superfluous were it not construed as a signal that the evidence and the issues in an impact case may warrant a different burden of proof analysis.

Nor is a unitary burden for all Title VII cases established by the other Supreme Court precedents. The footnote in *New York Transit Authority v. Beazer*, 440 U.S. 568, 587 n.31, 99 S.Ct. 1355, 1366 n.31, 59 L.Ed.2d 587 (1979), did no more than reaffirm the decision in *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), which in turn does not speak with the clarity attributed to it by the majority. *Albermarle Paper Co.* assigns plaintiffs, at most, the burden of proof on the existence of less discriminatory alternatives, an inquiry which is relevant only to the extent that the defendant has first persuasively shown that it has compelling needs and that its proposed plan will feasibly meet those needs. But even that construction of *Albermarle Paper Co.* would be too broad. The opinion can be read as simply acknowledging that plaintiffs who

failed to prove a *Griggs*-type violation, could nonetheless still attempt to succeed on an intent theory if they were prepared to prove that less discriminatory alternatives existed and that, therefore, defendant's justification was merely pretextual. 422 U.S. at 425, 95 S.Ct. at 2375. This use of alternatives as circumstantial evidence of discriminatory animus is standard in intentional discrimination cases. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978). In contrast, the existence of alternatives to Plan Omega revealed in this litigation was not urged as evidence of pretext, but went directly to the question of whether the disparate impact of WMC's proposed relocation could be mitigated and, therefore, federal benefits better distributed. That is purely an impact issue and, as such, should remain part of the defendant's burden of justification.

23. Elsewhere, the court seemed to appreciate the distinction, but the net effect of its ambiguous focus on pretext is to cast doubt on the court's treatment of the evidence. Hopefully, the opinion of this court has at least relegated the concept of "pretext" to its proper place. See Maj. op. p. 1336 n.17.

24. Cf. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 267 (3d Cir. 1970) (Equal Pay Act) ("In cases such as this, where the justification for the differential rests on economic benefit, the company has peculiarly within its knowledge the means of proof, and the burden therefore is one which cannot be satisfied by general or conclusory assertions.")

in an impact case by reference to precedent established in cases of intentional discrimination ignores important distinctions between access to proof in the two types of cases. In intent cases, the plaintiff-victim is often in a better position than the defendant to develop and uncover the particular acts upon which the charge of discrimination is based. In some instances, such evidence is probably more accessible to the victim, particularly when the discriminatory acts are committed by subordinates, but must be defended by their superiors. Evidence of the presence or absence of impact may also be equally available. But assuming some impact, the proof of justification is *always* going to be in the possession of the defendant and rarely also in the possession of plaintiff members of the protected class, since the latter are unlikely to be privy to the decision-making process or the competing considerations which ultimately form the defense of justification.

One need look no further than the instant appeal to appreciate the crucial importance which the risk of non-persuasion assumes in a case like this. All parties seem reconciled to the need for placing some facility in the Stanton area to foreclose competition from another institution, and all parties agree that WMC needs a new large hospital. The dispute has to a large extent been whether some variety of "Reverse Omega" could mitigate the disparate impacts of a relocation and still feasibly accomplish the hospital's pressing needs. By relying on intent

cases and placing the burden of demonstrating feasible alternatives on the plaintiffs, the court saddled them and their expert with the task of filling in the gaps in WMC's own consideration of alternatives,²⁵ and relieved WMC, which had far more ready access to the information, of the need to persuade that the alternatives were not financially or medically feasible. Moreover, the risk of non-persuasion was made critical by the abundance of conflicting evidence as to the projected cost differential between Omega and Reverse Omega, and it is noteworthy that the court did not accept at face value WMC's cost estimates, but made its own. 491 F.Supp. at 345. In short, the burden placed on plaintiffs was impractical and the error severe, not harmless. Thus, even if the errors discussed in Parts I and II did not require reversal, the erroneous allocation of burden of persuasion does.

IV.

I do not minimize the complexity of the trial judge's task in this case, requiring as it does consideration of future consequences. However, since the effective delivery of federally-supported health care is at stake, the federal interest in preventing creation of a racially identifiable facility and the possible curtailment of hospital services is clear. The dockets of this court and others bear testimony to the difficulties of desegregating institutions *after* they have become segregated. Regulations affecting

25. The difficulty of this task was at one point acknowledged by the district court. Although WMC submitted projections for Reverse Omega which showed it to be more costly than Omega, plaintiffs argued that the cost differential was due to the fact that the two plans did not contemplate equivalent facilities and services. In support of their contention, plaintiffs' key expert witness attempted to construct an estimate of what the Plan Omega hospitals would cost if they were to match the hospitals Reverse Omega would create. Indeed, the court found that WMC never had attempted to develop a plan for Reverse Omega using the same parameters that were used for Omega. 491 F.Supp. at 343. Therefore, in order to properly compare the two plans, plaintiffs' witness had to create an "Imaginary Omega."

However, the court found the expert's projections unreliable, acknowledging, though, that this was because "in devising his estimates, [the expert] relied upon documents that were never designed for the purpose of making the comparison he was attempting." 491 F.Supp. at 344.

A comparison among alternate plans using equivalent parameters would seem critical to proper determination of whether defendants' chosen alternative was unavoidable despite its disproportionate adverse effects. Assigning the burden of justification to the recipient of federal funds will help ensure that documents permitting such comparison are placed before the court.

site selection, designed to forestall segregation in health care delivery, intentional or otherwise, from occurring in the first place, simply reflect the wisdom—acknowledged, ironically enough, in the medical profession—that an ounce of prevention is worth a pound of cure.



John H. WEAVER,

v.

**G. Rogers BOWERS, George M. Metzger,
and Joseph F. Catania, Individually and
as members of the Board of Commis-
sioners of Bucks County, Appellants.**

No. 80-1245.

United States Court of Appeals,
Third Circuit.

Submitted on Briefs under Third Circuit
Rule 12(6) Sept. 19, 1980.

Argued In Banc May 11, 1981.

Decided Sept. 8, 1981.

Rehearing and Rehearing En Banc
Denied Oct. 13, 1981.

Park superintendent. brought action against county board of commissioners alleging that his discharge was solely by reason of his political party affiliation and violated his civil rights. The United States District Court for the Eastern District of Pennsylvania, Charles R. Weiner, J., entered judgment in favor of the park superintendent and denied the board's posttrial motion in which it claimed that United

States Supreme Court decision holding that patronage dismissals are unconstitutional should not be retroactively applied. The board appealed. The Court of Appeals, Slo-viter, Circuit Judge, held that: (1) the board's nonretroactivity claim was not timely raised; (2) in the interest of even-handedness in the administration of justice, the merits of the board's nonretroactivity claim would be considered, despite the fact that the claim was not timely raised; (3) United States Supreme Court decision holding that patronage dismissals are unconstitutional would not be retroactively applied and did not protect park superintendent who was discharged after his political party lost control of the county board of commissioners; and (4) the board's failure to timely raise the nonretroactivity claim was without legal justification and the board would be required to pay park superintendent's costs on appeal as well as court costs, exclusive of counsel fees, incurred in the district court posttrial proceeding.

Reversed and remanded.

Weis, Circuit Judge, filed dissenting statement in which Gibbons, Circuit Judge, joined.

1. Federal Courts ⇐858

In civil rights suit by park superintendent against county board of commissioners arising from the park superintendent's dismissal after control of the board changed from one political party to another, district court's finding that park superintendent was dismissed by the board solely because of his political party affiliation was not clearly erroneous.

2. Federal Courts ⇐858

In civil rights suit by park superintendent against county board of commissioners arising from the park superintendent's dismissal after control of the board changed from one political party to another, district court's finding that park superintendent was not a policymaking employee of the county was not clearly erroneous.

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defendant was timely sued, the mere fact that the action is later removed to a federal court should not dictate a different result. Defendant should not escape suit by merely removing an action to federal court. See generally *Marshall v. Mulrenin*, 508 F.2d 39, 44 (1st Cir. 1975); *Rumberg v. Weber Aircraft Corp.*, 424 F.Supp. 294, 300, footnote 9 (C.D.Cal.1976); *Walko Corp. v. Burger Chef Systems*, 180 U.S.App.D.C. 306, 311-312, 554 F.2d 1165, 1170-1171 (1977).

Accordingly, defendant's motion for summary judgment must be denied.



Hinton JOHNSON, on behalf of himself
and all others similarly
situated, Plaintiff,

v.

CITY OF ARCADIA, FLORIDA, E. Coleman Brewer, Mayor of the City of Arcadia, Florida, Eugene Hickson, Sr., Lester Summerall, Walter J. Banull, I. D. Eller, Jr., Councilmen for the City of Arcadia, Florida, their successors and agents, Defendants.

No. 76-12 Civ. Ft. M-K.

United States District Court,
M. D. Florida,
Fort Myers Division.

March 23, 1978.

Black citizens of city brought action against city and various city officials alleging deprivation of equal municipal services. The District Court, Krentzman, J., held that: (1) inequality in services and facilities provided to black residents of city with respect to street paving, parks and recreation and water supply system were result of systematic racial discrimination in violation of plaintiffs' constitutional rights, and it was therefore proper for the district court to take remedial action; (2) district court had jurisdiction over defendant city under statute conferring original federal district

court jurisdiction of all civil actions wherein matter in controversy exceeds sum or value of \$10,000 and arises under Constitution, laws or treaties of United States, and (3) jurisdiction of plaintiffs' claim against individually named defendants for statutory violations under Title VI of the Civil Rights Act of 1964 prohibiting racial discrimination in any federally funded program and Revenue Sharing Act was conferred by statute giving district court original jurisdiction of civil action commenced to redress deprivation, under color of state law, of constitutional rights, or to recover damages or to secure equitable or other relief under any act of Congress providing for protection of civil rights.

Judgment entered.

1. Dedication ⇐20(5)

Where street was regularly shelled and graded, garbage thereon was collected, and road was otherwise maintained in a continuous and uninterrupted manner for at least seven years, it was a dedicated public right-of-way under Florida law and presented no legal obstacles to paving, notwithstanding contention that city was unable to pave same because of legal ownership issues involving railroad. West's F.S.A. § 95.361.

2. Dedication ⇐20(5)

Notwithstanding contention that city had no legal access to pave street because such access required crossing railroad property, by maintaining street in a continuous and uninterrupted manner for at least seven years city regularly utilized railroad property for access to street. West's F.S.A. § 95.361.

3. Dedication ⇐20(5)

By virtue of city's continued management of street, which formed city limit in southwest portion of city, which consisted of, to south of the center line, county property, and city property to north thereof, which was actually maintained by county pursuant to agreement between the two governing bodies, for which county billed city proportionally for maintenance work performed on its portion of the street, and

which proceeded continuously and uninterrupted for at least seven years, was a dedicated street under Florida law. West's F.S.A. § 95.361.

4. Civil Rights ⇨8.2

City's unwritten policy of making dead-end streets lowest priority for street paving discriminated against black citizens of city, in that there was a far higher percentage of such streets in black community, and implementation of policy was inequitable and discriminatory, serving to exacerbate a system which already burdened black community unduly. 42 U.S.C.A. § 1983 et seq.

5. Civil Rights ⇨8.2

Two primary standards for use by district court in evaluation of respective recreational facilities in black and white communities in municipal service equalization suit were quality and access, with "quality" being concerned with kind of facilities respectively in use and their maintenance, and with "access" being concerned with relative availability of recreational space and facilities to respective communities. 42 U.S.C.A. § 1983 et seq.

6. Civil Rights ⇨8.2

Services and facilities provided to black residents of city with respect to street paving, parks and recreation and water supply system substantially inferior to provision of those facilities and services to white residents as result of systematic racial discrimination against city's black residents, in violation of equal protection clause. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983 et seq.

7. Federal Courts ⇨220

In action by black citizens of city alleging deprivation of equal municipal services, jurisdiction of plaintiffs' claims with respect to individually named defendants, i. e., mayor and councilmen, acting in their official capacities, was conferred by statute conferring original federal district court jurisdiction of all civil actions wherein matter in controversy exceeds sum or value of \$10,000 and arises under Constitution, laws or treaties of the United States and statute giving district court original jurisdiction of civil action commenced to redress deprivation, under color of state law, of constitutional rights, and to recover damages or to

secure equitable or other release under any act of Congress providing for protection of civil rights. 28 U.S.C.A. §§ 1331(a), 1343(3, 4).

8. Civil Rights ⇨13.5(3)

Statute providing civil action for deprivation of rights affords plaintiffs vehicle to redress violations of constitutional rights where such rights have been violated by public officials acting in their official capacity under "color of law." 42 U.S.C.A. § 1983 et seq.

9. Federal Courts ⇨220

Statute providing for civil action for deprivation of rights, while providing a substantive right of action, is not a jurisdictional statute; "jurisdictional counterpart" for said statute is statute giving district court original jurisdiction of civil action commenced to redress deprivation, under color of state law, of constitutional right or to recover damages or to secure equitable or other relief under any act of Congress providing for protection of civil rights. 28 U.S.C.A. § 1343(3, 4); 42 U.S.C.A. § 1983 et seq.

10. Civil Rights ⇨13.7

Federal Courts ⇨220

Defendant city itself was not a "person" within meaning of statute authorizing civil action for deprivation of rights and thus jurisdiction over city was not present pursuant to statutes giving district court original jurisdiction of civil action commenced to redress deprivation, under color of state law, of constitutional rights, or to recover damages or to secure equitable or other relief under any act of Congress providing for protection of civil rights, in action commenced by black citizens of city alleging deprivation of equal municipal services. 42 U.S.C.A. § 1983; 28 U.S.C.A. § 1343(3, 4).

11. Federal Courts ⇨220

In action by black citizens of city alleging deprivation of equal municipal services and seeking amelioration of disparities in quality and quantity of those services, district court had jurisdiction over defendant city under statute conferring original federal

al district court jurisdiction of all civil actions wherein matter in controversy exceeds sum or value of \$10,000 and arises under Constitution, laws or treaties of the United States. 28 U.S.C.A. § 1331(a).

12. Federal Courts ⇌ 220

In action by black citizens of city alleging deprivation of equal municipal services, jurisdiction of plaintiffs' claim against individually named defendants for statutory violation under Title VI of Civil Rights Act of 1964 prohibiting racial discrimination in any federally funded program and Revenue Sharing Act was conferred by statute giving district court original jurisdiction of civil action commenced to redress deprivation, under color of state law, of constitutional rights, or to recover damages or to secure equitable or other relief under any act of Congress providing for protection of civil rights. 28 U.S.C.A. § 1343(3, 4); State and Local Fiscal Assistance Act of 1972 § 122, 31 U.S.C.A. § 1242; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

13. Federal Courts ⇌ 220

In action by black citizens of city alleging deprivation of equal municipal services, jurisdiction of plaintiffs' claims against defendant city for statutory violations under Title VI of the Civil Rights Act of 1964 prohibiting racial discrimination in any federally funded program and Revenue Sharing Act was conferred by statute conferring original federal district court jurisdiction of all civil actions wherein matter in controversy exceeds sum or value of \$10,000 and arises under Constitution, laws or treaties of United States. 28 U.S.C.A. § 1331; State and Local Fiscal Assistance Act of 1972, § 122, 31 U.S.C.A. § 1242; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

14. Federal Civil Procedure ⇌ 186.15

Plaintiff black citizens, alleging deprivation of equal municipal services, could properly maintain action against city and various city officials as a class action on behalf of all black persons who resided and who would continue to reside in city, where class which plaintiffs represented was so numerous that joinder of all members was

impracticable, there were common questions of law and fact applicable to class, plaintiffs' claims were typical of claims of class, plaintiffs would fairly and adequately protect interests of class, and defendants acted or refused to act in manner generally applicable to class, thereby making appropriate final injunctive and declaratory relief with respect to class as a whole. Fed. Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.

15. Constitutional Law ⇌ 215

Once municipality elects to provide services, it must provide equal services to minority community or city violates equal protection clause of Federal Constitution. U.S.C.A.Const. Amend. 14.

16. Constitutional Law ⇌ 211(1)

Municipal inaction in response to discrimination in public institutions is violative of equal protection clause of Federal Constitution. U.S.C.A.Const. Amend. 14.

17. Civil Rights ⇌ 3

Standard for service provisions in a municipal service equalization suit is quality and quantity of services enjoyed by those citizens who are favored by discriminatory practices. 42 U.S.C.A. § 1983 et seq.

18. Civil Rights ⇌ 3

The longer the period of time over which it can be established that there have been substantial disparities in level of municipal services, the greater the presumption that disparity is a function of race. 42 U.S.C.A. § 1983 et seq.

19. Civil Rights ⇌ 13.13(1)

Citizens have a substantial interest in municipal services and when minority citizens show a statistical pattern of unequal and oppressive distribution of services, a legitimate inference of de facto racial discrimination can be drawn. 42 U.S.C.A. § 1983 et seq.

20. Civil Rights ⇌ 3

Governmental policies and practices which appear neutral on their face but which have a disparate effect on minority community are discriminatory. 42 U.S.C.A. § 1983 et seq.

21. Civil Rights ⇨ 13.13(3)

A past history of de jure racial discrimination in municipality with respect to schools, recreational facilities and other public facilities is persuasive evidence that racial inequalities in distribution of municipal services is result of racial discrimination. 42 U.S.C.A. § 1983 et seq.

22. Civil Rights ⇨ 13.13(3)

Disproportionate impact may be probative of intent to discriminate and in some cases sufficient to prove intent. 42 U.S.C.A. § 1983 et seq.

23. Civil Rights ⇨ 13.13(3)

Disproportionate impact of an official action, legislative or administrative record of decision are historical background of circumstantial evidence that show intent to discriminate. 42 U.S.C.A. § 1983 et seq.

24. Civil Rights ⇨ 13.13(3)

In action by black citizens of city alleging deprivation of equal municipal services, statistical proof coupled with historical showing of broad-based racial discrimination satisfied plaintiffs' burden of proving intent to discriminate. 42 U.S.C.A. § 1983 et seq.

25. Civil Rights ⇨ 13.13(1)

To create a presumption of discriminatory purpose, plaintiff must demonstrate that a government decision (a) made a racial classification on its face (b) was applied in discriminatory manner or (c) had a reasonably foreseeable discriminatory effect. 42 U.S.C.A. § 1983 et seq.

26. Civil Rights ⇨ 13.13(1)

To establish relief under Title VI of Civil Rights Act of 1964 prohibiting racial discrimination in any federally funded program, in a municipal services disparity case, it must be proven that a municipality is a recipient of federal financial assistance and that municipality has used criteria or methods of administration or has selected sites for facilities that have resulted in discrimination in a program or activity supported by federal financial assistance. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

27. Civil Rights ⇨ 9.5

Financing discriminatory governmental activities with revenue-sharing monies or other federal funds is violative of Revenue Sharing Act and Title VI of Civil Rights Act of 1964. State and Local Fiscal Assistance Act of 1972, §§ 101 et seq., 122, 31 U.S.C.A. §§ 1221 et seq., 1242; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

28. Civil Rights ⇨ 8.2, 9.5

A municipality or political subdivision may not with respect to any program or activity make selections or locate facilities in places which deny minority individuals the benefits of such facilities and may not use revenue-sharing funds to perpetuate the results of past discriminatory practices. State and Local Fiscal Assistance Act of 1972, § 122, 31 U.S.C.A. § 1242.

29. Civil Rights ⇨ 13.13(1)

Three essential elements in order for plaintiffs to prove a constitutional violation in municipal service suits are: (1) existence of racially identifiable neighborhoods in municipality; (2) substantial inferiority in quality or quantity of municipal services and facilities provided in black neighborhood; and (3) proof of intent or motive. 42 U.S.C.A. § 1983 et seq.

30. Civil Rights ⇨ 13.16

Having found that defendants' practices of providing substantially inferior municipal services to black residents of city violated plaintiff black citizens' constitutional rights, in municipal services equalization suit, it was proper for the district court to take remedial action, which did not exceed violation since remedy was tailored to cure condition that offended Constitution. 42 U.S.C.A. § 1983 et seq.

31. Federal Civil Procedure ⇨ 2582

Principle that nature and scope of remedy is to be determined by violation means simply that federal court decrees must di-

rectly address and relate to constitutional violation itself.

ices provided to black and white citizens be ameliorated.

David M. Lipman, Paul R. Dimond, Lawyers Committee for Civil Rights Under Law, Washington, D. C., Joseph J. Levin, Jr., Pamela S. Horowitz, Montgomery, Ala., Michael Masinter, Florida Rural Legal Services, Homestead, Fla., for plaintiff.

John H. Treadwell, III, Arcadia, Fla., for defendants.

MEMORANDUM OF DECISION

KRENTZMAN, District Judge.

The Court, having considered the pleadings, the testimony, exhibits and other evidence adduced in the course of the trial, at the end of which the Court made findings in the record, and having considered the post-trial and proposed findings of fact submitted by each of the parties, and being advised in the premises, makes and finds the following findings of fact and conclusions of law,¹ pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I. FINDINGS OF FACT

A. PROCEDURAL BACKGROUND

1. On February 25, 1976, plaintiffs—consisting of a class of all black citizens of Arcadia, Fla. allegedly deprived of equal municipal services—filed a complaint based upon *Hawkins v. Town of Shaw*, 303 F.Supp. 1162 (N.D.Miss.1969) *rev'd* 437 F.2d 1286 (5 Cir., 1971) *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972) seeking that disparities in the quality and quantity of certain serv-

2. Plaintiffs in addition invoked the jurisdiction of this Court pursuant to 42 U.S.C. § 2000d et seq. (Title VI of the Civil Rights Act of 1964) and 31 U.S.C. § 1242 (State and Local Fiscal Assistance Act of 1972, hereinafter "Revenue Sharing Act") and sought to apply the Revenue Sharing Act's anti-discrimination provisions. See, 31 C.F.R. 5152, as amended, 40 Fed.Reg. 50029 (1952). See also, *Robinson v. Schultz*, 8 E.P.D. ¶9832 D.D.C.1974, *Robinson v. Simon and United States v. Chicago*, 395 F.Supp. 329 (N.D.Ill.1975).

3. At the same time of the filing of the complaint, plaintiffs filed two sets of interrogatories, a request for production of documents and an extensive set of requests for admissions of fact concerning the City's delivery of municipal services and its budgeting mechanisms and practices.

4. On March 26, 1976, defendants filed various "across-the-board" pre-trial motions with supportive memoranda.² Plaintiffs filed extensive responsive memoranda and this Court heard oral argument on all pre-trial legal issues on September 27, 1976, in Tampa, Florida.

5. On October 21, 1976, the Court denied all of defendants' motions and directed plaintiffs' counsel to file a concurrent administrative complaint with the Secretary of Treasury relating to plaintiffs' Revenue Sharing claims. In addition, it granted plaintiffs' motion to certify this proceeding as a class action. Plaintiffs' class consists

1. Final Judgment, as to relief, has been consented to by parties and approved by this Court. Nonetheless, this Court deems it desirable to make written findings of fact and conclusions of law, since plaintiffs proceed in this litigation as a certified class. See e. g., *Girsh v. Jepsen*, 521 F.2d 153 (3rd Cir. 1975); *Byran v. Pitts Plate Glass Co.*, 494 F.2d 799 (3rd Cir.), cert. den. 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974).

2. Defendants' motions included: 1) motion to dismiss, alleging: (a) plaintiffs had failed to state a claim against defendants upon which

relief can be granted, (b) the Court lacked jurisdiction over defendants because the amount in controversy did not exceed \$10,000 for each member of the class, (c) the complaint as framed was vague and indefinite and therefore defendants could not properly answer, (d) plaintiffs failed to exhaust administrative remedies pursuant to 31 U.S.C. § 1242 and 42 U.S.C. § 2000d; 2) motion to strike, challenging: (a) plaintiffs' claim for fees, (b) plaintiffs' right to immediate relief, (c) plaintiffs' claims under the Revenue Sharing Act; 3) motion for protective order—relating to plaintiffs' initiation of discovery, and 4) defendants' motion to tax costs.

of all black residents residing in the City of Arcadia.

6. Thereafter, the plaintiffs conducted lengthy and complex pre-trial discovery concerning sophisticated financial and municipal service documents, reports and files. Counsel for plaintiffs with the assistance of their technical experts reviewed a complete inventory of service and financial data relating to the defendant City of Arcadia.

7. On April 11, 1977, trial commenced. The Court heard testimony over a two-day period relating to plaintiffs' claims of racial discrimination in the provision of certain municipal services in the City of Arcadia, Florida. On April 12, 1977, this Court in its bench opinion found that defendants had historically and presently perpetrated racial discrimination against plaintiffs with regard to the following municipal services:

- (a) the distribution of water facilities;
- (b) street paving; and
- (c) park and recreational facilities.

8. After holding that defendants had discriminated against plaintiffs, this Court enjoined defendants from spending any of the approximately \$415,000 of revenue sharing funds which it had on hand or any future revenue sharing funds without further order of Court. Pursuant to the Court's direction it has received from the parties comprehensive plans to equalize street paving, water systems, and park and recreational facilities in the black residential area of Arcadia.

9. The Court has received from the parties a stipulated final judgment which this Court has examined and approved as to relief. The final judgment sets forth in detailed fashion the type and quality of improvement works needed to eliminate racial discrimination in the provision of certain municipal services in the City of Arcadia.

B. THE PARTIES

10. Hinton Johnson, et al., plaintiffs, are adequate representatives of a class consisting of all of the black residents of the city

who are presently and have been discriminated against by the defendants in the provision of municipal services and facilities as hereinafter set forth. (See, Court order certifying class, October 21, 1976).

11. Defendant E. Coleman Brewer is the mayor of the City, defendants Eugene Hickson, Lester Summerall, I. D. Eller and Walter J. Banull are the councilmen, and Margaret Way is the City Recorder. Defendants have complete responsibility for administering the affairs of the town, including the provision, allocation and financing of all municipal facilities and services. [Source: Defendants' response to plaintiffs' first interrogatories Nos. 2 and 5.]

12. The City of Arcadia is a municipal corporation with a charter adopted pursuant to Chapter 5080, Special Acts of 1901 of the Florida Stat. Annotated. It was originally incorporated on December 8, 1886, and reincorporated in 1901. In area the City is approximately two miles square. Its present population of approximately 7,000 is 32% black and 68% white. [Source: Defendants' response to plaintiffs' request for production and inspection of documents (City Charter and Census Reports).]

13. The City of Arcadia has developed according to a strict pattern of residential racial segregation. The entire black community is bordered by railroad tracts to the east, north and west. Parker, Jordan, Baldwin, Manatee and Orange Streets, primarily in the black section, extend just one block north of Pine Street (which parallels the east-west railroad track). No blacks reside anywhere outside this small geographical area in the southwest portion of Arcadia. Some white households are located in the black section, where Monroe and Orange Streets between Hargrave and Harris are integrated. [Source: City Map of Arcadia, defendants' Exhibit No. 4.]

14. The City of Arcadia provides, maintains and improves certain facilities for its residents. It has always been responsible for the construction and maintenance of the

public rights of way. The City has undertaken the paving of streets, construction of park and recreational facilities and construction of an underground water system. Construction and/or improvements to these services has been financed wholly from either general revenues, derived from ad valorem tax or various federal monies from the following federal agencies: Department of Treasury (Revenue Sharing), Department of Housing and Urban Development (Low-Income Housing grants and loans) and the Environmental Protection Agency (Water and Sewer System grants). [Source: Defendants' responses to plaintiffs' first interrogatories No. 9.]

C. HISTORICAL DISCRIMINATION

15. Excerpts from entries from the official city minute books of the City of Arcadia, dating back as early as 1950 through the present, reveal a continuing unresponsiveness on behalf of white city elected officials to black citizens' needs. Specifically, City officials continually failed to act upon black citizens' requests to improve or extend various city provided services to black homeowners while at the same time these City officials responded affirmatively to similar requests from white citizens. [Source: Plaintiffs' Exhibit No. 25, Excerpts from Official City Minute Books of the City of Arcadia]

16. [City officials knew that municipal service conditions in the black residential neighborhood of Arcadia were a severe problem.] In 1968, Milo-Smith Associates, a Tampa based planning and consulting firm, contracted with the City of Arcadia to produce a Neighborhood Analysis, containing evaluations of municipal services and recommendations for future planning. In this plan, Neighborhood Two, which is the black community, is singled out as being the most severely blighted area of the City. The plan directed that the City of Arcadia invest a majority of its financial resources for needed neighborhood improvements in this area. City officials failed to implement this plan. [Source: Milo-Smith Neighborhood Analysis, Plaintiffs' Exhibit No. 4]

17. The Milo-Smith plan called City officials' attention to the fact that "The entire street pattern south of Pine Street is chaotic and to a significant degree underdeveloped." (Page 12) City officials did nothing to eliminate this chaotic condition. [Source: Milo-Smith Neighborhood Analysis, Plaintiffs' Exhibit No. 4]

18. The Milo-Smith report emphasizes the black neighborhood's lack of adequate recreation facilities and underground storm sewerage. While the other (white) neighborhoods analyzed in Arcadia were not completely provided for in all services, Milo-Smith left little doubt that these neighborhoods had been the primary recipients of adequate municipal services. The pressing needs of the black community were underscored in the plan's concluding remarks:

Summary

"Neighborhood two contains Arcadia's largest neighborhood population and also its worst problems. This may be demonstrated by the fact that 78.6% of Arcadia's substandard structures are located in the neighborhood. The area has the highest incidence of fire, crime and disease. Blighting influences, though certainly a major factor for the onset of deterioration, are not the whole problem. Residents attempting to live and own homes on an income which is below subsistence level find it impossible to maintain an adequate environment. *The net result of these factors is conditions which demand the greatest attention and expenditure from the City of Arcadia for this area than for any other neighborhood.*" (Page 13) (emphasis added) [Source: Milo-Smith Neighborhood Analysis, Plaintiffs' Exhibit No. 4]

19. During an eight month period in 1968, author Marc Lane and photographer Carolyn Mugar investigated general living conditions of Arcadia's black citizens. Their investigation revealed the following:

- 1) No blacks were employed in public facilities.
- 2) No blacks were seen in restaurants.

- 3) No blacks were seen in the town's bus depot.
- 4) Many blacks lived in chicken coops too small for grown individuals to stand erect inside.
- 5) Streets in the black community started and stopped abruptly, making smooth, circular travel impossible.
- 6) The public cemetery was segregated into white and black sides. The white side was green, lush and well maintained. The black side was barren, treeless and overgrown. [Source: Testimony of Plaintiffs' Expert Witnesses: Marc Lane—Author, Investigator, Lawyer; Carolyn Mugar—Photographer, Research Assistant.

20. For at least twenty years, the City of Arcadia has regularly consulted its Planning and Zoning Board on allocation of revenues, selection of projects and general administration of City government. Members on the Planning and Zoning Board are appointed by City officials. The Board's primary responsibility is to establish policy and priorities for the construction and maintenance of municipal service improvements. Every individual who has ever sat on this board up to and including the present is white. [Source: Testimony of E. Coleman Brewer, Mayor of Arcadia]

D. MUNICIPAL STREETS

1. STREET PAVING

21. There is presently 261,160 feet of residential street footage (public rights of way on which one or more persons reside) within the corporate limits of the town. The black population resides on 48,380 feet of these streets while the white population resides on 212,780 feet. Of the 48,380 feet of residential streets in the black community, 5,020, or 10.3%, are unpaved. In the white community, however, only 4.2%, or 9,075 feet of residential street footage, black to white, is 2.4 to 1. This means that black residents of Arcadia are approximately two and one half times as likely as white residents to live on an unpaved street.

A total of 1,920 households exist within the corporate limits of the City. Of the 612 households in the black community, 66, or 10.7%, front on unpaved streets. In the white community, of the 1,308 households only 38, or 2.9%, front on unpaved streets. The ratio of percent of households fronting unpaved streets, black to white, is 3.6 to 1. This means that black residents of Arcadia are approximately three and one half times more likely than white residents to live in a household which fronts on an unpaved street. [Source: Plaintiffs' Exhibit No. 9, Inventory of Street Conditions; Hereafter, Plaintiffs' Exhibit No. 9 and Testimony of City Administrator, Arthur Dyal]

22. At the time of the filing of this lawsuit, March, 1976, the existing disparity in street paving service between the black and white communities was even greater than at present. This is due to the fact that while the number of white unpaved streets has remained constant, a large number of black unpaved streets have been paved since the filing. At that time, the black community contained 10,210 feet, (or 21.1% of its total residential street footage), of unpaved streets. The ratio of percent of unpaved street footage, black to white, was 5.0 to 1. Of the total households in the black community, 107, or 17.4% fronted on unpaved streets. The ratio of households fronting unpaved streets, black to white, was 6.0 to 1. [Source: Plaintiffs' Exhibit No. 9; Testimony of Plaintiffs' expert witness Alan Paller, P.E., Engineer and Urban Systems Analyst; Testimony of City Administrator, Arthur W. Dyal]

23. The City of Arcadia has maintained that certain streets in the black community were unpaved because:

- 1) they were undedicated;
- 2) they were either abutting, or, the actual property of the Seaboard Coastline Railroad Co., and;
- 3) the street was divided in half between the City and DeSoto County.

As to the first two defenses, the City stated that it lacked the necessary right of way to pave the affected streets. As to the third

defense the City stated that it was not responsible for street paving based on its agreement with the county.

24. The City of Arcadia has maintained that the following streets are undedicated:

1. No Name # 1 (Plaintiffs' Exhibit No. 9, Fact 22)
2. No Name # 2 (Plaintiffs' Exhibit No. 9, Fact 26.1c)
3. Myrtle St. (Plaintiffs' Exhibit No. 9, Fact 26.1b)
4. Entrance to Gym (Defendants' Exhibit No. 5)

25. At least since 1970, the streets listed *supra.*, have been maintained in a continuous and uninterrupted manner. Street surfaces have been shelled and graded, garbage has been collected regularly and routine maintenance has been performed upon citizen request. Florida law is instructive:

"When a road, constructed by a county, or municipality, or the Division of Road Operations, has been maintained or repaired continuously and uninterruptedly for four years by the county, municipality, or Division of Road Operations, jointly or severally, the road shall be (deemed to be) dedicated to the public to the extent in width that has been actually maintained for the prescribed period, whether the road has been formally established as a public highway or not."³ Fla.Stat. Ann. § 95.361 (1976)

26. Furthermore, municipal services normally afforded residents of City streets of Arcadia, i. e. street lights, fire hydrants, underground water and underground sewer lines are provided on the streets listed herein.

[1] 27. As a second defense, the City of Arcadia argued that it was unable to pave

the following two streets because of legal ownership issues involving the Atlantic Coastline Railroad:

- 1) Pine Street (Plaintiffs' Exhibit No. 9, Fact No. 30-a)
- 2) Tillis Street (Plaintiffs' Exhibit No. 9, Fact No. 33)

28. Pine Street has been regularly shelled and graded, had garbage collected and has otherwise been maintained in a continuous and uninterrupted manner for at least seven years. As such, it is undisputably a dedicated public right of way and presents no legal obstacles to paving contrary to the City's assertions.

[2] 29. The City of Arcadia argued that it had no legal access to pave Tillis Street because such access required crossing railroad property. Tillis Street, however, has been maintained in a continuous and uninterrupted manner by the City for at least seven years. In so doing, the City has regularly utilized railroad property for access to the street.

30. Up to the time of trial, the City, through its public officials, had never approached the Railroad Company with a request for their permission to gain access for paving, it has now done so.

[3] 31. Hargrave Street forms the City limit in the southwest portion of the City. To the south of its center line is county property, to the north is City property. By agreement between the two governing bodies, the county does the actual maintenance of the street, which has proceeded continuously and uninterruptedly for at least seven years. DeSoto County bills the City proportionally for the maintenance work performed on its portion of Hargrave. By virtue of its continuous maintenance, the

3. See also: *Lovey v. Escambia County*, 141 So.2d 761 (Fla.App.1962) (The term "constructed by" has been held to include improvements and repairs to an existing road); *Pasco County v. Johnson*, 67 So.2d 639 (Fla.1953); *Bishop v. Nussbaum*, 175 So.2d 231 (Fla.App.1965); *Roe v. Kendrick*, 146 Fla. 119, 200 So. 394 (1941); *Sobolt v. State Road Department*, 176 So.2d

590 (1965); *Indian Rocks Beach South Shore, Inc. v. Ewell*, 59 So.2d 647 (Fla.1952); *United States v. 936.71 Acres of Land, State of Florida*, 418 F.2d 551 (5th Cir. 1969) and *City of Hollywood v. Zinkil*, 283 So.2d 581 (Fla.App.1973) (Florida Supreme Court reaffirmed the proposition that acceptance need not be formal and may be public user).

City's claim that Hargrave Street is an undedicated street is unfounded.

32. The City of Arcadia, through its public officials, has never approached the county with an offer to jointly pave the unpaved portion of Hargrave Street.

[4] 33. It is an "unwritten" policy of the City of Arcadia that dead-end streets are the lowest priority for paving. This defense was provided as an explanation for the following streets in the black community being unpaved:

- 1) Singleton Avenue (Plaintiffs' Exhibit No. 9, Fact No. 32-a, Pg. 4)
- 2) Dade Avenue (Defendants' Exhibit No. 5)
- 3) Madison Avenue (Plaintiffs' Exhibit No. 9, Fact No. 26-b)
- 4) Spring Avenue (Plaintiffs' Exhibit No. 9, Fact No. 32-a, Pg. 5)
- 5) Citrus Avenue (Plaintiffs' Exhibit No. 9, Fact No. 8-a)

In conjunction with the streets to which the City pleaded "Undedicated—no responsibility" these represent all the remaining black unpaved streets in Arcadia. [Source: (Facts 23-33) Testimony of Dyal]

34. This unwritten policy has an inherently discriminatory impact on black Arcadia. A far higher percentage of streets in the black community are dead-end than in the white community. In the black community, thirteen of the forty-six streets and street segments, or 28.2%, listed in Plaintiffs' Exhibit No. 9, were dead-end streets. In the white community, of the ninety-two

streets and street segments listed in Exhibit No. 9, only 9, or 9.7%, were dead-end.

35. Furthermore, the City of Arcadia has arbitrarily and irregularly executed this policy. As a result a discriminatory policy on its face has been implemented in a discriminatory manner.

36. Of the nine dead-end white streets, only three, Hodges (west of Johnson), Crawford and Immogene are unpaved.⁴ This amounts to 33.3% of the white dead-end streets as unpaved. In the black community, of the thirteen dead-end streets, seven, or 53.8% are unpaved. In addition, prior to the March 1976 filing of the lawsuit, four additional black dead-end streets, or a total of 84.6%, were unpaved.⁵ [Source: (Fact Nos. 34-36), City Map, Defendants' Exhibit No. 4]

37. A comparison of those dead-end streets which were paved in the white community, versus those dead-end streets which were not paved in the black community, shows that a far higher concentration of households existed on the black streets. Thus even within the scope of the City's discriminatory policy to pave dead-end streets last, the decisions of which streets to pave are not fiscally justifiable. In applying the standard engineering cost-efficiency analysis for street paving, the number of households per linear foot of City street, it is clear that the City has benefitted white streets at the expense of black streets. The following table illustrates these facts by listing dead-end streets in both the white and black communities.

4. Other white dead-end streets, all paved, are: Reynolds, Nelson, Lowe, Heard, Oak Ridge, Asbury.

5. Black Dead-End Streets:

<u>Unpaved</u>	<u>Paved</u>	<u>Paved Since March 1976</u>
1. Hargrave	1. Watson	1. Bond
2. N-N-1	2. Parker	2. Owens

<u>Unpaved</u>	<u>Paved</u>	<u>Paved Since March 1976</u>
3. Madison		3. Court (w. of Morqus)
4. Singleton		4. Court (w. of Alabama)
5. Citrus		
6. Tillis		
7. Dade		

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Dead-End -- Black

<u>PAVED</u> 7			<u>UNPAVED</u> 6		
<u>ST. (No.)</u>	<u>FT.</u>	<u>HOUSE-HOLDS</u>	<u>ST. (No.)</u>	<u>FT.</u>	<u>HOUSE-HOLDS</u>
Court (9-B)	440	3	Hargrave (14-A)	600	4
Court (9-C)	330	3	N-N-1	250	9
Watson (34)	330	8	Citrus (8-A)	200	2
Bond (6-A)	1050	2	Madison (26-B)	330	9
Owens (20)	550	6	Singleton (32-A)	230	5
Parker (29)	<u>660</u>	<u>2</u>	Tillis (33) 7	1160	13
	3360	24	Dade ()	<u>200</u>	<u>1</u>
Households:foot = 1:140				2970	43

Households:foot = 1:64

Dead-End -- White

<u>PAVED</u>			<u>UNPAVED</u>		
<u>ST. (No.)</u>	<u>FT.</u>	<u>HOUSE-HOLDS</u>	<u>ST. (No.)</u>	<u>FT.</u>	<u>HOUSE-HOLDS</u>
Oak Ridge (54)	1320	5	Crawford (9)	1390	2
Asbury (2)	900	3	Immogene () 7	300	1
Reynolds (63)	500	1	Hodges ()	<u>600</u>	<u>1</u>
Nelson (50)	400	5		2290	4
Lowe (40)	660	9	Households:foot = 1:572		
Heard (28)	<u>660</u>	<u>3</u>			
	4440	26			

Households:foot = 1:170 [Source: Plaintiffs' Exhibit No. 9; Defendants' Exhibit No. 5]

38. The City of Arcadia's policy of making dead-end streets the lowest priority for street paving discriminates against blacks in two ways:

- 1) There is a far higher percentage of such streets in the black community.
- 2) The implementation of the policy has been inequitable and discriminatory.

6. Fact No. from Plaintiffs' Exhibit No. 9.

serving to exacerbate a system which already burdens the black community unduly.

A higher percentage of white dead-end streets have been paved than black dead-end streets. This has happened despite the fact that on a cost-efficiency basis, the same amount of street paving would bene-

7. From Defendants' Exhibit No. 5.

fit many more households were it constructed on black dead-end streets. [Source: Plaintiffs' Exhibit No. 9; Defendants' Exhibit No. 5 and Testimony of Dyal]

39. The inconsistent, fiscally unsound execution of a discriminatory, though unwritten, policy reviewed above is representative of the City's street paving practices. The City of Arcadia has not formulated, or communicated to its administrator a uniform set of guidelines to use in decisions concerning street paving. Thus all decisions of this nature are left up to the administrator's judgment. Lacking a coherent system for analyzing needed street repairs, designed with the concern for equitable distribution of funds in mind, the Arcadia street paving scheme is inconsistent and discriminates against blacks. Streets are frequently re-sand sealed in the white community before old streets are initially sand sealed in the black community. For example, Luther, Fortune and N.E. Oak Streets in the white community, 4,100 linear feet of street, were re-sand sealed at an approximate cost of \$20,500. As additional examples of the discriminatory effect of Arcadia's lack of street paving guidelines, Johnson Street and Kelly Avenue are noteworthy. Johnson Street has three houses spread over 1,300 feet of pavement and does not serve as an access route. Kelly Avenue has one house on 2,500 feet of paved street, and does not serve as an access route. The City Administrator testified he knew of no reason why these streets were paved. The approximate cost of paving these streets was (3,800 lin. ft. $\times$ \$5) \$19,000. [Source: Plaintiffs' Exhibit No. 19, Administrator's progress reports dated June 15, 1976]

40. Quality in pavement surfacing is measured by the thickness of bituminous material, a mixture of tar and sand.

41. Generally, streets in the black community have been paved with the City paving machine which is incapable of putting down a sufficiently thick surface. As a result, streets in the black community are of inferior quality and require more repair and maintenance.

42. In contrast, most white streets are paved with the county's paving machine, which is capable of producing a thicker, higher quality surface. As a result, these streets last considerably longer and require less maintenance than those in the black community. [Source: Testimony of Paller]

2. PARK AND RECREATIONAL FACILITIES

[5] 43. The two primary standards used in evaluation of respective recreational facilities in the black and white communities are quality and access. Quality is concerned with the kind of facilities respectively in use and their maintenance. Access concerns the relative availability of recreational space and facilities to the respective communities.

44. In examining quality of recreational facilities in Arcadia, the logical comparison focuses on the two large multi-purpose recreational complexes in the City; Smith-Brown, which is black, and Speer, which is white. A review and comparison of these facilities follows.

—Interiors—

45. The Smith-Brown center is a converted gymnasium, high ceilinged with basketball courts and a stage. It is essentially one large room that can support few other activities when basketball is being played, which is most of the time. To the side of the basketball court is one pool table and the stage has a ping-pong table. However, the primary function of the center during daytime recreational use, is basketball.

The Speer center is a much more modern building with many rooms to separate different recreational functions. Its main room contains two ping-pong tables. Adjacent rooms contain:

- 1) Two bumper pool and one pool table;
- 2) A fully equipped tumbling area;
- 3) An arts and crafts area;
- 4) Fully equipped kitchen;
- 5) A T.V. viewing room; and
- 6) A meeting room.

The difference in facilities is that Speer is able to support a multitude of recreational activities simultaneously, while Smith-Brown is completely inadequate for such a task. In comparison to Speer, Smith-Brown is not in fact a recreation center, but a converted gymnasium.

—Exteriors—

46. The land surrounding Speer is excellently maintained, with the grasses kept mowed and the grounds regularly kept clear of debris. The building itself, built of wood and brick, is very well maintained.

The Smith-Brown building's exterior is dramatically different. The building itself is covered with peeling, flaking paint and a thick cover of dirt. The center is adjacent to four abandoned structures that were once a school. They are filled with chipped plaster, exposed wires and assorted debris, especially glass. This debris also covers the grounds adjacent to the buildings. The entire area is unsightly and hazardous and completely unsuitable for a recreational complex. These buildings are technically school board property, but the City has evidenced no serious efforts to either a) clean up the area themselves; b) ask the school board to do so; or, c) condemn the buildings.

—Ballfields—

47. Speer Recreation Center has a fully equipped, well kept lighted little league softball field, with dugouts, bleachers, backstop, fencing and a building housing concessions and restrooms.

The Smith-Brown field, still in the process of renovation, consists presently of a unfinished field, backstop, fencing and dugouts. There are as yet no lights, equipment storage or bathrooms. The field is not graded, or shaped and lacks bases.

—Courts—

48. The Speer Center has adjacent to it four recently completed fenced tennis courts, of composition cement surfacing. The Smith-Brown Center has two tennis courts made of less expensive concrete, and

two adjacent basketball courts. The courts at Smith-Brown, on Hargrave Street, are not afforded the proximity to restrooms that the courts at Speer enjoy.

—Play Equipment—

49. Speer Recreation Center has a fully-equipped, fenced "tot lot" with many varieties of play structures for children and shaded sitting areas with picnic tables for adults. The black community has absolutely no facilities for younger children, at Smith-Brown or elsewhere. This is perhaps the most needed recreational improvement in black Arcadia.

—Access Problems—

50. Speer Recreation Center has no access problems whatsoever, Smith-Brown however has a severe one. Running between the center on Harris Road and the fields and courts on Hargrave is an open drainage ditch. A path between the two areas leads across this ditch, which is a potential health hazard and has been the object of many complaints by the black community. Children crossing the ditch must now step carefully on old tires which sink in the bottom of the ditch. After a rain, crossing is nearly impossible. Minimum health standards would indicate that some sort of simple footbridge be built across it.

51. The question of access to recreational areas and facilities in the black and white communities hinges on the availability of such areas to the highest percentage of the respective racial residential groups.

52. Given that the Smith-Brown and Speer Centers are both in the extreme south and north of the City, respectively, the two parks neutralize each other in comparing access (availability) for black and whites. However, the white community has a total of 3.2 acres of land in seven mini-parks distributed throughout their neighborhoods. These parks afford whites shaded, protected recreational space where families may congregate. No such equivalent spaces exist in the black community. [Source: (Facts 41-50) Testimony of Paller]

53. The Office of Revenue Sharing (herein "O.R.S.") responded to plaintiffs' administrative complaint of discrimination with an investigation of Arcadia's various municipal services. Their investigative team found the City in non-compliance with the anti-discrimination clause of the Revenue Sharing Act due to:

- 1) the vastly superior maintenance of the Speer Center area, grounds, etc., and;
- 2) the superior condition of the Speer Center restrooms, and;
- 3) the health hazard presented by the debris adjacent to Smith-Brown.

The City was directed by O.R.S. to:

- 1) upgrade restrooms of Smith-Brown equally to those of Speer.
- 2) request the DeSoto County School Board to either clean up Smith-Brown grounds or ask permission of the board to allow City to do it.
- 3) adopt a plan to ensure equal maintenance of facilities in the future.

The report was issued March 16, 1977. [Source: Plaintiffs' Exhibit No. 1, Report of Office of Revenue Sharing]

3. WATER SYSTEM

54. The existing disparity in the underground water system in Arcadia results from the differences in the quality of the system. Specifically, this means the ability of the distribution system to deliver at each fire hydrant a flow of 500 gallons per minute at a residual pressure of 20 pounds per square inch. This quantity of flow can be

<u>Street</u>	<u>Beginning</u>	<u>Ending</u>	<u>Lin. Ft. of Pipe</u>
Hargrave	Spring	East	700'
Harris	Dade	Orange	150'
Spring ⁸	Hargrave	Bay	2900'

Source: (Facts 54-56): Testimony of John E. Foster, P.E., plaintiffs' expert witness specializing in civil engineering; analysis of water and wastewater distribution systems.

provided through either a grid system (intersecting pipes) of 6-inch diameter pipe or a single line 8 inches in diameter or larger. With the exception of four small areas, the entire white community is served by a grid system of 6-inch pipe. The other four areas are adequately served by 8-inch diameter pipe or larger.

55. With the exception of two blocks adjacent to Arcadia's commercial district, the black community does not contain a 6-inch diameter grid system. The 12-inch diameter pipe which passes through the black community distributes water to the commercial area; the 8-inch diameter pipe distributes water to the white community. Except for one other short section of 8-inch pipe, the water system in the black community consists of unlooped 6-inch, 4-inch, 2-inch and smaller diameter pipe; this design and layout will not provide adequate water pressure at fire hydrants. The one in the white community will provide adequate water pressure. Thus, the entire black community suffers from an inferior water quality system.

56. Engineering consultants representing both plaintiffs and the City have agreed on the necessary additional pipe necessary to close the grid system in the black community and thereby increase overall water pressure. They consist of the following additions: (all water pipe recommended to be 6-inch diameter)

E. CONCLUSIONS OF FINDINGS OF FACT

[6] 57. The services and facilities provided to the black residents of Arcadia with

8. This line is optional if the City does not elect to build a new storage tank on Spring.

respect to street paving, parks and recreation and water supply system are substantially inferior to the provision of these facilities and services to white residents.

58. These inequalities are the result of systematic racial discrimination against the black residents of the town.

59. These inequalities continued up to the date of the filing of this suit.

II. CONCLUSIONS OF LAW

A. JURISDICTION, CLASS STATUS AND PARTIES

[7] 1. Jurisdiction of plaintiffs' claims with respect to the individually named defendants—the mayor and councilmen—acting in their official capacities, is conferred by 28 U.S.C. § 1331(a) and 1343(3) and (4).

[8] 42 U.S.C. § 1983 *et seq.* affords plaintiffs the vehicle to redress violations of constitutional rights, in this case a violation of the Fourteenth Amendment to the United States Constitution, where such rights have been violated by public officials acting in their official capacity under “color of law.” *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1967); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida*, 493 F.2d 799 (5th Cir. 1974) and *McGill v. Parsons*, 532 F.2d 484, n. 1 (5th Cir. 1976).

[9] 2. § 1983 *et seq.*, while providing a substantive right of action, is not a jurisdictional statute. *Hagans v. Lavine*, 415 U.S. 528, 535, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). The “jurisdictional counterpart” for § 1983 is § 1343(3) with jurisdiction recently enlarged to § 1343(4) in 1970, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n. 7, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). § 1331 confers jurisdiction without regard to the amount in controversy, since plaintiffs have alleged and proven an unconstitutional infringement (the Equal Protection Clause of the Fourteenth Amendment) of their right to be free of racial discrimination at the hands of public officials of the City of Arcadia.

[10] 3. The defendant City of Arcadia itself is not a “person” within the meaning of 42 U.S.C. § 1983 and thus jurisdiction over the defendant City is not present pursuant to 28 U.S.C. § 1343(3) and (4). *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); and *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

[11] 4. This Court does, however, have jurisdiction over the defendant City of Arcadia under 28 U.S.C. § 1331(a) *City of Kenosha v. Bruno, supra*; and *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976) 28 U.S.C. § 1331(a) confers original federal district court jurisdiction “of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.”

In the case *sub judice*, all black citizens share in their concern for improved municipal services. The paving of only a portion of an unpaved street fronting one specific black household will not solve that black resident's concern with regard to living on an otherwise unpaved access route. Likewise, other City services which are the subject matter of this suit—water lines and park and recreational facilities—are commonly shared by homeowners living on a particular city block, street, or subdivision. Because of the subject matter of this case, it is impossible to conceive of separate and distinct claims for each black citizen in Arcadia.

[12] 5. Jurisdiction of plaintiffs' claim against the individually named defendants for statutory violations under 42 U.S.C. § 2000d *et seq.* (Title VI of the Civil Rights Act of 1964) and 31 U.S.C. § 1242 State and Local Fiscal Assistance Act of 1972, hereinafter “Revenue Sharing Act”) is conferred by 28 U.S.C. § 1343(3) and (4). (Title VI) *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Lemon v. Bossier Parish School Board*, 240 F.Supp. 709 (W.D.La. 1965), *aff'd* 370 F.2d 847 (5th Cir. 1967) *cert.*

den., 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967); (Revenue Sharing) *Robinson v. Simon and United States v. Chicago*, 395 F.Supp. 329 (N.D.Ill.1975), 405 F.Supp. 480 (N.D.Ill.1975), 411 F.Supp. 218 (N.D.Ill. 1976), 416 F.Supp. 788 (N.D.Ill.1976), and 420 F.Supp. 733 (N.D.Ill.1976).

[13] 6. Jurisdiction of plaintiffs' claims against the defendant City of Arcadia for statutory violations under Title VI of the Civil Rights Act of 1964 and the Revenue Sharing Act is conferred by 28 U.S.C. § 1331. *City of Kenosha v. Bruno*, supra; *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976); and *Mathews v. Massell*, 356 F.Supp. 291 (N.D.Ga.1973).

[14] 7. Plaintiffs may properly maintain this action as a class action on behalf of all black persons who reside and will continue to reside in Arcadia, Florida. Rule 23(b)(2), Fed.R.Civ.P. The class which plaintiff represents is so numerous that joinder of all members is impracticable; there are common questions of law and fact applicable to the class; plaintiffs' claims are typical of the claims of the class; plaintiff will fairly and adequately protect the interests of the class. Defendant has acted or refused to act in a manner generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

B. MUNICIPAL SERVICE DISCRIMINATION

8. The substantive standards imposed by 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment to compare municipal service provision between black and white residential communities are essentially established by *Hawkins v. Town of Shaw*, 303 F.Supp. 1162 (N.D. Miss.1969) rev'd 437 F.2d 1286 (5 Cir., 1971) *aff'd en banc*, 461 F.2d 1171 (5th Cir., 1972).

[15] 9. Once a municipality elects to provide services, it must provide equal services to the minority community or the City violates the Equal Protection Clause.

[16] 10. Municipal inaction in response to discrimination in public institutions is violative of the Equal Protection Clause.

[17] 11. The standard for service provisions in a municipal service equalization suit is the quality and quantity of services enjoyed by those citizens who are favored by discriminatory practices.

[18] 12. The longer the period of time over which it can be established that there have been substantial disparities in the level of municipal services, the greater the presumption that the disparity is a function of race.

[19] 13. Citizens have a substantial interest in municipal services and when minority citizens show a statistical pattern of unequal and oppressive distribution of services, a legitimate inference of *de facto* racial discrimination can be drawn.

[20] 14. Governmental policies and practices which appear neutral on their face but which have a disparate effect on the minority community are discriminatory.

[21] 15. A past history of *de jure* racial discrimination in the municipality with respect to schools, recreational facilities and other public facilities is persuasive evidence that racial inequalities in the distribution of municipal services is the result of racial discrimination. *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973).

[22] 16. Disproportionate impact may be probative of intent to discriminate and in some cases sufficient to prove intent. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

[23] 17. Disproportionate impact of an official action, the legislative or administrative record of the decision are historical background of circumstantial evidence that show intent to discriminate. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

[24] 18. Statistical proof coupled with historical showing of broad-based racial discrimination satisfied Plaintiffs' burden of

intent

proving the intent requirement of *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); and *Village of Arlington Heights v. Metropolitan Housing Development, Corp.*, *supra*.

hoods in the municipality; (2) substantial inferiority in the quality or quantity of the municipal services and facilities provided in the black neighborhood; and, (3) proof of intent or motive.

C. RELIEF

[30, 31] 24. Having found that defendants' practices violate plaintiffs' constitutional rights, it is proper for this Court to take remedial action. The well-settled principle that the nature and scope of the remedy is to be determined by the violation means simply that federal court decrees must directly address and relate to the constitutional violation itself. *Milliken v. Bradley*, (Milliken II) 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745, 757 (1977) and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

25. In this case, a constitutional violation has been found. The remedy which this Court has approved in the Final Judgment does not exceed the violation since the remedy is tailored to cure the "condition that offends the Constitution." *Milliken v. Bradley* (Milliken I), 418 U.S.C. 717, 738, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) and *Hills v. Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976).

In the case *sub judice*, as has been shown, the "condition that offends the Constitution" is intentional, systematic across-the-board discrimination relating to certain municipally provided services. A systematic remedy, as provided for in the Final Judgment, cannot "exceed" that violation.

26. The Court commends counsel for the respective parties and the parties themselves. Counsel for plaintiffs has proceeded in this relatively novel action with energy, effectiveness, skill and professionalism. Counsel for defendants has, with complete fidelity to his clients, acted in a competent and professional way.

The citizens of Arcadia, black and white alike, have appreciated and accepted the realities of the law as they have been made apparent and give every indication of cooperating as fellow citizens of what is and can be an attractive community.

[25] 19. To create a presumption of discriminatory purpose the plaintiff must demonstrate that a government decision (a) made a racial classification on its face (b) was applied in a discriminatory manner or (c) had a reasonably foreseeable discriminatory effect. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *United States v. School District of Omaha*, 541 F.2d 708 (8th Cir. 1976) (Omaha II) (en banc) (per curiam).

[26] 20. To establish relief under 42 U.S.C. § 2000d et seq. (Title VI) in a municipal services disparity case, it must be proven that a municipality is a recipient of federal financial assistance and that the municipality has used criteria or methods of administration or has selected sites for facilities that have resulted in discrimination in a program or activity supported with federal financial assistance. *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) and *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

[27] 21. Financing discriminatory governmental activities with revenue sharing monies or other federal funds is violative of the Revenue Sharing Act and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. respectively.

[28] 22. A municipality or political subdivision may not with respect to any program or activity make selections or locate facilities in places which deny minority individuals the benefits of such facilities and may not use revenue sharing funds to perpetuate the results of past discriminatory practices. Revenue Sharing Act, 31 U.S.C. § 1242.

[29] 23. The three essential elements in order for plaintiffs to prove a constitutional violation in municipal service suits, which they have done in this case, are: (1) existence of racially identifiable neighbor-

By separate instrument the Court is concurrently entering final judgment.

FINAL JUDGMENT

1. This judgment extends to all issues set forth in the complaint as filed in this matter and to the class of plaintiffs defined as:

All black residents of Arcadia, Florida who are similarly situated and affected by the defendants' policy, practice, custom and usage of racial discrimination in providing municipal services and in the spending of federal revenue sharing funds.

2. This Court has jurisdiction over the subject matter of this action and the parties thereto.

3. The defendants are enjoined from providing municipal services and spending revenue sharing monies in a racially discriminatory manner in violation of the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d-1, 31 U.S.C. § 1242 *et seq.*, and 42 U.S.C. § 1983.

4. A declaratory judgment is entered adjudicating that defendants have violated plaintiffs' right under the Fourteenth Amendment to the Constitution of the United States.

5. Defendants are enjoined from initiating any major service or improvement program in the white residential community until such time as the improvements ordered by this Court for the black residential community are completed; except those items, equipment, improvements, and facilities authorized for expenditure by the Office of Revenue Sharing and consented to and agreed between the parties. The only major improvement program anticipated at this time by the City of Arcadia, Florida will be a Public Safety Complex which shall include, but not be limited to, police and fire protection facilities and administrative office spaces.

6. The Court's previous Order restraining further expenditure of Federal revenue sharing funds by the City of Arcadia be,

and the same is hereby amended and the Federal revenue sharing funds of the City of Arcadia now on deposit and all future revenue sharing funds received by the City of Arcadia be, and the same are hereby released subject to the services, facilities and improvements being made as designated in Appendices A, B and C within the time as specified herein.

That the City of Arcadia shall place in escrow, Federal revenue sharing funds in the amount of \$154,863.00 as good faith money to guarantee the construction of the facilities and performance of the services as outlined in Appendices A, B and C.

That any other Federal revenue sharing funds presently on deposit by the City of Arcadia and all future Federal revenue sharing funds be, and the same are hereby released unto the City of Arcadia to be expended as provided by law.

7. Defendants shall make the improvements and/or additions to municipal services provided in black residential areas in the City of Arcadia, Florida, as outlined in Appendices A and B and to accomplish the same shall adhere to the construction, maintenance and finance schedules set forth in Appendices A, B and C.

8. The defendants are required to make a good faith effort to construct the improvements and additions in the manner and engineering design specified in Appendices A and B attached hereto unless good and acceptable engineering practices should dictate otherwise. In the event that defendants decide that said improvements and additions shall be constructed in a manner or engineering design substantially different from that set out in said Appendices, then, such changes shall first be submitted to counsel for plaintiffs for acceptance or rejection. Should plaintiffs' counsel reject such changes, then the matter shall be submitted to this Court.

9. That on or about June 1, 1978 and November 1, 1978, and on the same dates of each year until completion, defendants shall file with the Clerk of this Court and serve upon lead counsel for plaintiffs a report

which sets forth all steps taken to implement and the status of each facet of the programs required by Appendices A, B and C of this judgment.

10. Not later than 30 days after entry of this judgment plaintiffs shall cause to be published in a newspaper of general circulation in the City of Arcadia, Florida a concise summary of this judgment, in a form to be approved by respective counsel. Said summary shall be published for two consecutive weeks, and is to give notice that a copy of this judgment is posted for public inspection at the City Hall.

11. Jurisdiction of this cause is retained for the entry of such further and other orders as may be necessary or required.

12. That all stipulations and agreements entered into between the parties in the trial of this case pertaining to correction of disparity of quality of water service be, and the same are hereby ratified, approved and fully incorporated into the terms and provisions of this Final Judgment.

13. That this judgment is intended to resolve all issues between the plaintiffs and the defendants as these issues are set forth in the pleadings filed in this matter. Upon completion of all projects as specified in Appendices A and B parties shall file a joint motion with this Court to complete active litigation of all the issues in the case. Upon the filing of said joint motion the Court will terminate litigation of this case.

14. Reasonable costs and expenses incurred by plaintiffs in prosecuting this case will be borne by the defendants. Defendants shall immediately upon entry of this Final Judgment reimburse counsel for plaintiffs a sum of money, which has been previously agreed upon by the parties, incurred as reasonable costs in this matter.

15. Plaintiffs, as the prevailing party in this action, are entitled to an award of attorney fees in an amount which has been previously agreed upon by the parties. Defendants shall immediately upon entry of this Final Judgment pay said sum of money to counsel for plaintiffs.

APPENDIX "A"

I. ROAD MAINTENANCE

A. STREET PAVING

Streets listed below are to be graded and paved with a shell base (minimum six inches compacted to four) and a paved surface which is applied in such a manner that the street has a continuous bituminous surface course of not less than one inch of compacted asphalt that meets Department of Transportation specifications. This work is to be completed within six months from the entry of this Judgment.

<u>STREET</u>	<u>LENGTH</u>	<u>HOUSE- HOLDS</u>	<u>COST</u>
1. Ash St.-Singleton Ave. to End	300 ft.	-	\$ 2,000
2. Citrus Ave.-Bay St. to End	200 ft.	2	2,000
3. Dade Ave.-Ash St. to North	200 ft.	1	2,000

uncertain as to how much weight may be accorded experience accrued during the course of an alien's appeal of deportation, we note that Mrs. Chen's training, taken in combination with her prior experience, might be viewed as providing a considerable range of familiarity with most of the important tasks likely to be necessary to operate a restaurant successfully, and possibly might bring her within the terms of 8 C.F.R. § 212.8(b)(4). See *Talanoa v. INS*, 427 F.2d 1143 (9th Cir. 1970).

We refer this matter to the Board for further clarification of the relevance of the training involved in this case. Accordingly, the portion of the Board's decision denying petitioners' motion to remand and reopen is vacated, and the case is remanded to the Board for proceedings in light of this opinion.

So ordered.



Rachel EVANS et al., Appellants,

v.

James T. LYNN et al., Appellees,

v.

The TOWN OF NEW CASTLE,
Appellee-Intervenor.

No. 157, Docket 74-1793.

United States Court of Appeals,
Second Circuit.

Argued Oct. 21, 1974.

Decided June 2, 1975.

Resubmitted Oct. 20, 1975.

On Rehearing En Banc June 4, 1976.

Minority residents of inner-city area appealed from an order of the United States District Court for the Southern Dis-

trict of New York, Milton Pollack, J., 376 F.Supp. 327, which dismissed for lack of standing their complaint alleging violation of the 1964 and 1968 Civil Rights Acts. A panel of the Court of Appeals, Oakes, Circuit Judge, reversed and remanded in part and affirmed in part. The Court of Appeals, en banc, Moore, Circuit Judge, held that minority residents, who alleged that federal agencies allocated funds for sewers and recreational development to a suburban area without assessing the impact of such allocations on racial housing patterns there- by perpetuating the minority residents' ghettoized living patterns, did not have standing to sue under the provisions of the Civil Rights Acts of 1964 and 1968 imposing on federal agencies affirmative duties to encourage fair housing, where the plaintiffs did not complain that they unsuccessfully sought housing in the suburban area, or that the suburban area arbitrarily rejected housing proposals of benefit to them, but claimed only that, had the grants not been approved, the monies could conceivably have gone to some other, as yet totally imaginary project which might have had the result of making more housing available to them.

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Affirmed.

Mansfield, Circuit Judge, filed a concurring opinion with which Timbers, Circuit Judge, joined.

Oakes, Circuit Judge, filed a dissenting opinion with which Kaufman, Chief Judge, and Feinberg and Gurfein, Circuit Judges, concurred.

Kaufman, Chief Judge, filed a dissenting opinion with which Gurfein, Circuit Judge, concurred.

Gurfein, Circuit Judge, filed a dissenting opinion with which Kaufman, Chief Judge, concurred.

1. Courts — 281

Case and controversy requirement is jurisdictional limitation which can be considered in a determination of her investor status.

who did what

larged neither by act of Congress nor by courts sua sponte.

2. Courts ⇐281

Because case and controversy requirement is jurisdictional in nature and Constitutional in origin, it is a threshold requirement which must be satisfied before federal court can take cognizance of any claim.

3. Courts ⇐281

Hallmark of case or controversy is presence of adverse interests between parties who have substantial personal stake in outcome of litigation.

4. Federal Civil Procedure ⇐103

Standing to sue, in its constitutional sense, is showing by plaintiff that his particular grievance gives him personal stake in outcome of litigation, the essence of which is presence of injury in fact suffered by plaintiff as result of defendant's actions.

5. Federal Civil Procedure ⇐103

Mere interest in, or concern over, prospective defendant's acts, no matter how deeply felt, is insufficient to demonstrate injury in fact, but what must be shown is specific and perceptible harm—a concrete injury actually suffered by particular plaintiff, or else clearly imminent, which is capable of resolution and redress in federal courts.

6. Federal Civil Procedure ⇐103

While particular statute may confer rights upon party, it cannot abrogate Constitutional requirement that plaintiffs in fact suffer some injury due to breach of law in order to maintain action in federal courts.

7. Federal Civil Procedure ⇐103

Whether or not plaintiff falls within zone of interest protected by statute—whether he can, in other words, rightfully assert whatever rights are granted by statute—is entirely separate inquiry from question of whether injury has been suffered per se.

8. Civil Rights ⇐13.6

Minority residents of inner-city area, who alleged that federal agencies allocated

funds for sewers and recreational developments to suburban area without assessing impact of such allocations on racial housing patterns thereby perpetuating minority residents' ghettoized living patterns, did not have standing to sue under provisions of Civil Rights Acts of 1964 and 1968 imposing on federal agencies affirmative duty to encourage fair housing, where they did not claim that they unsuccessfully sought housing in suburban area, or that suburban area arbitrarily rejected housing proposals of benefit to them, but claimed only that, had grants not been approved, monies could conceivably have gone to some other, as yet totally imaginary project which might have had result of making more housing available to them. Civil Rights Act of 1964, §§ 601 et seq., 602, 42 U.S.C.A. §§ 2000d et seq., 2000d-1; Civil Rights Act of 1968, §§ 801 et seq., 808(d), (e)(5), 42 U.S.C.A. §§ 3601 et seq., 3608(c), (d)(5).

9. Courts ⇐281

Disagreement with government action or policy, however strongly felt, does not, standing alone, constitute injury in constitutional sense which is cognizable in federal courts and susceptible of remedy by judicial branch; but it is a matter properly addressed to Congress or executive.

J. Christopher Jensen, Yonkers (Richard F. Bellman, Lois D. Thompson, Suburban Action Institute, Yonkers, of counsel), for appellants.

V. Pamela Davis, Asst. U. S. Atty. (Paul J. Curran, U. S. Atty., S. D. N. Y., Steven J. Glassman, Asst. U. S. Atty., of counsel), for Federal Appellees.

Arthur M. Handler, New York City (Andrea Hyde, Golenbock & Barell, New York City, of counsel), for appellee Town of New Castle.

Jeremiah J. Spires, New York City (Harry A. Gottlieb, Wikler, Gottlieb, Taylor & Howard, New York City, of counsel), for appellees Douglas Carroll, Director of Tri-State Regional Planning Commission, and Tri-State Regional Planning Commission.

OPINION OF THE PANEL

Before MOORE, OAKES and GURFEIN,
Circuit Judges.

OAKES, Circuit Judge:

This appeal involves a legal challenge against policies of federal agencies said to flout the requirements of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d et seq., and Title VIII (Fair Housing) of the 1968 Civil Rights Act, 42 U.S.C. § 3601 et seq. Title VI requires federal agencies affirmatively to effectuate its anti-discrimination policy in programs receiving federal financial assistance, 42 U.S.C. §§ 2000d, 2000d-1.¹ Title VIII requires similar effectuation of its fair housing policies, 42 U.S.C.

§§ 3601, 3608(c), (d)(5).² The federal agencies are the Department of Housing and Urban Development (HUD) and the Bureau of Outdoor Recreation of the Department of the Interior (BOR), whose respective grants to a municipal sewer district within the Town of New Castle, Westchester County, New York, for construction of a sanitary sewer, and to the Town itself for acquisition of "Turner Swamp" for recreational purposes³ are challenged here as being made to a town that allegedly maintains a racially and economically discriminatory housing and community development program. Suit has also been brought against the regional planning agency, Tri-State Regional Planning Commission (Tri-State), which is the designated clearing-

ure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

2. 42 U.S.C. § 3601:

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.
42 U.S.C. § 3608:

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(d) The Secretary of Housing and Urban Development shall—

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

3. The grant of matching funds for the sewer was made under the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102, and the grant for the acquisition of Turner Swamp was made pursuant to the Outdoor Recreation Programs Act, 16 U.S.C. § 4601.

1. 42 U.S.C. § 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
42 U.S.C. § 2000d-1.

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the fail-

house which reviews and coordinates applications for federal grants-in-aid in certain counties of New York and New Jersey and certain planning regions of Connecticut, 42 U.S.C. § 3334(a)(1), and which declined to review the grants in question on the grounds that they lacked regional significance.

Appellants assert that they are minority residents of Westchester County who reside in racially concentrated areas of the county and are constrained to do so because the failure of the federal agencies to perform their affirmative duties permits the maintenance of a growing pattern of racial residential segregation both in New Castle and elsewhere in the county. Thus, the case is another in the series of cases in this court and others⁴ raising one phase or another in the complex of legal, social, economic and moral problems engendered both by the emergence of the suburbs as increasingly important units of the metropolitan area, significant to the achievement of national goals, and by the realization that housing "does not mean shelter alone—it means a collection of services and opportunities based on locations."⁵ The court below granted the Town of New Castle leave to intervene but denied appellants standing to sue on the basis that they assert no "injury in fact" since enjoining the grants in question would not alleviate their injury (in the

form of "ghetto living conditions"); Judge Pollack added that their status as "potential residents" of New Castle did not change this result. (This ruling applied to the federal defendants and to Tri-State.) We disagree, expressing, however, no opinion on the question whether appellants have stated a claim for relief.

On the question of standing as to the federal agencies there are three facts which have to be assumed, as they were below, in the present posture of the case. First, appellants are low-income minority residents of Westchester County who live in "ghetto" conditions, that is, racially-concentrated low-income neighborhoods.⁶ Second, a matter entirely overlooked in Judge Moore's dissent, the Town of New Castle, to or for whose benefit the challenged grants were made, is, in the words of the district court, "predominantly white [98.7 per cent] and a well-to-do enclave," 90 per cent of which is zoned for single-family, residential development on parcels of more than one acre, with a median value of single-family homes in 1970 in excess of \$50,000; the Town has, not coincidentally, thwarted the New York State Urban Development Corporation's attempt to construct within its borders a small 100-unit low cost housing facility and thus in the words of the court below "continues to be resistant to attempts to alter its present housing character."⁷ Third, the

4. *E. g.*, *Citizens' Committee for Faraday Wood v. Lindsay*, 507 F.2d 1065 (2d Cir. 1974); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971). See generally A. Downs, *Opening Up the Suburbs: An Urban Strategy for America* (1973); Brantman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 Yale L.J. 483 (1973); Shields & Spector, *Opening Up the Suburbs: Notes on a Movement for Social Change*, 2 Yale Rev.L. & Soc.Action 300 (1972). But see Glazer, *On "Opening Up" the Suburbs*, *The Public Interest* 89 (1974). An interesting text in the field is Haar & Iatridis, *Housing the Poor in Suburbia: Public Policy at the Grass Roots* (1974) (hereinafter Haar).

5. See Haar, *supra* n.4 at 320.

6. None of the appellants has been refused the sale or rental of housing in New Castle, has any

interest in land within the town or has any connection with any plan or proposal to construct housing for them within the town. Appellant Evans concedes that since September, 1973, she has resided in "decent housing" in a public housing development, with "fine" space. (Her complaint alleging residence in substandard housing was filed August 8, 1973.) It is not claimed that the sewer or park projects will be operated discriminatorily.

7. As is recounted in Haar, *supra*, at 360-61, the State Urban Development Commission (UDC) had housing plans for nine of Westchester County's 18 towns, including New Castle.

By going into 9 of Westchester's 18 towns at once, [the UDC president] hoped to avoid putting any one local government on the spot. Instead he has found himself up against a coalition of private citizens and private officials attacking the agency on the issues of big government, local control, and home rule.

challenged federal agencies, in approving the grants in question, did very little by way of evaluating the Town's development policies or otherwise,⁸ to perform any allegedly affirmative duties required of them by Title VI and Title VIII respectively;⁹ the approval of each grant in question was based solely on its internal merits (as to which there is no dispute, that is, no claim that either the sewer system or recreation area will be administered discriminatorily).

Assuming these underlying facts, we first face the question whether appellants are arguably within the zone of interests protected by the statutes, that is, whether

United Towns for Home Rule was formed by several dozen residents from three of the northern Westchester towns three days before the UDC formally announced its plan.

"What we are saying to the UDC," says Stuart Greene of New Castle, the organization's president, "is, We have not been consulted, you do not have our consent. If we want New York City to move into New Castle, we'll tell you."

Governor Rockefeller and Edward J. Logue, president of the State Urban Development Corporation, have apparently decided to defer the UDC's building plans in Westchester County for four months to give the nine towns involved a chance to come up with multi-family housing plans of their own. (*The New York Times*, September 26, 1972.)

The chairman of United Towns for Home Rule, the group that has led the opposition to the state Urban Development Corporation's housing plans in Westchester County, announced yesterday that he was resigning because others in the group's leadership wanted to take it off a present course he characterized as 'moderate.'

In an interview last July, Chairman Greene, a Harvard-educated lawyer, had said he feared that race prejudice rather than the philosophy of local home rule might emerge as the dominant theme in the anti-UDC protest. "The minute I lose a vote to a redneck, I quit," he said then.

Asked whether the events he feared had in fact come to pass, he said, "Yes." (*The New York Times*, October 10, 1972.)

The foregoing Times excerpts were quoted in Haar, *supra* n.4 at 360-61.

8. The HUD "rating sheet" for the preliminary application for the sewer grant here does carry some points for, e. g., the "Percent of housing in project area that will be accessible on a nondiscriminatory basis to families and individuals with low and moderate incomes," but there appears to be no evaluation of the overall

there is a viable claim that affirmative duties are imposed upon these federal agencies by Titles VI and VIII which would require them to take some action, not taken here, on behalf of county residents such as withholding otherwise proper grants. Absent such an arguable claim of affirmative duties owed to appellants, they are not within any zone of statutory protection. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Put another way, we must consider whether either of these agencies is alleged to have "consciously and expressly adopted a general policy

residential segregation policies of the community. It is a matter of defense on the merits, on which we express no opinion, whether the agencies in fact performed their affirmative duties; for our purposes it is enough if a viable claim of nonperformance is made.

9. The project approvals here came after President Nixon's 8,000 word policy statement concerning equal housing opportunity on June 11, 1971, in the course of which he declared that his administration would "not attempt to impose federally assisted housing upon any community." See Haar, *supra* n.4 at 319, 321-22. Cf. *N.Y. Times*, Dec. 21, 1970, at 1, col. 1, regarding Dayton, Ohio:

The officials [of Dayton], most of whom are Republicans, are worried about how much support they will receive from Washington. They believe the plan fits the philosophy expressed repeatedly by George Romney, Secretary of Housing and Urban Development, but they are disturbed by President Nixon's news conference statement last week that "forced integration of the suburbs is not in the national interests."

The Dayton plan, they say, is voluntary, not forced, but one of the factors that brought its acceptance was the belief that H.U.D. would use Federal grants in a way that would encourage open communities.

"If political pressures build up so that the suburbs can continue to flout low and moderate income housing and still get their money from Washington there is little we can do," said one official.

Further, the development here illustrates what is involved in the housing controversy that has been under way in the national government. Plans by the Department of Housing and Urban Development to make a strong stand for open communities in the administration of Federal grants have been questioned by Attorney General John N. Mitchell and the White House.

[of nonenforcement] which [is] in effect an abdication of its statutory duty." *Adams v. Richardson*, 156 U.S.App.D.C. 267, 480 F.2d 1159, 1162 (1973) (en banc, per curiam) (ordering HEW to take affirmative action to end segregation in ten states' public educational institutions receiving federal funds, at suit of black "students, citizens and taxpayers"). We think such a viable claim is clearly made out under the express language of the Acts, nn. 1 and 2 *supra*, the legislative history and the case law.

Title VI requires effectuation of § 2000d by agencies "empowered to extend Federal financial assistance to any program or activity, by way of grant" 42 U.S.C. § 2000d-1. Title VIII requires administration of housing and urban development programs and activities in all agencies "affirmatively to further the purposes" of the Act, as expressed in 42 U.S.C. § 3601, n.2 *supra*.¹⁰ It may be that, as the federal appellees suggest, because Title VI is somewhat limited in remedy, it is not so much involved, although this is a question ultimately on the merits; Title VI contains language in its so-called "pinpoint provision" that limits the power of the agency to

10. Arguably, the fact that the grants are made to a community which is *near* an urban area would not necessarily make them grants relating to "urban development," since in an era of superhighways and jet travel every community is in a real sense near an urban area. Title VIII, 42 U.S.C. § 3608(c), requires only that the agencies "administer their programs and activities relating to housing and urban development" (emphasis added) affirmatively to further fair housing. Similarly, 42 U.S.C. § 3608(d)(5) specifically requires HUD so to administer its programs and activities "relating to housing and urban development" Arguably neither the HUD grant here nor the BOR recreation grant is for a program relating to housing or to urban development.

We are aided here, however, by the interpretation of Title VIII by HUD itself, one which is entitled to substantial weight. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). HUD has formally stated as recently as October, 1972, that the affirmative action requirements do extend to grants for sewer installation such as here involved:

A substantial number of programs are subject to these affirmative provisions including those relating to urban renewal, model cities, grants for sewer and water installation,

terminate funding "to the particular program, or part thereof, in which such [discrimination] has been so found." 42 U.S.C. § 2000d-1, n.1 *supra*. See *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972) (HUD could release Model Cities funds to city independent of city housing authority's discriminatory site selection and tenant assignment procedures). See 86 Harv.L.Rev. 427 (1972).

But the same limitation or "pinpoint provision" does not apply to Title VIII. The legislative history of Title VIII is indicative of its scope. In introducing the legislation Senator Mondale referred to the

sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credit and credit guarantees.

Traditionally the American Government has been more than neutral on this

roads, schools and other public facilities relating to urban development.

U. S. Dep't of Housing and Urban Development, Historical Overview—Equal Opportunity in Housing, quoted in P-H Equal Opportunity in Housing ¶ 2301, at 2316 (emphasis added). The HUD regional administrator stated in his deposition that the Water and Sewer Program was subject to Title VIII requirements. This explains the rating or selection system which, as he said, "did give extra points to those communities with open housing policies."

The same might not be said of the BOR grant which was from the Land and Water Conservation Fund, n.3 *supra*. A grant made under that Act would not necessarily be a "housing" or "urban development" grant under Title VIII. But BOR itself considers New Castle an urban area, both as having a population of over 2,500 and as a satellite community. And BOR's Regional Director demonstrated the nexus which appellants urge, in his deposition that "existing housing patterns and desirable housing patterns ought to be a factor in the planning process in assessing [recreation] needs and we attempt to encourage consideration of all community needs and not just to leave ourselves merely concerned with recreation, because it's important to the fabric of this system."

issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color.

114 Cong.Rec. 2278 (1968).

So too Representative Celler said: "The purpose or 'end' of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettos" 114 Cong.Rec. 9563 (1968).

The cases relating to duties created by Titles VI and VIII include *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Brookhaven Housing Coalition v. Kunzig*, 341 F.Supp. 1026 (E.D.N.Y.1972); *Garrett v. City of Hamtramck*, 335 F.Supp. 16 (E.D. Mich.1971). See also *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973). The Third Circuit held in *Shannon, supra*, that HUD could not approve a change in an urban renewal plan (from "owner occupied" to "rent supplement" dwellings) without considering under the affirmative duty requirements of Titles VI and VIII whether "the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial discrimination." 436 F.2d at 822. So holding, the court said that "Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." 436 F.2d at 821. Clearly the federal government, to the extent it is in the business of granting housing and development funds to communities, is in a central position to exert influence upon, or against, concentration of minority groups in limited areas. As put in dictum by Mr. Justice Stewart in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), Title VIII at least is "a detailed housing law, applicable to a broad range of discriminato-

ry practices and enforceable by a complete arsenal of federal authority." Here appellants claim no influence was exerted; the housing law remained unenforced.

We must not only be aware of, we must be guided by the teaching of *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1972), a case involving the question whether complaining tenants were within the class of persons expressly entitled to use under § 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a), that in connection with fair housing litigation "the main generating force must be private suits . . ." and that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns' [quoting Senator Mondale]." So, too, the Court has advised us that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973), citing *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. at 212, 93 S.Ct. 364. (White, J., concurring). The limitation on this is that there must be an "indication that invasion of the statutory right has occurred or is likely to occur." *O'Shea v. Littleton*, 414 U.S. 488, 494 n.2, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). Here the "statutory right" is to have programs and activities "relating to housing and urban development" administered in furtherance of the fair housing policy. That right is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered.

We are satisfied, then, that the first of the two prongs of the test of standing is met; appellants are arguably within the zone of interests protected by Titles VI and VIII. The inaction on the part of the federal agencies here may have created a breach of their affirmative duties under these Acts and these Acts were designed to protect people such as these appellants who continue to live in ghettoized communities in the New York City metropolitan area.

Title VI protects every person in the United States from discrimination in applicable projects, and Title VIII seeks to ensure fair housing throughout the United States. 42 U.S.C. §§ 2000d, 3608, nn. 1 and 2 *supra*.

Have, however, the appellants demonstrated a nexus between their injury (it is postulated in the opinion of the district court that "ghetto living conditions are a very real and very serious 'injury'") and the claim of omission of federal civil rights enforcement with respect to the New Castle community development grants? That is, is there asserted an "injury in fact" to these appellants? If we were to look, as the appellees and intervenor would have us look, solely toward New Castle's housing and land-use policies, we would have to answer in the negative, if for no other reason than that a recent decision of this court, *Warth v. Seldin*, 495 F.2d 1187 (2d Cir.), *cert. granted*, 419 U.S. 823, 95 S.Ct. 40, 42 L.Ed.2d 47 (1974), would require us to do so.¹¹ In this respect, appellants have no connection whatsoever with New Castle; there is no showing that they would even try to live in New Castle.

But the gist of appellants' complaint is the failure of HUD and BOR to implement Title VIII, the fair housing law, an act which was intended to change the functions of federal grant programs the history of which, as Senator Mondale's quoted remarks suggest, reinforced existing, if not created new, patterns of racial segregation.¹² In this instance appellants allege injury from appellees' allocation of funds to New Castle in violation of Titles VI and VIII which contributes to the perpetuation of appellants' living patterns in the New York City metropolitan area.

Here, then, are agencies with an affirmative duty to encourage fair housing. Allocation of grants without assessing their im-

pact on integration not only may maintain the status quo of living patterns, resulting in injury to those who must continue to live in ghettos, but may also increase the disparity between living styles by supporting "white enclaves" while diverting funds which otherwise would have been used to alleviate ghettoization. In *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), plaintiffs alleged that the Interstate Commerce Commission's failure to suspend increased freight rates would discourage use of recycled products to the detriment of the environment which they enjoyed. Such omission, they claimed, violated the ICC's duties under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C). The Court found those plaintiffs aggrieved within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 702. *Id.* at 685, 93 S.Ct. 2405. The Court also held that

To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

Id. at 688, 93 S.Ct. at 2416. As in *SCRAP* we have plaintiffs injured in fact by administrative inaction. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966). *Cf. Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970). This is sufficient to give plaintiffs standing to challenge administrative violations of statutory duties. This case is distinguishable from the recent Supreme Court cases so heavily relied upon in Judge Moore's dissent,¹³ in which standing was

tion"); U. S. Comm'n on Civil Rights, *Equal Opportunity in Suburbia* 43 (July 1974).

11. *Warth* held that "potential residents" of a community lacked standing to challenge its exclusionary zoning policies.

12. See *Haar*, *supra* n. 4 at 338 (mortgage insurance and aid to highways as examples of "federal funds . . . partly responsible for present residential socio-economic segrega-

13. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (constitutional challenge to

denied to plaintiffs bringing constitutional challenges to statutes since they contain an underlying, if not articulated, minor premise that Congress cannot enact a statute conferring standing to bring a constitutional challenge. See Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1380-83 (1973). But where Congress has created a duty, Congress can declare that anyone aggrieved can enforce the corollary right. Again, standing is conceptually broader where a statutory duty has been violated than when prosecutorial or judicial discretion is challenged, since there is no statute conferring review of such actions.¹⁴

So that our decision may be very clearly understood, we hold only that appellants have standing as to the federal agencies to challenge the particular grants in question. We do not do so on the basis that they have a sufficient connection with the community to or for the benefit of which the grants are made. We do so purely and simply because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development. The grants here involved, made to an urban community, or one that is satellite to a metropolitan area of which appellants are residents, are so related. *United States v. SCRAP*, *supra*; *Trafficante v. Metropolitan Life Insurance Co.*, *supra*; *Adams v. Richardson*, *supra*.

My brethren are in accord that the complaint against Tri-State must be dismissed. In stating my dissenting view, I note that while Tri-State is an interstate body, both corporate and politic, serving as a common agency of Connecticut, New Jersey and

New York, created by compact,¹⁵ it has been designated as the areawide clearing-house for review of applications for federal aid to assure conformance with regional comprehensive plans, a designation which occurs under Circular A-95, promulgated by the Office of Management and Budget, see 38 Fed.Reg. 228 (1973), to implement the Demonstration Cities and Metropolitan Development Program Act, 42 U.S.C. § 3334, and the Intergovernmental Cooperation Act, 42 U.S.C. § 4231. The latter commands consideration of impact of the proposed program upon housing and human resources development. 42 U.S.C. § 4231(c). The A-95 Circular specifically calls for comment on the "civil rights aspect of the project," ¶ 3(d), and "[t]he extent to which the project contributes to more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups." ¶ 5(d).

It is true that all that Tri-State allegedly did here was to say that the proposed grants had no "regional significance." But it seems to me that appellants are precisely those minority persons who are disadvantaged by unbalanced "patterns of settlement and delivery of services."

Judgment reversed and remanded as to James T. Lynn, the Department of Housing and Urban Development and the Bureau of Outdoor Recreation of the Department of the Interior; judgment affirmed as to appellee Tri-State Regional Planning Commission.

MOORE, Circuit Judge (dissenting):

Essentially there is presented in this litigation the question of the extent to which, at the behest of the plaintiffs, the judicial

act permitting CIA not to disclose all its expenditures). Cf. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (no standing to challenge Congressmen's reserve statute as violative of the incompatibility clause).

14. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (no standing to challenge bond-setting, sentencing and jury fee practices as violative of 42 U.S.C. §§ 1981-83, 1985); *Linda R. S. v. Richard D.*, 410 U.S. 614,

93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) (no standing to compel prosecution of the father of plaintiff's illegitimate child for nonsupport).

15. Conn. Public Acts, 1965, P.A. 413; Laws of N.J., 1965, c. 12; Laws of N.Y., 1965, c. 413. The Compact was amended in 1972 to expand Tri-State's role to embrace responsibility for comprehensive planning for the compact region, Conn. Public Acts, 1971, P.A. 450; Laws of N.J., 1971, c. 161; Laws of N.Y., 1971, c. 333.

branch of our constitutional government can override, or veto the exercise of, discretionary judgments made by the executive and legislative branches in connection with grants of federal funds made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102 (1972) and the Outdoor Recreation Programs Act, 16 U.S.C. § 4601 (1963). Obviously an abstract answer cannot be given, as it were, in a vacuum. Hence the facts essential to a resolution of this controversy must be analyzed with great particularity. In short, who are the plaintiffs, what relief do they seek, what is the legal basis for their alleged grievance, who are the defendants, what wrongs have they allegedly committed and finally wherein did the trial court commit error in the judgment appealed from?

THE PLAINTIFFS

Plaintiffs describe themselves as Black residents, respectively, of the Town of Peekskill, the City of Mount Vernon, the City of White Plains and the Town of Ossining, all in Westchester County, who (with the exception of the plaintiff Evans) express a desire to live in the Town of New Castle, also in the same County, but profess inability to do so because of New Castle's alleged "discriminatory land use practices."¹

THE DEFENDANTS

The defendants are James T. Lynn, as Secretary of the Department of Housing and Urban Development (HUD); Joseph D.

Monticciolo, Acting Area Director of HUD (New York); S. William Green, Regional Administrator of HUD; HUD; Douglas Carroll, as Director of Tri-State Regional Planning Commission (Tri-State); Tri-State; Rogers C. B. Morton, as Secretary of the Department of the Interior (Interior); James A. Watt, as Director of the Bureau of Outdoor Recreation (BOR) of Interior; and Interior.

THE COMPLAINT

The King-Greeley Sewer District Grant

The complaint, in substance, alleges that New Castle in 1969 determined to install in the Chappaqua section² of New Castle a sanitary sewer system. For this purpose it created the King-Greeley sewer district.³ New Castle thereafter made an application to HUD for federal financing of the project.⁴ "HUD was specifically notified that black and Spanish-speaking persons and all other persons of low income would be denied the opportunity to benefit from Federal funding of the King-Greeley sewer project by virtue of the fact that New Castle through its housing and zoning laws prevents the development of low and moderate income housing." (Complaint, par. 21.) Nevertheless HUD granted \$358,000 for the project.

The emphasis of the complaint is on New Castle's alleged housing, zoning and land use policies. Neither New Castle nor King-Greeley were named as defendants.⁵ Plaintiffs seek indirectly to obtain their objective not by a frontal attack on New Castle on the theory of unconstitutional zoning⁶ but

1. Plaintiff Brooks, Jr., merely wishes to move to "safe and sanitary housing in the County which he can afford."
2. Hamlet of Chappaqua.
3. King-Greeley was organized under the New York Town Law (McKinney 1965).
4. The application in the name of "King-Greeley Sanitary Sewer District," dated January 9, 1972, was submitted to HUD.
5. Their presence in the case is as subsequent intervenors.

6. King-Greeley has no zoning authority or powers. In *Warth v. Seldin*, 495 F.2d 1187 (2d Cir.), cert. granted, 419 U.S. 823, 95 S.Ct. 40, 42 L.Ed.2d 47 (1974), this court was faced with a direct (not oblique, as here) attack on the zoning ordinances of the town of Penfield, a suburb of Rochester. There builders had been denied the opportunity to construct multi-family housing in Penfield. The plaintiffs claimed that Penfield's zoning ordinances were unconstitutional because they barred low and middle income persons, especially members of racial minority groups, from residing in Penfield. After reviewing *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Association of Data Processing Service Organizations, Inc. v.*

by an oblique attack on HUD for failing, in making the sewer grant, "to affirmatively promote fair and suitable housing irrespective of race, color, creed, or national origin pursuant to 42 U.S.C. 3608(d)(5)." (Complaint, par. 36, First Cause of Action); and that HUD by the grant did "assist and encourage New Castle in its practice of racial discrimination" and denying to plaintiffs "their right to participate in the receipt of Federal benefits." (Complaint, par. 37, Second Cause of Action.)

Plaintiffs assert that they "are Black citizens suffering from a lack of fair housing opportunity in the County in which they reside—" (Brief, p. 23) and attribute this suffering to the agencies vested by Congress with the power to administer and allot the financial grants made available by Congress in alleging that "they [the agencies] have neglected to administer the civil rights requirements of the community development assistance programs to promote an increased supply of integrated housing" (Brief, p. 23) and that "[t]he housing and land-use policies of New Castle are certainly an effective measure of the extent to which HUD and BOR have violated their independent civil rights obligations." (Brief, p. 25.) Plaintiffs would have the judiciary focus by means of this litigation on "the specific and nationwide abdication by HUD and BOR of their statutory civil rights obligations, as reflected by their failure to engage in any meaningful civil rights review of the New Castle applications for federal community development grants." (Brief, p. 25.)

The Turner Swamp Grant

In 1971 New Castle proposed to acquire some 35 acres of land consisting largely of a bog or marsh area. New Castle requested Federal aid for this Open Space and Recrea-

tion project. A review was made by the requisite agencies, Tri-State, Westchester's Department of Planning and appropriate sub-regional planning agencies and municipalities. Tri-State classified the project as "one of non-regional significance." After an inspection by an inspector of BOR who reported that the site ("almost entirely marsh and bog") seemed "to provide excellent wildlife habitat and the proposed impoundment should enhance this quality," a grant (approximately one-half of the estimated cost of \$115,000) was made by Interior. Tri-State characterized the area as "a highly suitable conservation area for use as a managed wildlife area, where a varied wildlife population already exists and needs only to be encouraged." (Tri-State Appendix 11.)

THE PROCEEDINGS BELOW

On September 13, 1973, the defendants, the Secretaries of HUD and Interior and certain Directors of various divisions thereof moved to dismiss the complaint pursuant to Rules 12(b)(1) and (6), Fed.R.Civ.P. An affidavit of an Assistant United States Attorney pointed to the alleged weakness of the complaint by stating that plaintiffs made no allegation therein that either the Sewer District or the Turner Swamp would be in any way discriminatory or would not serve all residents equally "black, or white, rich or poor."

On October 9, 1973 plaintiffs moved for a preliminary injunction enjoining HUD from disbursing any funds for the King-Greeley sewer district and Interior from disbursing funds for the acquisition of the Turner Swamp.

The trial court, believing that it could not adequately pass upon the issues raised by both motions without a record showing what HUD and BOR had done prior to

cases, this court concluded that to grant injunctive relief or to make a declaration that zoning was unconstitutional upon the facts presented would be "too abstract, conjectural and hypothetical to establish an Article III case or controversy" (p. 1193) and affirmed "on the ground that appellants lack standing." (p. 1189).

Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972); and other

approving the grants, directed that the administrative files of each Department relating to the grants in question be made available to the plaintiffs and that the federal administration officials involved be produced for depositions.

Accordingly, during November 1973 the depositions of S. William Green, Regional Administrator (HUD); Gerald V. Cruise, Program Manager (HUD); Susan Alem, Resources Development Officer (HUD); Robert E. Mendoza, Metropolitan Development representative (HUD); Bernard C. Fagan, Outdoor Recreation Planner (BOR); and Maurice D. Arnold, Regional Director (BOR) were taken. Various exhibits were introduced.

Prior to decision and by letter dated March 9, 1974, New Castle and King-Greeley sought to intervene. The deposition of the plaintiff Evans was thereafter taken.

On April 5, 1974, many of the key factual issues were resolved by a Stipulation of Facts entered into (by counsel) by the plaintiffs and New Castle (King-Greeley). The substance of the stipulation was that none of the plaintiffs had "looked for housing for himself or his family in the Town of New Castle"; that no plaintiff or the town of his residence had been deprived of the federal funds granted as herein described; that plaintiffs had no information to believe that non-residents of New Castle would be refused admission to the proposed park (Turner Swamp) for any reason including race, creed, color or income; that no claim is made that persons residing in the King-Greeley district will be denied use of the sewer for reasons of race, creed, color or income; and that there is no claim that the Turner Swamp area has been utilized for low or moderate multi-family housing.

Upon this stipulation and lengthy affidavits with exhibits attached, the deposition of the plaintiff Evans, New Castle and King-Greeley, joined the federal defendants' motion to dismiss.

Tri-State had also moved to dismiss pursuant to Rule 12(b)(1), (2) and (6), an attorney affidavit accompanying the motion,

stating that it was "upon grounds of sovereign immunity". Tri-State had been formed pursuant to an Interstate Compact (New York, New Jersey and Connecticut) wherein in Article IV, sec. 3 it is declared that "It [the Commission] shall enjoy the sovereign immunity of the party states and may not be sued in any court or tribunal whatsoever;"

THE OPINION BELOW

As a preamble, in effect, to the opinion, the court noted that the plaintiffs had been "accorded a wide opportunity to make a factual determination of the New Castle applications and the civil rights enforcement procedures utilized by the federal defendants." Equally the defendants "had an opportunity to elicit the facts concerning the interest of the plaintiffs." The court concluded that the "legal issue of standing raised by the motions, is now cast in sharp relief against this well-developed factual background."

The court then turned to the threshold and, in its opinion, decisive issue, i. e., "whether plaintiffs have standing to bring this suit." Standing was then tested by "the two-pronged test" namely, have the plaintiffs suffered or will they suffer an "injury in fact" and are they "within the zone of interests protected by the relevant statute." The court was also mindful of the necessity that "litigants maintain a personal stake in the outcome of the controversies they present." *DeFunis v. Odegaard*, 416 U.S. 324, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

From the proof submitted, the court concluded that "Plaintiffs do not, and apparently cannot, allege that they will suffer any injury from the grants that have been made by the agencies," which grants clearly insure that New Castle must not discriminatorily administer the sewer or swamp projects. (See "Assurance of Compliance" of HUD and BOR). Accordingly, the court denied plaintiffs' motion for an injunction and dismissed the complaint for lack of jurisdiction.

I

Before the motions were finally submitted to the court for decision, they had acquired somewhat of a hybrid character. The original government defendants' motion to dismiss pursuant to Rule 12(b)(1) and (6), Fed.R.Civ.P., was supported by a five-page affidavit setting forth facts. Plaintiffs' motion for a preliminary injunction was based on two lengthy affidavits. Tri-State's motion was supported by an affidavit and New Castle-King-Greeley's motion by affidavits of 19 pages and 7 pages plus exhibits. The motion to dismiss thus assumed the status of a motion for summary judgment which in decision the court restricted to the issue of standing. However, only by this factual development was the court able to "cast [this issue] in sharp relief." For purposes of appellate review, "standing" may be assumed to be the sole issue to be determined in light of all the facts developed by the trial court in aid of such determination.

II

Prior to embarking upon a discussion of how the Supreme Court has defined, and granted or denied, jurisdictional standing, it would be well to capsule the nature of this action in terms of plaintiffs' objectives. First, the negative. They do not claim that they have been denied housing or land purchase in New Castle because of color. They do not seek to overturn the New Castle's zoning ordinances as unconstitutional. They do not assert that the funds appropriated will deprive any low-cost housing project thereof. They do not claim that

there are any discriminatory features in the sewer and swamp grants.

Affirmatively what they seek is to prevent HUD and BOR from using federal funds (1) for aid in constructing a sewer in a small densely populated section of the Town of New Castle where neither housing or zoning are in question because the area is already well built up on quarter and half acre plots⁷ which area is badly in need of sewers for reasons of health;⁸ and (2) from acquiring a swamp to protect the environmental quality of the area by preserving open spaces for a wildlife sanctuary and for educational purposes, the very goal and concern of so much of our current legislation.

Another pertinent inquiry at this stage is: what would be the result of success for plaintiffs in this litigation? Primarily it would be to prevent their fellow-citizens who are as much in need of sewers as they claim to be in need of housing from having sanitary sewers and a wildlife sanctuary or park, thus preserving fast-shrinking open spaces. But a far more dangerous result would be the establishment of a principle that the judgment and discretion exercised by the executive and legislative branches of government can be examined and questioned (or even overturned) by any citizen, aided by the judiciary, to determine whether the decision (such as HUD's and BOR's here) was to their liking. In short, all administrative agencies will have to make their decisions with the knowledge that Big Brother⁹ in the guise of a private attorney-general is peering over their respective administrative shoulders.

In sum, plaintiffs, in a suit challenging only a sewer and a park, seek by an oblique

7. Tri-State Appendix 4. "The area is almost entirely developed with existing residential and business uses . . . the establishment of sewers in the King-Greeley Sewer District area will not alter, or offer the opportunity to alter, the range of densities proposed for residential development, since the area is already substantially developed with single-family homes that are of good quality and have a considerable period of useful life remaining." Letter, December 28, 1971, Commissioner of Westchester County Department of Planning to New Castle Town Engineer. Tri-State Appendix 29.

8. "[T]he extension of sewers into the service area will greatly improve the environmental and public health aspects of this central area of your town . . . [and is an] improvement of the highest priority, and one which should receive every favorable consideration for Federal aid."

9. G. Orwell, 1984, written in 1949 as a fantasy. Now with only nine years remaining to stave off the prophecy, the date is becoming dangerously close.

coercive proceeding to have this court, in effect, direct HUD to provide more housing throughout the nation. This conclusion is well-illustrated by their argument that "the lack of federal administrative pressure on New Castle to encourage fair housing opportunity within its borders through local housing and community development policy directly and materially contributes to growing patterns of racial segregation in Westchester County." (Appl't's Brief, p. 39).

In fairness to HUD and BOR they are entitled to have set forth what they did before making the grants in question. No claim is made that any project discrimination exists as to the King-Greeley or Turner Swamp projects. Title VI, 42 U.S.C. § 2000d. HUD also attempted to follow the requirements of Title VIII, 42 U.S.C. § 3601 et seq., albeit the loss of the original rating sheet required reconstruction and there were differences of opinion within the Department. Furthermore, the sewer project had been approved by the appropriate County and State departments. Likewise, as to the Turner Swamp, Interior through BOR and the State Liaison Officer had rated the project as qualified for a grant.

III

The guiding principles of law applicable to the proper decision here are to be found in Supreme Court's recent decision in *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). There, as here, an injunction was sought on the basis that the defendants "have engaged in and continue to engage in, a pattern or practice of conduct . . . all of which has deprived and continues to deprive plaintiffs of their constitutional rights." The Supreme Court gave a most explicit statement as to the essentials for "standing" stating:

"Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from some putatively illegal action before a federal court may assume jurisdiction.' . . . There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon

which the court so largely depends for illumination of difficult constitutional question.' . . . Nor is the principle different where statutory issues are raised. . . . Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" (pp. 493-94, 94 S.Ct. p. 675) (citations omitted).

Within the year the Supreme Court has again reaffirmed its views as to standing in *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 and *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (both decided June 25, 1974). In these recent decisions the Court expressed its opinion as to the effect of its former (although also recent) decisions defining standing. Since these former decisions are heavily relied upon by the majority, an analysis of the June 25, 1974 decisions and some of the preceding decisions should suffice to demonstrate that the majority opinion cannot be reconciled with them.

In *Schlesinger* the Court "recognized the continued vitality" of *Ex parte Lévit*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937) (p. 220, 94 S.Ct. 2925), and reaffirmed that decision, holding that there must be a concrete injury "actual or threatened", namely, "a particular injury caused by the action challenged as unlawful"—in short, a "particular injury" and a "personal stake." This concrete injury "is especially important when the relief sought produces a confrontation with one of the coordinate branches of the Government;" and "the relief sought would, in practical effect, bring about conflict with two coordinate branches." (p. 222, 94 S.Ct. p. 2932.) What the plaintiffs seek to achieve here would indeed "distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government

by injunction.' (p. 222, 94 S.Ct. p. 2933). In holding that there was no citizen standing in *Schlesinger*, the Court noted the restrictive nature of *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) ("private competitive injury"), and *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) ("individual enjoyment of certain natural resources impaired").

In *Richardson*, the Court observed that there is a modern tendency to call upon the courts to solve all problems of society but adhered to the "personal stake" requirement, stating:

"As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than in any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' . . . in short, something more than 'generalized grievances,' . . ." (pp. 179-80, 94 S.Ct. p. 2948) (citations omitted).

The concern of Mr. Justice Powell regarding "the expansion of judicial power" should well be a worry here. In his concurrence he wrote:

"Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing an unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the lifetime tenured branch [the judiciary] and the representative branches of government will not, in the long run, be beneficial to either." (p. 188, 94 S.Ct. p. 2952) (footnote omitted).

It would be in the Justice's opinion, as it is in mine, highly inconsistent "if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch." (p. 188, 94 S.Ct. p. 2952) (footnote omitted). "Unrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government." (p. 189, 94 S.Ct. p. 2952).

In the same vein, Mr. Justice Powell commented that "recourse to the federal courts [where the Federal Government has allegedly been unresponsive to recognize needs or serious inequities in our society] has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform." (p. 191, 94 S.Ct. p. 2953). But he observed "how often and how unequivocally the Court [the Supreme Court] has expressed its antipathy to efforts to convert the judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." (citing cases) (p. 192, 94 S.Ct. p. 2954).

In *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), the Sierra Club, whose members are interested in preserving woodlands and wildlife, in contrast to the destruction of forests and the construction of broad concrete highways, sought to enjoin the building of a vast resort and amusement center, including roadways, in the Mineral King Valley in California. The District Court had granted an injunction but the Court of Appeals reversed stating among other things that "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." 433 F.2d 24, 30 (9th Cir. 1970).

The Supreme Court affirmed the Court of Appeals, writing with particular perti-

nence to the litigation before us, at page 732, 92 S.Ct. at page 1364: "Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

Congress in the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI) clearly evidenced its intention to limit the question of discrimination to the *particular* program in issue. See 42 U.S.C. § 2000d-1. As previously mentioned, no discrimination is claimed in either program here, and thus Title VI cannot support the standing of these plaintiffs. Nor is the Civil Rights Act of 1968 any more applicable. Congress clearly stated its intent: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

The Court in *Sierra Club* continues with the principle that: The "injury in fact" test requires more than an injury to a cognizable interest. "It requires that the party seeking review be himself among the injured." (p. 735, 92 S.Ct. p. 1366). The Court would deny standing to those "individuals who seek to do no more than vindicate their own value preferences through the judicial process."

The consequences of any other result were pointed out as follows: "And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so." (pp. 739-40, 92 S.Ct. p. 1368).

In *United States v. SCRAP*, *supra*, the Court was dealing "simply with the pleadings in which appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected." (p. 689, 93 S.Ct. p. 2416) (footnote omitted). The Court could not

"say on these pleadings" that injury in fact could not be proven.

But in *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), the respondents' claim "simply stated, is that they disagree with the judgments made by the Executive Branch . . ." (p. 13, 92 S.Ct. p. 2325). On this subject the Court noted that: "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; . . ." (p. 15, 92 S.Ct. p. 2326). Accordingly the Court reversed a Court of Appeals decision which had reversed the District Court's denial of an injunction and dismissal of the complaint.

IV

THE MAJORITY OPINION

Court decisions should be made with an eye to, and with due regard to, the practical consequences thereof. The consequences of the majority's decision are that the residents of the Hamlet of Chappaqua will not have their much-needed sewer or park. And this, by court decree instigated by a group of plaintiffs who have no interest whatsoever in a King-Greeley sewer or a Turner Swamp park, neither of which projects admittedly has any discriminatory features. The majority states that "Here, then, are agencies with an affirmative duty to encourage fair housing." However, "fair housing" is not an issue in this case (if "case" it be). To say that plaintiffs' right to adequate housing "is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered" is a most illogical *non sequitur*. Equally illogical is it to say that the allocation of funds to New Castle "contributes to the perpetuation of [plaintiffs'] living patterns in the New York metropolitan area." \$358,000 and \$57,500 would scarcely suffice for a low-cost housing project.

Admitting that plaintiffs do not have "a sufficient connection with the community to or for the benefit of which the grants are made", the majority believes that it can

exert court coercion upon HUD and Interior as well as Tri-State "because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development." They then find that the grants "are so related."

V

TRI-STATE

Tri-State is not a federal agency. It has made its own independent appraisal of the King-Greeley sewer and Turner Swamp projects as of "non-regional significance." Accordingly, review of the projects was referred to the Westchester County Department of Planning. It scarcely befits the role of the federal judiciary to override and supersede the judgment of Tri-State in evaluating whether a sewer in a minute area of a town and a small wildlife park are of sufficient area concern as to call for Tri-State action and reaction. I find no error in Judge Pollack's dismissal of the complaint against Tri-State.

VI

In conclusion I cannot reconcile the majority's holding with the Supreme Court's decisions in *Sierra Club*, *O'Shea*, *Richardson* and *Schlesinger*, all of which support Judge Pollack's denial of a preliminary injunction and dismissal of the complaint. Accordingly, I dissent and would affirm Judge Pollack's order.

GURFEIN, Circuit Judge (concurring and dissenting):

I concur in Brother Oakes' thoughtful opinion holding that the plaintiffs have standing with respect to defendants HUD and BOR. I must add some words of caution, however, to explain my position. I believe that Judge Pollack's decision was based on a pragmatic view that the case itself, so far as injunctive relief against the grant of federal funds is concerned, may ultimately end in a mere spinning of wheels, for the plaintiffs may not have suffered sufficient "injury in fact" to enjoin

the federal grants. While Judge Oakes carefully notes that we are not deciding the merits, I would like to make my own position even clearer.

I would not hold that the plaintiffs necessarily have standing to seek injunctive relief against the Secretary of HUD and his assistants to restrain the grant of federal funds, for that involves the preliminary question of whether a determination of HUD to grant funds to New Castle is subject to judicial review and, if so, at whose instance, a matter we need not decide if we simply reverse the summary judgment. I would hold *only* that the plaintiffs are "adversely affected or aggrieved by agency action within the meaning of a relevant statute" under the Administrative Procedure Act, 5 U.S.C. § 702, to raise the question of whether the Secretary has failed to make the inquiries implied from his affirmative duty to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter," Pub.L. 90-284, Title VIII, § 808(e)(5), April 11, 1968, 42 U.S.C. § 3608(d)(5), without any consideration of the merits of the lawsuit. See *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

In 1968 Congress passed the "Fair Housing" Act prohibiting discrimination in the sale or rental of housing. Civil Rights Act of April 11, 1968, Pub.L. 90-284, Title VIII, § 801, 42 U.S.C. § 3601. It contains the general affirmative duty provision noted. 42 U.S.C. § 3608(d)(5).

The Supreme Court has not yet determined whether the affirmative duty goes beyond enforcement of the sale and rental provisions of the Fair Housing Act. Nor has it decided whether, in the absence of hearing and notice provisions like those contained in the Civil Rights Act of 1964, Congress intended that the federal courts should review HUD's policies in relation to grants under the Housing and Urban Development Act of 1965, with the power to issue injunctions against federal assistance to non-pinpointed programs which are not, in themselves, discriminatory.

I think that, in conformity with our national policy to eliminate the disgrace of racial discrimination, the plaintiffs should be heard to test whether HUD has done its duty in the premises. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), supports this result, as does *SCRAP*, *supra*.

Although the question is close, minority people fairly near the geographical area involved may be deemed "aggrieved" by agency inaction, at least in the general way that the environmentalist law students were injured by the inaction of the Interstate Commerce Commission in *United States v. SCRAP*, *supra*, or the class of black students in *Adams v. Richardson*, 156 U.S.App.D.C. 267, 480 F.2d 1159, 1162 (1973). The failure of the Executive Branch to enforce a statutory duty imposed on it may cause injury in fact to the class affected, even though, as Judge Oakes states, "no injury would exist without the statute." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). That does not mean, to be sure, that they can compel judicial review. In that sense, as Judge Oakes recognizes, standing and judicial review are discrete issues.

In cases raising issues of discrimination, as well as environmental considerations, all that conferring standing under the Administrative Procedure Act does is to let an Article III "case or controversy" be heard with the sharp adversity required. See *SCRAP*, *supra*.

The courts must still determine the extent, if any, of permissible federal coercion by the withholding of federal assistance. Cf. *Adams v. Richardson*, *supra*. That is why it is proper to allow standing to these plaintiffs so that they may raise, in a judicial context, what the obligations of HUD are and whether HUD has met them. We should be liberal in granting standing where the challenge is to alleged administrative failure to act in the face of an alleged statutory duty, particularly in a civ-

il rights case. As Judge Oakes notes, that is the meaning of *United States v. SCRAP*, *supra*. Cf. *Shannon v. HUD*, 436 F.2d 809 (3 Cir. 1970). In my view, a person may be an "aggrieved person" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702, to remedy administrative inaction without necessarily having standing for other relief. He may be aggrieved by HUD's failure to perform its statutory duty of inquiry, which is for his class benefit. He may not have been injured in fact sufficiently to coerce the executive agency to withhold funds.

On the standing to sue Tri-State I respectfully disagree with my brother Oakes. There must be some balancing of interests. To allow every denial of area significance to be reviewed by the courts, particularly at the instance of persons as remote from area considerations as these plaintiffs are, would simply invite a plethora of suits with a grave question of the ultimate judicial competence to solve them. Whether a sewer pipe in a town is a concern of a large area need not be litigated in the context of racial discrimination. It is better to dismiss the complaint against Tri-State now, as Judge Pollack did. In that respect I agree with Judge Moore though for somewhat different reasons.

Lastly, I must disassociate myself from my Brother Moore's statement that the issue is "the question of the extent to which, at the behest of the plaintiffs, the judicial branch of our constitutional government can override, or veto the exercise of, discretionary judgments made by the executive and legislative branches in connection with grants of federal funds made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102 (1972) and the Outdoor Recreation Programs Act, 16 U.S.C. § 4601 (1963)." When Congress imposed on the Secretary of HUD the affirmative duty to administer all "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter," 42 U.S.C. § 3608(d)(5), it did not mean that HUD could disregard that man-

date "in its discretion." In fact, HUD has adopted procedures to determine local racial policies in the case of the New Castle grant.

The case may well be a close case, but it is not out of the mainstream of court review of agency inaction in the face of a statutory duty. When Congress says federal funds shall not be used if certain conditions exist, the courts are often not without jurisdiction to review. The majority opinion does not mean that New Castle shall not have its sewer. If that should be the end result of the judicial process it will be only because Congress, not the courts, determined the national policy against the particular use of federal funds, which the courts were required to respect.

ON REHEARING EN BANC

Before KAUFMAN, Chief Judge, and MOORE, FEINBERG, MANSFIELD, MULLIGAN, OAKES, TIMBERS, GURFEIN, VAN GRAAFEILAND and MESKILL, Circuit Judges.

MOORE, Circuit Judge:

Some three weeks after a divided panel of this Court reversed Judge Pollack's dismissal of appellants' complaint¹ the Supreme Court announced its decision in *Warth v. Seldin*,² a case which originated in this Circuit.³ Thereupon the federal appellees urged the reconsideration of this case *en banc*,⁴ citing both the impact of *Warth* on the earlier panel holding, and the importance of that holding to principles of standing generally. A majority of the *en banc* panel felt similarly, and a rehearing was ordered on August 11, 1975, pursuant to F.R.App.P. 35(a). The appeal was submitted without further oral argument.

1. *Evans v. Lynn*, 376 F.Supp. 327 (S.D.N.Y. 1974), *rev'd*, 537 F.2d 579 (2d Cir. 1975). At the time the earlier opinions were announced, James T. Lynn was the Secretary of Housing and Urban Development. He has been succeeded by Carla A. Hills, who now appears as appellee of record pursuant to F.R.App.P. 43(c).

2. 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

In light of the Supreme Court's opinion in *Warth v. Seldin*, *supra*, and the many recent Supreme Court decisions on the subject of "standing"—or, more accurately, the lack thereof—referred to in the dissent from the original panel's decision, 537 F.2d 571, we now hold that the appellants lack standing to maintain this action because they have sustained no injury as a consequence of appellees' actions. Accordingly, we affirm the district court's dismissal of the complaint as to all appellees.⁵

I.

The facts, insofar as they bear on appellants' standing to sue, are substantially undisputed, and have been fully set forth in the earlier opinions and dissent. A brief summary will suffice at this point.

In 1969, the King-Greeley Sewer District ("District"), a special purpose district within the Town of New Castle ("Town") in Westchester County ("County"), sought federal aid from the Department of Housing and Urban Development ("HUD") for the construction of a sanitary sewer facility in the hamlet of Chappaqua. In 1972, the Town sought federal funds from the Department of Interior's Bureau of Outdoor Recreation ("BOR") in order to acquire Turner Swamp ("Turner") for preservation as a wildlife area and public park. Both of these grants were approved. Thereafter the Tri-State Regional Planning Council ("Tri-State"), a regional "clearinghouse" in the area for coordination and review of federal grants, declined to review the propriety of the grants.

Appellants—who do not dispute the need of Chappaqua's residents for a sewer or the desirability of preserving Turner for public

3. *Warth v. Seldin*, 495 F.2d 1187 (2d Cir., 1974). The Court's opinion, subsequently affirmed by the Supreme Court, n. 2 *supra*, was announced by Judge Hays and concurred in by Judges Moore and Timbers.

4. Appellee's petition was brought pursuant to F.R.App.P. 35(b).

5. The earlier panel's affirmance of the dismissal as to Tri-State Regional Planning Council is, of course, left undisturbed.

recreational use—filed an action in federal district court claiming that the grants amounted to support of the Town's primarily white, single-family housing pattern in violation of the federal government's affirmative duty to eliminate discrimination and encourage fair housing opportunities in the United States.⁶ Appellants allege that they are persons "aggrieved" by the action of the federal agencies and Tri-State within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702, and the 1968 Civil Rights Act, 42 U.S.C. § 3610(a) and (d). Standing to sue is asserted on the ground that appellants are low and moderate income individuals⁷ belonging to minority groups who have suffered, as a result of the federal agencies' "absence of meaningful civil rights enforcement",⁸ a lessening of "federal impetus"⁹ to encourage integration and fair housing in the County. Appellants make no specific allegations of damage.

Appellants do not reside in the Town. They make no claim that they have ever sought or been refused housing in the Town. They have no interest in any Town property, or connection with any past or proposed housing project in the Town. They do not allege that either of the challenged projects will discriminate against them. They make no claim that the federal funds were diverted from any actual or proposed housing project that could have

been of benefit to them. In short, they allege no specific, personal, adverse results whatsoever from the grants for sewer and park construction.¹⁰

II.

[1, 2] The aid of the federal courts is not freely available to all who seek it. Access to the courts is restricted by judicial discretion,¹¹ regulated by statute,¹² and subject to the overriding limitation¹³ of Article III of the Constitution that the federal courts decide only cases and controversies.¹⁴ The case and controversy requirement is a jurisdictional limitation which can be enlarged neither by act of Congress nor by the courts *sua sponte*. Because it is jurisdictional in nature and Constitutional in origin, it is a "threshold requirement"¹⁵ which must be satisfied before the federal court can take cognizance of any claim. As was recently stated by the Supreme Court in *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975):

The exercise of judicial power under Art. III of the Constitution *depends on* the existence of a case or controversy. As the Court noted in *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." *Its judgments must resolve "a*

6. Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and Title VIII of the 1968 Civil Rights Act, 42 U.S.C. § 3601, respectively.

7. These terms are nowhere defined in appellants' briefs or memoranda.

8. Appellants' brief on rehearing at 21.

9. *Ibid.*

10. On the contrary, Mrs. Evans has conceded that since September, 1973, she has resided in housing which is altogether satisfactory to her.

11. See, *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970).

12. *Ibid.*

13. *Id.*, citing *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

14. These two terms are used interchangeably; "controversy" is distinguishable from "case", if at all, in that it is generally held to embrace only civil actions. See C. Wright, *Federal Courts* § 2 (1970); cf. *United States v. Nixon*, 418 U.S. 683, 696-7, 94 S.Ct. 3090, 3102, 41 L.Ed.2d 1039 (1974).

15. In *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) the Supreme Court dismissed petitioners' complaint on the ground that it

"failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy." 414 U.S. at 493, 94 S.Ct. at 675 (emphasis supplied).

real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" Ibid, quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937). (Emphasis supplied).

[3, 4] The hallmark of a case or controversy is the presence of adverse interests between parties who have a substantial personal stake in the outcome of the litigation.¹⁶ Standing to sue, in its Constitutional sense, is the showing by a plaintiff

that his particular grievance meets this standard,¹⁷ the "essence"¹⁸ of which is the presence of "injury in fact"¹⁹ suffered by the plaintiff as a result of the defendant's actions.²⁰

[5] Mere interest in, or concern over, a prospective defendant's acts—no matter how deeply felt—is insufficient to demonstrate injury in fact.²¹ What must be shown is a "specific and perceptible harm"²²—a "concrete injury"²³ actually suffered by the particular plaintiff,²⁴ or else clearly imminent,²⁵ which is capable of resolution and redress in the federal courts.²⁶ Abstract or hypothetical injury is not enough:²⁷

16. In the well-known cases of *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), the Supreme Court framed the issue in the following manner:

"Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions? This is the gist of the question of standing."

See, also, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 217-218, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974); *Socialist Labor Party v. Gilligan*, 406 U.S. 585, 586-7, 92 S.Ct. 1716, 1718, 32 L.Ed.2d 317 (1972). Cf. *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 959-960, 22 L.Ed.2d 113 (1969).

17. "[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 151-2, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970), quoting *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968).

18. "[W]hatever else the 'case or controversy' requirement embodie[s], its essence is a requirement of 'injury in fact.'" *Schlesinger v. Reservists to Stop the War*, supra at 418 U.S. 218, 94 S.Ct. 2931, citing *Association of Data Processing Service Org., Inc. v. Camp*, supra at 397 U.S. 152, 90 S.Ct. 829.

19. Ibid.

20. See, *Flast v. Cohen*, supra, at 392 U.S. 102, 88 S.Ct. 1953-4; *Warth v. Seldin*, supra, at 422 U.S. 504-5, 95 S.Ct. 2208; *Linda R. S. v. Rich-*

ard D., 410 U.S. 614, 618, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1973).

21. *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972).

22. *United States v. SCRAP*, 412 U.S. 669, 689, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973).

23. *Schlesinger v. Reservists to Stop the War*, supra at 418 U.S. 222, 94 S.Ct. 2932.

24. *Sierra Club v. Morton*, supra at 405 U.S. 740, 92 S.Ct. 1368-9; *United States v. SCRAP*, at 412 U.S. 687, 93 S.Ct. 2415-6.

25. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974).

26. *Preiser v. Newkirk*, supra at 422 U.S. 401, 95 S.Ct. 2334.

27. See, *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971), wherein the Court, quoting *Aetna Life Ins. Co. v. Haworth*, supra at 300 U.S. 240-1, 57 S.Ct. 464, held that:

"To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" (quotation marks omitted and emphasis supplied).

See, also, *Schlesinger v. Reservists to Stop the War*, supra, at 418 U.S. 221-222, 94 S.Ct. at 2932, quoting from *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U.S. 151, 164, 35 S.Ct. 69, 59 L.Ed. 169 (1914); *DeFunis v. Odegaard*, 416

Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial. *United States v. SCRAP*, *supra*, at 412 U.S. 688-9, 93 S.Ct. at 2416 (emphasis supplied).

[6,7] While a particular statute may confer rights upon a party, it cannot abrogate the Constitutional requirement that a plaintiff *in fact* suffer some injury due to a breach of the law in order to maintain an action in the federal courts.²⁸ Whether or not a plaintiff falls within the "zone of interests"²⁹ protected by the statute—whether he can, in other words, rightfully assert whatever rights are granted by statute—is an entirely separate inquiry from the question of whether injury has been suffered *per se*. When it rejected the notion of "legal interest" as a test for determining standing to sue, the Supreme Court held in *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970):

The "legal interest" test goes to the merits. The question of standing is different. It concerns, *apart from the "case" or "controversy" test*, the question whether the interest sought to be protected by the complainant is arguably within U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974); and most recently, *Rizzo v. Goode*, 423 U.S. 362, 371-72, 96 S.Ct. 598, 604, 46 L.Ed.2d 561, 44 L.W. 4095, 4098 (1976).

28. See, *O'Shea v. Littleton*, *supra* at 414 U.S. 493-494, 94 S.Ct. 675; *Schlesinger v. Reservists to Stop the War*, *supra* at 418 U.S. 218, 94 S.Ct. 2931.

"We have previously noted that Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. But such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occurred or is likely to occur."

the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. 397 U.S. at 153, 90 S.Ct. at 830.

Recognition of the practical need for a "zone of interests" type determination was evidenced by the Court's comment, in the same case, that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."³⁰ However, as Chief Justice Burger subsequently made clear, such an inquiry does not supersede or in any way encroach upon the threshold determination of injury in fact.³¹

Although we there [referring to *Association of Data Processing Service Org., Inc. v. Camp*, *supra*] noted that the categories of judicially cognizable injury were being broadened, we have more recently stressed that the broadening of categories "is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972). And, in defining the nature of that injury, we have only recently stated flatly: "Abstract injury is not enough." *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 218, 94 S.Ct. 2925, 2931, 41 L.Ed.2d 706 (1974). (citation omitted; emphasis in original).

The Constitutional limitation imposed by the case or controversy requirement has

O'Shea v. Littleton, *supra* at 414 U.S. 493-4, n. 2, 94 S.Ct. 675 (quotation mark and citations omitted; emphasis supplied).

29. *Association of Data Processing Service Org., Inc. v. Camp*, *supra* at 397 U.S. 153, 90 S.Ct. 830.

30. *Ibid.* (emphasis supplied).

31. See, also, *Sierra Club v. Morton*, *supra* at 405 U.S. 733, n. 5, 92 S.Ct. 1365, wherein the Court, finding that the petitioner had suffered no injury in fact, did not reach the issues concerning the "zone of interests" under the statute.

been specifically applied to the "person aggrieved" language of section 810(a), 42 U.S.C., of the Civil Rights Act of 1968, on which appellants primarily rely to support their claims of standing. In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), the Supreme Court held that where housing discrimination was alleged, the language of § 810(a) reflected "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."³² The petitioners' standing to sue was upheld on the express ground that

Individual injury or injury in fact to petitioners, the ingredient found missing in Sierra Club v. Morton [supra] is alleged here. 409 U.S. at 209, 93 S.Ct. at 367 (emphasis supplied).

32. 409 U.S. at 209, 93 S.Ct. at 367 (quotation marks and citation omitted; emphasis supplied). See, also, *Rizzo v. Goode*, supra 423 U.S. at 370-71, 96 S.Ct. at 604, at 44 L.W. 4098, wherein the Court reached a similar conclusion respecting the right to allege deprivation of civil rights under 42 U.S.C. § 1983 (Civil Rights Act of 1871); and *Association of Data Processing Service Org., Inc. v. Camp*, supra at 397 U.S. 153-4, 90 S.Ct. 830, and *Sierra Club v. Morton*, supra at 405 U.S. 739, 92 S.Ct. 1368, wherein the Court held similarly respecting suits brought under Administrative Procedure Act § 702.

33. *Warth v. Seldin*, supra, 422 U.S. at 492-496, 95 S.Ct. at 2203-4.

34. Appellants have pleaded the violation of a federal statute as the basis for their action and their standing to sue. However, the alleged violation exists only because the grants were purportedly made to a locality which, through the maintenance of zoning laws, has preserved itself as an allegedly affluent white suburb which is inaccessible to the appellants. Their claims of damage flow—if at all—from the Town's exclusionary practices, not from the specific grant of federal aid. This is an indirect route to the same charge made more directly in *Warth*, to wit, an alleged exclusion from housing of their choice in a more integrated neighborhood.

We note that the appellants at bar are not the only plaintiffs who have attempted indirectly to attack local housing laws by pleading the violation of federal housing law. In *Cornelius v. City of Parma*, 374 F.Supp. 730 (N.D. Ohio 1974), aff'd 521 F.2d 1401 (6th Cir. 1975), cert. denied 424 U.S. 955, 96 S.Ct. 1430, 47 L.Ed.2d 360, 44 LW 3501 (1976), five assertedly low

III.

Any doubt that the appellants in this case have alleged only abstract injury which is constitutionally insufficient to sustain their standing to sue, has been resolved by the Supreme Court's decision in *Warth v. Seldin*, supra. *Warth* involved a Constitutional challenge to the zoning practices in the suburban town of Penfield, New York. Among the petitioners were individuals who asserted standing to sue on the basis of their status as low and moderate income individuals who were members of a minority group, and were suffering from the town's exclusionary pattern of housing which preserved it as a primarily white enclave of single-family dwellings³³—the same civil rights allegations which are made by appellants in the present case.³⁴

income black individuals residing outside the city of Parma joined with two white citizens of Parma and three organizations in charging that Parma's discriminatory housing practices—specifically, local ordinances prohibiting low income housing projects absent a referendum and establishing a height limitation for buildings—violated, *inter alia*, the Fair Housing Act of 1968, 42 U.S.C. § 3601; jurisdiction was asserted under 42 U.S.C. § 3612. The district court stated that

"A fair reading of the complaint indicates that its basic thrust is directed against Parma's adoption and implementation of the ordinances previously discussed in regard to the Government's suit. It is alleged that the City's conduct, in enacting and implementing these ordinances, was aimed at setting up barriers to exclude low and moderate income blacks and other minorities from living in the City. The ordinances are said to have the further effect of maintaining the virtually all-white character and image of Parma, depriving white residents of Parma of the benefits of an integrated community, discouraging prospective builders and sponsors of low-income housing from building within the City of Parma, interfering generally with federally assisted housing programs, and excluding blacks and other minorities from equal access to jobs in the Parma area as well as equal access to educational opportunities. The plaintiffs in *Cornelius* seek as relief a declaration that the ordinances are void and of no effect, an injunction against Parma and its agents from engaging in further discriminatory housing practices and affirmative remedial action.

* * * * *

"The challenged conduct of Parma in enacting the ordinances has not as yet

Writing for the Court, Mr. Justice Powell reiterated the primacy of Article III's requirement of injury in fact *irrespective* of any right of action granted by statute,³⁵ and concluded that the petitioners had failed to allege such injury. Because the Court's analysis bears so directly on the instant case, we quote at length from the Warth opinion.

[W]e turn first to the claims of Petitioners Ortiz, Reyes, Sinkler, and Broadnax, each of whom asserts standing as a person of low or moderate income and, coincidentally, as a member of a minority racial or ethnic group. We must assume, taking the allegations of the complaint as true, that Penfield's zoning ordinance and the pattern of enforcement by respondent officials have had the purpose and effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups. We also assume, for purposes here, that such intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded.

"But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they *personally have been injured*, not that injury has been suffered by other, unidentified

directly and immediately injured plaintiffs. No actual conflict has yet arisen between the rights of the low and moderate income plaintiffs and the actions of the defendants relative to these ordinances. *Indicative of the presence of abstract injury only is the fact that if the Court were to entertain this suit and on the merits declare the suspect ordinances invalid, this judicial action would not serve as the catalyst for the construction of the housing undeniably needed by plaintiffs.*" 374 F.Supp. at 733, 739 (emphasis supplied)

The district court held, as we hold here, that the asserted cause of action did not present a case or controversy. 374 F.Supp. at 739. The

members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the *requisite case or controversy between themselves personally and respondents*, "none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). See, e.g., *Bailey v. Patterson*, 369 U.S. 31, 32-33, 82 S.Ct. 549, 550-551, 7 L.Ed.2d 512 (1962).

In their complaint, petitioners alleged in conclusory terms that they are among the persons excluded by respondents' actions. None of them has ever resided in Penfield; each claims at least implicitly that he desires, or has desired, to do so. Each asserts, moreover, that he made some effort at some time, to locate housing in Penfield that was at once within his means and adequate for his family's needs. Each claims that his efforts proved fruitless. We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a *substantial probability* that they would have been able to purchase or lease in Penfield and

district court's holding was affirmed without opinion by the Court of Appeals, and *certiorari* was recently denied by the Supreme Court which apparently continues to adhere to the holding in *Warth v. Seldin*, *supra*.

35. " . . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."

422 U.S. at 501, 95 S.Ct. at 2206 (citation omitted; emphasis supplied).

that, if the court affords the relief requested, the asserted inability of petitioners will be removed. *Linda R. S. v. Richard D.*, *supra*.

We find the record devoid of the necessary allegations.

Petitioners here rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation *might* have been better had respondents acted otherwise, and *might* improve were the court to afford relief.

We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he *personally* would benefit in a *tangible* way from the courts' intervention. Absent the necessary allegations of *demonstrable, particularized injury*, there can be no confidence of a "real need to exercise the power of judicial review" or that relief can be framed "no [broader] than required by the precise facts to which the court's ruling would be applied." *Schlesinger v. Reservists Committee to Stop the War*, *supra*, 418 U.S., at 221-222, 94 S.Ct., at 2932." *Warth v. Seldin*, *supra*, at 422 U.S. 502-4, 507-8, 95 S.Ct. at 2207-8, 2209-10 (footnotes omitted; emphasis supplied in part; brackets in original).

[8] The same rationale applies with equal, if not greater, force to the case at bar. Here, appellants have failed to allege any facts whatsoever indicative of injury suffered by them as a result of the grants to the District and the Town. They do not claim, as did the petitioners in *Warth*, that they unsuccessfully sought housing in the Town, or that the Town arbitrarily rejected housing proposals of benefit to them. They claim only that, had the grants not been

approved, the monies could conceivably have gone to some other, as yet *totally imaginary* project in the County which *might* have had the result of making more housing available to them. This goes beyond even the realms of "remote possibility" which were rejected in *Warth*. It amounts to pure speculation and conjecture and, needless to say, it is completely inadequate to demonstrate the requisite injury under Article III.

We note that, as in *Warth*, the injunctive relief sought by the appellants here would not likely result in any improvement of their housing status. Indeed, since the appellants here do not allege that the grants deprived them of any actual housing opportunities—in contrast to the *Warth* petitioners, who claimed that they had been deprived of the benefits of at least two proposed housing developments—there is even less likelihood in this case that an injunction restraining the federal agencies would result in any betterment of appellants' housing status in the County. The link between the ill allegedly suffered and the remedy requested is so tenuous as to approach the non-existent.

IV.

The Supreme Court has warned repeatedly in the past of the hazards in straying from the Constitutional requirement of a case or controversy.³⁶ Absent adherence to the Constitutional mandate, courts become forums for the vindication of personal values and political preferences, usurping the legislative branch as the focus for public debate and lobby, and usurping as well the executive's primary responsibility for the implementation of federal law. Federal courts cannot, consistent with the Constitution, exercise their jurisdiction to vindicate litigants' chosen causes;³⁷ *they are empowered only to grant specific relief in response*

36. See, e. g., *North Carolina v. Rice*, *supra* at 404 U.S. 246, 92 S.Ct. 404; *Sierra Club v. Morton*, *supra* at 405 U.S. 732, n. 3, 92 S.Ct. 1365; *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201-2, 24 L.Ed.2d 214 (1969); *Flast v. Cohen*, *supra* at 392 U.S. 96, 88 S.Ct. 1950; cf.

Warth v. Seldin, *supra* at 422 U.S. 499-500, 95 S.Ct. 2205-6.

37. *United States v. SCRAP*, *supra* at 412 U.S. 687, 93 S.Ct. 2415-6.

to, and in order to remedy, a particularized showing of individual injury.³⁸

This is not the time, or especially the place, to attempt a general dissertation on judicial supervision of the functioning of administrative agencies. To guard against any such danger it may be tritely said today that the draftsmen of the Constitution in 1789 were not altogether unaware of little-changing human tendencies to endeavor to seize power. The well-defined role assigned to the judiciary is to be found in Article III of that Constitution. To avoid a possible tendency to seek declaratory judgments or advisory opinions on matters possibly hypothetical, the role of the courts under Article III is confined to passing upon an actual "case or controversy". Even within these restricted limits the courts over the years have not suffered from want of business.

Two recent decisions of the Supreme Court would seem to illustrate the continued vitality of Article III and the reluctance of that Court to become an arbiter of all human ills. They are *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), and *Hills v. Gautreaux*, — U.S. —, 96 S.Ct. 1538, 47 L.Ed.2d 792, 44 LW 4480 (1976). The Supreme Court in *Milliken* reversed the Court of Appeals' affirmation³⁹ of a multi-district desegregation order, on the grounds that the order constituted an impermissible—indeed, unconstitutional—exercise of the federal courts' equitable powers.⁴⁰

In *Gautreaux* the Court reiterated the importance of this consideration in the strongest language:

Although the *Milliken* opinion discussed the many practical problems that would be encountered in the consolidation of numerous school districts by judicial de-

cree, the Court's decision rejecting the metropolitan area desegregation order was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state government entities. That power is not plenary. It "may be exercised 'only on the basis of a constitutional violation.'" 418 U.S. at [738, 94 S.Ct. at 3124, 41 L.Ed.2d, at 1087], quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 [91 S.Ct. 1267, 1276, 28 L.Ed. 554, 566-67]. See *Rizzo v. Goode*, 423 U.S. 362, [96 S.Ct. 598, 46 L.Ed.2d 561]. Once a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." 418 U.S. at 744 [94 S.Ct. at 3127, 41 L.Ed.2d at 1091]; *Swann, supra*, [402 U.S.] at 16, [91 S.Ct. at 1276, 28 L.Ed.2d at 566-67].

[T]he *Milliken* decision was based on basic limitations on the exercise of the equity power of the federal courts

The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local government entities that were not implicated in any constitutional violation.

— U.S. at —, 96 S.Ct. at 1544, 44 LW at 4483, 4484.

tion of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." 418 U.S. at 747, 94 S.Ct. at 3128 (footnote omitted).

38. *Warth v. Seldin*, *supra* at 422 U.S. 499, 95 S.Ct. 2205.

39. *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973).

40. "The view of the dissenters [who urge affirmation of the lower court's desegregation order], that the existence of a dual system in [the City of Detroit] can be made the basis of a decree requiring cross-district transporta-

Applying these principles to the facts before it, the court in *Gautreaux* concluded that the wrong which was properly complained of by the plaintiffs below⁴¹ was not constitutionally insufficient to support the remedy sought; appropriateness and feasibility of remedy were of crucial importance and a prerequisite to the exercise of the courts' equitable powers.⁴² The necessity for continued adherence to the Article III requirements of standing and the proper limitations on the exercise of equity powers was underscored in Mr. Chief Justice Burger's majority opinion in *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), in which the Court held that the taxpayer plaintiff lacked standing to sue.

"As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' . . . in short, something more than 'generalized grievances,' . . ." 418 U.S. 166, 179-80, 94 S.Ct. 2948 (citations omitted).

Concurring in the holding in *Richardson*, 418 U.S. at 180, 94 S.Ct. 2940, Mr. Justice Powell offered a cogent analysis of the dangers inherent in the relaxation of the historic and Constitutional restraints on judicial power; we would do well to recall his words:

Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable

that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. We should be every mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a non-representative, and in large measure insulated, judicial branch. 418 U.S. 188, 94 S.Ct. 2952.

* * * * *

[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the counter-majoritarian implications of judicial review and the

41. In *Milliken* the question of "standing" was not involved although the Chief Justice in his opinion must have been aware of this necessity because in a footnote he stated "the standing of the NAACP as a proper party plaintiff was not contested in the trial court and is not an issue in this case." 418 U.S. at 722, note 2, 94 S.Ct. at 3116.

42. In *Gautreaux* there was no question but that the plaintiffs (respondents in the Supreme Court had standing to seek vindication of their rights and the defendants made no challenge respecting standing before the district court when they moved to dismiss the action. See *Gautreaux v. Chicago Housing Authority*, 296 F.Supp. 907 (N.D.Ill.1969).

democratic principles upon which our Federal Government in the final analysis rests. 418 U.S. 192, 94 S.Ct. 2954.

[9] In this action, appellants are invoking the Court's jurisdiction *solely* to impose upon the appellees priorities which the appellants favor. Sincere as their views may be, they are not properly addressed to the courts. Disagreement with government action or policy, however strongly felt, does not, standing alone, constitute an "injury" in the Constitutional sense which is cognizable in the federal courts and susceptible of remedy by the judicial branch; it is a matter properly addressed to the Congress or the Executive.

Accordingly, the judgment of the district court is affirmed, and appellants' complaint is hereby dismissed.

MANSFIELD, Circuit Judge, concurring, with whom TIMBERS, Circuit Judge, joins:

In concurring in Judge Moore's carefully considered opinion I would like to add that, sympathetic as I am to the idea of providing ready court access to those who seek enforcement of civil rights legislation, a holding that federal grants-in-aid may be attacked by persons unaffected by them would violate basic standing requirements that have repeatedly been reaffirmed and enforced by the Supreme Court in recent years. See e. g., *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). There is not the slightest indication in the present record that the plaintiffs will be adversely affected by the federal funding of the New Castle sewer and recreation projects or that if the funding were enjoined as demanded the plaintiffs would be benefitted. What they seek is a ban on federal funding to New Castle because it is allegedly a predominantly white, wealthy, exclusionary community, not because they would thereby gain anything. Should the relief be granted, HUD would presumably be free to use the money

to aid construction of sewers and parks in San Francisco.

Thus the case differs sharply from those cited by our esteemed dissenting brothers, in each of which the plaintiffs would be benefitted by the relief sought. In *Hills v. Gautreaux*, — U.S. —, 96 S.Ct. 1538, 47 L.Ed.2d 792, 44 U.S.L.W. 4480 (1976), for instance, the plaintiffs, who were tenants in federally funded, racially segregated housing in predominantly black ghetto areas in Chicago, stood to benefit from the relief sought, an order which would eliminate the discrimination against them by directing that such housing, for which they had applied as tenants, must be constructed in predominantly white areas where the plaintiffs might then reside, see 296 F.Supp. at 908 (N.D.Ill.1969). Here plaintiffs gain no comparable benefit from the injunction sought. The most they can realize is the satisfaction that federal funds will not be misused. Absent statutory authorization, this is not enough to confer standing. They must show *some* stake in the outcome. See *Flast v. Cohen*, 392 U.S. 83, 96, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

Our dissenting brothers seek to remedy this glaring deficiency by advancing a theory nowhere found in the complaint: that the grants to New Castle might have a discriminatory effect on what they choose to call a "regional housing market" that would include plaintiffs and New Castle. They also suggest that Congress, by providing that HUD's performance of its affirmative duties under Title VI (1964 Civil Rights Act), 42 U.S.C. § 2000d, and Title VIII (Fair Housing Act of 1968), 42 U.S.C. § 3601, et seq., would be subject to judicial review, intended to give standing to citizens in the position of the plaintiffs here. However, no such authority to sue is to be found in these statutes. Title VI, 42 U.S.C. § 2000d-1, obligates HUD to terminate funds "to the particular program, or part thereof, in which such [discrimination] has been so found" but since this case does not involve an attack upon particularized discrimination plaintiffs cannot use 42 U.S.C.

§ 2000d-2 for judicial review. Title VIII, 42 U.S.C. § 3608, obligates HUD to administer programs in a manner affirmatively to further the purposes of the Act, but there is no indication, express or implied, that Congress intended to give private persons the right to sue HUD for non-compliance with this duty. On the contrary, 42 U.S.C. § 3612, which authorizes enforcement of certain provisions of the Fair Housing Act (§§ 3603 through 3606) by private civil action, omits § 3608, the section outlining HUD's general duties, which is allegedly violated here by HUD. Title 42 U.S.C. § 3610 is limited to suits against private persons alleged to have violated the Act, which may be brought only after voluntary compliance proceedings before the Secretary of HUD have failed. Surely if Congress had intended judicial review of HUD's alleged maladministration of the Act, it would not have excluded § 3608 from those sections that might be enforced by private action.

Thus the dissents' suggestion that Congress intended to confer such authority upon private litigants is but an example of the wish becoming the father of the thought. When Congress desires to authorize citizen suits for the enforcement of laws of widespread public interest, it knows how to do so, as it vividly demonstrated in its enactment of § 304(a)(1) of the Clean Air Act, 42 U.S.C. § 1857h-2 and § 505 of the Water Pollution Control Act, 33 U.S.C. § 1365. Here it has not yet taken such action.

1. 42 U.S.C. § 2000d provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 3601 provides:

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

2. The Tri-State Regional Planning Commission (Tri-State) was an original defendant but dismissed as such by the majority of the panel, a decision which is not sought to be reversed by the court en banc. Tri-State's duties are rele-

OAKES, Circuit Judge, dissenting, with whom IRVING R. KAUFMAN, Chief Judge, and FEINBERG and GURFEIN, Circuit Judges, concur:

In this suit, residents of lower-income, predominantly black housing areas in Westchester County, New York, have alleged that federal grants have been improperly awarded to the Town of New Castle, a wealthy, predominantly white community also located in Westchester County. The challenged awards were made to the Town of New Castle by the United States Department of the Interior and the United States Department of Housing and Urban Development. The purpose of the awards was to assist New Castle in the development of Town parkland and the construction of a sewer system. The appellants claim that the two federal departments have statutory obligations, under Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968,¹ 42 U.S.C. §§ 2000d *et seq.*, 3601 *et seq.*, to refuse to make grants which are inconsistent in design or effect with nondiscriminatory, fair housing objectives. Their claim is that the two grants to New Castle are inconsistent with fair housing goals because the grants tend to support and perpetuate patterns of economically and racially discriminatory housing in Westchester County. The complaint is that the federal courts have the responsibility under the Civil Rights Acts to review and strike down grants made by federal departments which have failed to consider the implications of the grants in respect to attainment of the goal of nondiscriminatory, fair housing.²

vant, however, to the question to be discussed *infra* regarding the scope of the federal affirmative duty to assure that federal grants are not made for discriminatory purposes or with discriminatory effects. Tri-State is an interstate body, both corporate and politic, serving as a common agency of Connecticut, New Jersey and New York. Created by compact, it has been designated under Circular A-95, promulgated by the Office of Management and Budget, as the areawide clearinghouse for review of applications for federal aid to assure conformance with regional comprehensive plans, to implement the Demonstration Cities and Metropolitan Development Program Act, 42 U.S.C.

The majority of the court, however, has held that appellants are not sufficiently "aggrieved" or "injured in fact" by the grant of federal funds to New Castle to have "standing" to attack the awards. This holding is made despite the fact that appellants are the very persons who, by their own allegations, will continue to suffer from the racially restricted housing environment in Westchester County which is allegedly perpetuated by the challenged federal action. Since it is exactly this sort of third-party injury for which Congress, in 42 U.S.C. § 2000d-2,³ must have meant to provide relief when it established judicial review of federal grants, and in view of the precedents in both this and other courts upholding standing for challenges to federal grants in similar cases, see *Jones v. Tully*, 378 F.Supp. 286, 287 & n. 1 (E.D.N.Y.1974), *aff'd per curiam sub nom. Jones v. Meade*, 510 F.2d 961 (2d Cir. 1975); *Southern Christian Leadership Conference, Inc. v. Connolly*, 331 F.Supp. 940, 942-44 (E.D.Mich.1971). I must respectfully dissent.

Appellants' complaint, briefly recapitulated, states that appellants are low-income

§ 3301 *et seq.*, and the Intergovernmental Cooperation Act, 42 U.S.C. § 4231. See 38 Fed. Reg. 228 (1973). The latter commands consideration of impact of the proposed program upon housing and human resources development. 42 U.S.C. § 4231(c). The A-95 Circular specifically calls for comment on the "civil rights aspect of the project," ¶ 3(d), and "[t]he extent to which the project contributes to more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups." ¶ 5(d).

3. 42 U.S.C. § 2000d-2 provides in pertinent part:

Any department or agency action taken pursuant to section 2000d-1 of this title [see note 6 *infra*] shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds.

4. The district court also found that "New Castle continues to be resistant to attempts to alter its present housing character." 376 F.Supp. at 330. The town, it found, had "successfully thwarted" the attempt of the New York State Urban Development Corporation to "construct a small 100-unit low-cost housing facility in the town." *Id.* The Town's master plan sets as a goal "maintaining New Castle as a single-family residential community." It also provides in

minority (black) residents of Westchester County who live in what the district court called "ghetto living conditions," that is, in racially concentrated low-income neighborhoods, which the district court postulated "are a very real and very serious 'injury'."

"*Evans v. Lynn*, 376 F.Supp. 327, 332 (S.D.N.Y.1974). The complaint alleges that the Town of New Castle, to or for whose benefit the challenged grants were made, is, in the words of the district court, "predominantly white [98.7 per cent] and a well-to-do enclave." *Id.* at 330. It is further alleged that 90 per cent of New Castle's land is zoned for single-family, residential development on parcels of more than one acre, that there are currently 7,000 vacant acres and that the median value of single-family homes in 1970 was in excess of \$50,000.⁴ Appellants quite directly complain that New Castle's zoning ordinance has the purpose and effect of excluding blacks and other racial minorities from living in the Town. Finally, it is alleged that the federal agencies in question approved the grants⁵ without performing the affirmative duties required of them by Title VI

reference to sanitary sewer development that "the provision or extension of water and sewers in low [density] residential areas shall not be considered as a basis for rezoning to higher residential density."

5. The grant of matching funds for the sewer was made under the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102, and the grant for the acquisition of Turner Swamp was made pursuant to the Outdoor Recreation Programs Act, 16 U.S.C. § 460i.

The sewer grant was made by HUD to the King-Greeley sewer district in the Chappaqua section of town. The Town of New Castle is, nonetheless, the effective grantee of the benefits of the grant. The recreation grant was made by the Bureau of Outdoor Recreation of the Department of the Interior directly to the Town of New Castle.

The HUD "rating sheet" for the preliminary application for the sewer grant here does carry some points for, e. g., the "Percent of housing in project area that will be accessible on a nondiscriminatory basis to families and individuals with low and moderate incomes," but there appears to be no evaluation of the overall residential segregation policies of the community. It is a matter of defense on the merits, which are not reached, whether the agencies in

and Title VIII.⁶ A consideration of the law of standing as it relates to this case must assume that all of these facts as alleged are true.⁷ It at least has to take them into

fact performed their affirmative duties. For our purposes it is enough if a viable claim of nonperformance is made.

The BOR grant was allegedly made without any reference to civil rights enforcement procedures or any Title VIII obligations, though a Title VI compliance form was attached to the application, signed by the Town Supervisor.

6. The affirmative duties, following the policies set forth in note 1 *supra*, are respectively imposed by 42 U.S.C. § 2000d-1 (Title VI) and 42 U.S.C. §§ 3608(c), (d)(5) (Title VIII). The former provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 3608 provides in part:

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(d) The Secretary of Housing and Urban Development shall—

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

See generally as to Title VIII, the panel opinion, *Evans v. Lynn*, 537 F.2d 571, 576 n. 10 (2d Cir. 1975).

7. It is possible, of course, that the "pinpoint provision" in 42 U.S.C. § 2000d-1 may provide a defense on the merits under this section. Under that provision, compliance with nondiscrimination requirements may be obtained by agency

refusal to grant . . . assistance
to any recipient as to whom there has been
an express finding . . . of a failure to
comply with such requirement, but such termination or refusal shall be limited to the
particular political entity . . . and, shall
be limited in its effect to the particular program
in which such noncompliance has been so found

42 U.S.C. § 2000d-1 (emphasis supplied). Judge Mansfield, in his concurrence, argues that no discrimination could be "found" in the particular grants involved in this case and, therefore, the appellants have no right to overturn these grants under the review provision in 42 U.S.C. § 2000d-2. Surely the question of what findings can properly be made in this case raises issues going far into the merits of appellants' claim and, therefore, should not be decided prematurely at the present appeal which concerns only the subject of appellants' standing to raise the claim. Nonetheless, I feel it appropriate to indicate that the matter is far more complex than Judge Mansfield suggests.

On the pleadings of this case, which allege that New Castle has pursued zoning and housing policies with the purpose and effect of excluding blacks and other racial minorities from living in the town, there can be little doubt that the Town is in violation of the nondiscrimination requirements adopted pursuant to 42 U.S.C. § 2000d-1 by HUD, see 24 C.F.R. § 1.1 *et seq.*, and Interior, see, 43 C.F.R. § 17.1 *et seq.* The question as to the applicability of the "pinpoint provisions" in this case therefore turns on whether the sewer and park grants to the Town are programs "in which such non-

account which, I regret to say, the majority opinion does not.

Fundamental to analysis under the law of standing, in view of the vague generalities oftentimes employed to decide particular cases,⁸ is a differentiation between the two important functions the doctrine performs: the first is determining whether the plaintiff is a proper party to request an adjudication of the particular issue, see *Flast v. Cohen*, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); the second is determining whether as a matter of policymaking responsibility the particular issue is suitable for determination by the courts, *Barlow v. Collins*, 397 U.S. 159, 169 n. 2, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970) (Brennan, J., concurring in the result). The first of these has been called "access standing" and the second can best be called "decision standing," although the latter often goes by the broad terms "justiciability" or "reviewability" and although it often subsumes a number of other doctrines or techniques which are used by the courts when as a matter of policy it is thought desirable to avoid decisions on the merits.⁹ See Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv.L.Rev. 645 (1973), cited by Mr. Jus-

compliance has been so found. . . . Judge Mansfield would consider "noncompliance" to have been "found" in the sewer and park grants only if the particular programs were being administered on a visibly discriminatory basis, e. g., by prohibiting minorities from using the parks and sewers of New Castle. This strikes me as an unduly restrictive reading of the limitation. Where a particular grant is used as one step in furtherance of a discriminatory scheme, the fact that the administration of the grant is facially neutral should not foreclose a finding that the grant is in implicit, if veiled, noncompliance with the non-discrimination requirements. Here appellants claim that ostensibly neutral grants (sewer and park grants) directly assist a political entity (New Castle) to attain its discriminatory scheme (by forclosing opportunities for low-income housing development in New Castle, see text at notes 13 & 14, *infra*). It is totally unrealistic to suppose that federal grants in aid to local communities for sewage or recreation/wildlife areas, or for that matter water systems, do not exert a significant leverage on the location and type of housing, or, where made to communities with exclusionary policies, the perpetuation of those policies. See C.

tice Powell in *Warth v. Seldin*, 422 U.S. 490, 500 n. 11, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Cf. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 156 (2d ed. 1973). The Court's present analysis directs us first to examine the question "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)." *Warth v. Seldin*, *supra*, 422 U.S. at 498-99, 95 S.Ct. at 2205. This is in essence the question of access standing.

Have the appellants alleged such a personal stake in the outcome of *this* controversy? In this connection it must be remembered that the controversy sought to be determined is *not*, as in *Warth v. Seldin*, *supra*, whether a town in which the plaintiffs are not resident may exclude persons of low and moderate income by its zoning laws. Rather, on the allegations, the question brought in this case is whether federal agencies administering grants-in-aid may approve grants to "activities" (the Town of

Haar & D. Iatridis, *Housing the Poor in Suburbia* 338 (1974). HUD's own rating sheets relative to these grants constitute an administrative construction of the statute contrary to that espoused by Judge Mansfield. This construction is entitled to substantial weight under *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and *Udall v. Tallman*, 380 U.S. 1, 18, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). A district court, after a full hearing, could properly "find" the grant to be discriminatory in both design and effect and therefore not in compliance with the statutory requirements.

8. See 3 K. Davis, *Administrative Law Treatise* § 22.18 (1958); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 151, 90 S.Ct. 827, 25 L.Ed.2d 84 (1970).

9. Compare Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv.L.Rev. 40 (1961), with Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv.L.Rev. 1 (1959), and Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum.L.Rev. 1 (1964).

New Castle) whose practices (exclusionary zoning) have the purpose and effect of subjecting blacks and other racial minorities to discrimination by excluding them from residence within the Town's borders, 42 U.S.C. § 2000d; see also 42 U.S.C. § 3608.¹⁰ If minorities are "denied the benefits" of such grants because of the discriminatory access limitations of Town zoning policies, 42 U.S.C. § 2000d indicates that the grants should not be made, and 42 U.S.C. § 2000d-2 provides for judicial review to enforce that law. Accordingly, *Warth v. Seldin*, so heavily relied on by the majority opinion, is sharply distinguishable from the present case. Indeed, it is helpful to appellants. In *Warth* the Court was extremely careful to point out not only that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes

creating legal rights, the invasion of which creates standing . . .'"¹¹ but also that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."¹² *Warth* itself involved no such statutes; here the statutory claim is the essence of appellants' case. In *Warth*, the parties denied standing had failed to show how the specific town practices which they challenged (zoning laws) had resulted in the type of particularized injury required to obtain standing to litigate a generalized constitutional challenge to government action. 422 U.S. at 508, 95 S.Ct. 2197. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-22, 94 S.Ct. 2425, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 177, 179-80, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). In the

10. See notes 1 and 6 *supra*. That the affirmative duties imposed were intended by Congress to be meaningful is evidenced, e. g., by the remarks of Senator Mondale in connection with the 1968 Civil Rights Act, relied upon in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). He referred to the

sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credit and credit guarantees.

Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color.

114 Cong.Rec. 2278 (1968). So, too, Representative Celler said: "The purpose or 'end' of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettos . . ." 114 Cong.Rec. 9563 (1968). See U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* 67-70 (1974).

11. 422 U.S. at 500, 95 S.Ct. at 2206, citing *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Sierra*

Club v. Morton, 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

12. 422 U.S. at 501, 95 S.Ct. 2197. The "prudential rules" to which Justice Powell refers include the rule that "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens . . . normally does not warrant exercise of jurisdiction." *Id.* at 499, 95 S.Ct. at 2205, citing *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2425, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 188-97, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (Powell, J., concurring). Similarly, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975), citing *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943). At the same time, an attenuated injury suffered in common with many others may still be enough to establish standing. *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). See also Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv.L.Rev. 645, 681 (1973); Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1669, 1730 (1975). Professor Scott concludes that, by virtue of the costs of litigation, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom." 86 Harv.L.Rev. at 674. One would suppose this was all the more true in the light of *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

instant case, as shall be shown below, the connection between the challenged action (federal grant) and the injury claimed (perpetuation of racially restricted housing environment in Westchester County) is amply direct, under the controlling cases, to supply standing for appellants to seek statutory review of the government action. See, e. g., *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

The majority opinion, with all due respect, misses the point of this law suit when it emphasizes that appellants "do not claim" that they unsuccessfully sought housing in the Town of New Castle or "that the Town arbitrarily rejected housing proposals of benefit to them."¹³ The opinion also misapprehends their claim when it states it as saying that "had the grants not been approved, the monies could conceivably have gone to some other, as yet totally imaginary project in the County which might have had the result of making more housing available to them." [At 595.] Rather, appellants' claim is that the federal departments violated affirmative action requirements of the Civil Rights Acts by making grants to municipalities without evaluating the economic and racial consequence of their housing and development practices, with the effect of maintaining racial residential segregation in Westchester County, further constraining them to continued residence in the county's ghettos.

In cases decided in several circuits, including our own, courts have found that persons who live in concentrated, segregat-

ed, low-income housing areas have standing under 42 U.S.C. § 2000d-2 to challenge federal grants which have the effect of increasing the concentration of low-income housing in their portion of the regional housing market. In *Jones v. Meade*, *supra*, this court, in a per curiam opinion, upheld standing for "several individuals who reside in Spinney Hill" (a low-income predominantly black portion of the Town of North Hempstead, New York) to challenge a federal grant for a low-income housing project in the Spinney Hill area because the grant would tend to "perpetuate racial concentration in the Spinney Hill area in violation of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d" *Jones v. Tully*, *supra*, 378 F.Supp. at 287, *aff'd per curiam sub nom. Jones v. Meade*, *supra*. See also *Banks v. Perk*, 341 F.Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part on other grounds*, 473 F.2d 910 (6th Cir. 1973); *Gautreaux v. Chicago Housing Authority*, 296 F.Supp. 907 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922, 91 S.Ct. 980, 28 L.Ed.2d 236 (1971). Cf. *Shannon v. United States Department of Housing & Urban Development*, 436 F.2d 809, 812, 817-18 (3d Cir. 1970). The claim that the federal grants will have the effect of perpetuating racially segregated housing conditions in the plaintiffs' housing market is precisely the argument made against these federal awards by the appellants in this case. The reasoning which supports their claim may be traced as follows:

1. Patterns of racially segregated housing are perpetuated either by building low-income housing in low-income areas (as in *Jones v. Tully*) or by building high-income housing in high-income areas of the same housing market.¹⁴ This is

13. It is not precisely correct that the Town did not arbitrarily reject housing proposals that might have been of benefit to appellants. See note 4 *supra*. But this is not the gist of appellants' claim. It goes without saying, as the panel opinion pointed out, p. 574 n. 6, that there is no claim that the sewer or park projects will be operated discriminatorily, but that is not what this suit concerns, either.

14. An initial predicate of this argument, of course, is that New Castle and lower Westchester County are not different housing markets but are part of a larger market of which the entire Westchester County is but a sub-market. Certainly plaintiffs in a low-income black housing area in, say, Cincinnati would not have standing, under this rationale, to challenge grants made to New Castle. This requirement that the challenging parties be within the same housing market as the grantee Town, however,

because, in either case, the construction decision forecloses opportunities for integration of housing facilities throughout the regional housing market.¹⁵

2. A federal grant to a high-income area which is consistent with increased development of high-income housing but which is inconsistent with development of low-income housing in that area tends to perpetuate patterns of racially segregated housing.

3. The federal parkland and sewer grants challenged in this case are consistent with and promote development of high-income housing in New Castle, but are inconsistent with and negate development of low-cost, high-density housing in that area.

4. The sewer grant is inconsistent with construction of high-density, low-cost housing in New Castle because, as is stated in an affidavit attached to the complaint, the sewer system planned by New Castle "will have the capacity to handle the needs of the area only if the area is developed at low densities."

Affidavit of Paul Davidoff, Director of Suburban Action Institute, formerly Associate Professor of Urban Planning at is undisputably fulfilled in the present case; Tri-State's participation in approval of the grants, note 2 *supra*, is clearcut evidence of this.

The decision of the United States Supreme Court in *Hills v. Gautreaux*, — U.S. —, 96 S.Ct. 1538, 47 L.Ed.2d 792, 44 U.S.L.W. 4480 (1976), while dealing with the remedy for HUD's violation of its constitutional and statutory duties in respect to the selection of public housing sites and assignment of tenants, emphasized the metropolitan area relationship in respect to housing market opportunities. As the Court there said, with the greatest of materiality to appellants' claims here, "The relevant geographic area for purposes of the respondents' housing options is the Chicago [substitute Westchester County] housing market, not the Chicago city limits [substitute the boundaries of the Westchester County town or city within which they reside]." — U.S. at —, 96 S.Ct. at 1547, 44 U.S.L.W. at 4485. It is interesting that in *Hills v. Gautreaux*, the "more substantial question" was said to be "whether an order against HUD affecting its conduct beyond Chicago's boundaries would impermissibly interfere with local governments and suburban housing authorities that have not

the University of Pennsylvania. Mr. Davidoff's affidavit charged that HUD review of the sewer grant had wholly ignored the role which sewer systems play in shaping the parameters of future community development, and the impact of that development on low and moderate income housing opportunities within the region.

5. The parkland grant may also be inconsistent with development of low-income housing in New Castle because different park facilities (including sizes of open areas and walkways, numbers of, and therefore location of, playing fields, landscaping design, etc.) would be demanded for a high-density housing area than for a low-density area.¹⁶

The claim of the pleadings that the appellants are "injured in fact" because the federal grants tend to perpetuate economically and racially discriminatory housing in Westchester County, I must insist, represents "something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP*, *supra*, 412 U.S. at 688, 93 S.Ct. at 2416. The fair sense of appellant's claim is that they have been or "will in fact be perceptibly harmed by the

been implicated in HUD's conduct." *Id.* Here, the alleged improper conduct of HUD relates to grants to local authorities that have been implicated in alleged exclusionary zoning.

15. It should be noted that this foreclosure effect is a direct, immediate consequence of the grant. *Cf. O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). This consequence, moreover would be eliminated by a simple reversal of the decision to make the grant. Amelioration of the injury complained of is not, therefore, as in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), one contingent on the future economic decisions of independent third persons. *See id.* at 505, 95 S.Ct. 2197.

16. Appellants do not claim that the parkland should, or could, be developed for housing rather than for recreation. Their complaint must, therefore, be read as alleging the inconsistency of the proposed parkland development with the type of recreational demand which high density housing would create. There is nothing in the record to permit summary judgment against appellants on this point.

challenged agency action." *Id.* As the findings of the district court indicate, the harm appellants will suffer from a perpetuation of the conditions of segregative housing in which they presently live constitutes a "very real and very serious 'injury.'" 376 F.Supp. at 332. Government actions which allegedly perpetuate (if not exacerbate) the injurious condition of segregative housing seem quite plainly to effect an injury-in-fact to the precise type of interest which Congress intended to protect when it enacted Titles VI and VIII of the Civil Rights Act. The apparent thrust of those Titles is to assure that federal grants are consistent with the objectives of nondiscriminatory, fair housing. However, the two federal departments, charged by Congress with the duty of affirmative action to encourage fair housing, economically viable communities, and the breakdown of segregated residential housing, are, if appellants' supporting evidence is to be believed,¹⁷ giving priority to parks and sewers for the privileged communities without regard to the needs for regional development and integration of low-cost housing opportunities.

I think it important, in evaluating the sufficiency of appellants' claims of injury, to note that the complaint of appellants in their county, which is part of Greater New York, finds its echo in many other American localities, many of which are cities and have, to say the least, vast problems in the way of finances, municipal services and quality of life. If federal grant procedures are as

appellants allege, they are exacerbating these problems, to appellants' individual disadvantage (and that of many American cities) by enhancing the quality of life in already privileged communities wholly without consideration of the housing needs of those trapped in low-income, segregated housing areas only a few miles away.¹⁸

Appellants are what Norman Williams has aptly called the "third party non-beneficiaries" of exclusionary land use controls and policies.¹⁹ Their challenge to federal policies or practices which can be said to perpetuate "power to the people who got there first"²⁰ in their specific area is based on federal statutes. The appellants allege that the grants were made for the sole benefit of a discriminatory grantee, the Town. They have alleged that the effect of the grants is to injure appellants by perpetuating the racially restrictive housing conditions in which they currently live. Accordingly, appellants have stated both a cause for relief and standing under 42 U.S.C. § 2000d-2. Only at trial will it become necessary for appellants to prove the truth of the facts alleged. *United States v. SCRAP*, *supra*, 412 U.S. at 689, 93 S.Ct. 2405. In short, under the controlling precedents in this area, appellants have access standing. See *Investment Company Institute v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970) (per curiam); *Barlow v. Collins*, *supra*; *Association of Data Processing v. Camp*, *supra*.²¹

17. Robert Mendoza, the HUD official who prepared the rating sheet for the sewer grant, testified that he never reviewed the housing and land-use policies of an applicant community. He "reconstructed" the rating sheet since there was none in the file presented to the district court, but on the "reconstruction," it is claimed, he gave points to New Castle improperly (because of its wealth) so that the application should never have been approved. Howard A. Glickstein, former staff director of the U.S. Commission on Civil Rights, pointed out that HUD had consistently "devoted itself to processing individual complaints of housing discrimination to the exclusion of all other responsibilities under the act." BOR has been, appellants aver, equally delinquent.

18. See Editorial, *City vs. Suburbia*, N.Y. Times, Nov. 30, 1975.

19. Williams, *The Strategy on Exclusionary Zoning: Toward What Rationale and What Remedy?* 1972 Land Use Controls Annual 177.

20. See "Housing Programs for Poor Can't Break Into the Suburbs," N.Y. Times News Service, Rutland (Vt.) Daily Herald, Nov. 12, 1975, at 6, quoting Herbert Franklin of Potomac Institute, Inc.

21. As the Supreme Court said analogously in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1972), with respect to the legislative history of Title VIII:

The second or "reviewability" aspect of the standing question involves additional judge-made policymaking considerations. They are what Mr. Justice Powell has referred to as "essentially matters of judicial self-governance." *Warth v. Seldin*, *supra*, 422 U.S. at 500, 95 S.Ct. at 2206. Even assuming there is access standing on the part of appellants, is the issue of the propriety of the HUD or Interior Department grants to New Castle an "abstract question of wide public significance [which] other governmental institutions may be more competent to address"? *Id.* Should the court decline standing as a matter of policy?²² A powerful argument can be made that the court should not act as a "planning agency"²³ or as a "congressional inquiry" to correct an Executive Department which has refused to carry out a congressional mandate, especially where the suit might be unmanageable.²⁴ The Supreme Court decision in *Train v. City of*

New York, 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975) (agency may not impound water pollution control act appropriations), indicates quite plainly, however, that the courts should not fail in their duty to assure that the Executive has faithfully executed the laws merely because a complex regulatory scheme is involved. See also *National Treasury Employees Union v. Nixon*, 160 U.S.App.D.C. 321, 492 F.2d 587 (1974) (federal court may grant declaratory relief ordering Executive to implement federal employees' pay adjustment). Other courts, including our own, have corrected errors in the Executive's administration of congressionally established programs in a multiplicity of cases where, arguably, the alleged damage to the plaintiff has been less or no more direct, where their alleged material interests have been less or no more affected, and where the alleged agency action or inaction has been less or no more egregious than here.²⁵

Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which, the Solicitor General says, the complainants act not only on their own behalf but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." The role of "private attorneys general" is not uncommon in modern legislative programs. See *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 [88 S.Ct. 964, 966, 19 L.Ed.2d 1263]; *Allen v. State Board of Elections*, 393 U.S. 544, 556 [89 S.Ct. 817, 22 L.Ed.2d 1]; *Perkins v. Matthews*, 400 U.S. 379, 396 [91 S.Ct. 431, 440, 27 L.Ed.2d 476]; *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 [84 S.Ct. 1555, 12 L.Ed.2d 423].

22. Mr. Justice Brennan in *Barlow v. Collins*, 397 U.S. 159, 178, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970) (concurring opinion), and Scott, *supra* note 12, at 684, believe standing narrowly and properly should refer to what the latter has called "access standing." See also K. Davis, *Administrative Law Treatise* § 22.00-04, at 723 (Supp.1970).

23. Professor Stewart has used this term in reasoning against wholly unlimited access standing. See Stewart, *supra* note 12, at 1737.

24. Unmanageability might exist here if the general policy of HUD grant-making, as opposed to the specific grants to New Castle, had been the subject of the appellants' claim. But see

Adams v. Richardson, 156 U.S.App.D.C. 267, 480 F.2d 1159, 1162 (1973) (en banc) (challenge to HEW school desegregation policies generally).

25. E. g., *Schlaflly v. Volpe*, 495 F.2d 273 (7th Cir. 1974) (persons complaining of cessation of highway construction funded by federal gas tax, on basis they would benefit from use of highways); *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974) (buyers of FHA-insured homes challenging failure to require obedience to local housing codes); *Bradley v. Weinberger*, 483 F.2d 410, 413-14 n. 1 (1st Cir. 1973) (patients and doctor challenging labeling requirements as too strenuous); *Adams v. Richardson*, 156 U.S.App.D.C. 267, 480 F.2d 1159 (1973) (en banc) (black students, citizens and taxpayers challenging HEW failure to enforce 10 state operated and numerous other school district desegregation plans); *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972) (adjacent city affected by noise from federally financed airport); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) (persons displaced by urban renewal); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966) (representatives of "aesthetic, conservation and recreation" interests not resident of the town where the project was to be located). See also *Eastern Kentucky Welfare Rights Org. v. Shultz*, 370 F.Supp. 325 (D.D.C.1973) (welfare organization challenging IRS regulation

The courts have taken the view that agency disregard of congressional mandate is challengeable by persons affected adversely because it involves, it does not negate, deference to another branch of the Government. As Mr. Justice Powell, concurring in *United States v. Richardson*, *supra*, pointed out:

The doctrine of standing has always reflected prudential as well as constitutional limitations. . . . Whatever may have been the Court's initial perception of the intent of the Framers . . . it is now settled that such rules of self-restraint are not required by Art. III but are "judicially created overlays that Congress may strip away. . . ."

But where Congress does so, my objections to public actions are ameliorated by the congressional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make "judicial forbearance the part of wisdom."

418 U.S. at 196, n. 18, 94 S.Ct. at 2956.²⁶ If there were any doubt that this concept is the law of the Court,²⁷ that doubt was removed by *Warth v. Seldin*. There, speaking through Mr. Justice Powell, the Court held:

Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. *E. g.*, *United States v. SCRAP*, 412 U.S. 669 [93 S.Ct. 2405, 37 L.Ed.2d 254] (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights

permitting charitable exemption status to hospitals which do not provide for free care for indigents).

26. See also *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972) (White, J., concurring).

and interests of others, and, indeed, may invoke the general public interest in support of their claim. *E. g.*, *Sierra Club v. Morton*, 405 U.S. [727] at 737 [92 S.Ct. 1361, at 1367, 31 L.Ed.2d 636] (1972); *FCC v. Sanders Radio Station*, 309 U.S. 470, 477 [60 S.Ct. 693, 698, 84 L.Ed. 869] (1940).

422 U.S. at 501, 95 S.Ct. at 2206

Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute. *Linda R. S. v. Richard D.*, 410 U.S. at [614], 617 n. 3 [93 S.Ct. 1146, at 1148, 35 L.Ed.2d 536 (1973)], citing *Trafficante v. Metropolitan Life Ins. Co.* [409 U.S. 205, at 212, 93 S.Ct. 364, at 368, 34 L.Ed.2d 415 (1972)] (White J., concurring).

422 U.S. at 514, 95 S.Ct. at 2213.

The question remains, of course, whether in this case "Congress has granted a right of action." As discussed above, the plain intentment of Title VI if not Title VIII is to provide for review of federal grants to assure their consistency with federal anti-discrimination and fair housing objectives. See, *e. g.*, *Jones v. Tully*, *supra*; note 3 *supra*. Since it is unlikely that either the federal departments or the grant recipients would have any interest in challenging the grants themselves, Congress must have meant to provide for review at the instance of persons "adversely affected" or "aggrieved by" improper grants. The implied right of review for these persons is at least as clear and as significant as in cases such as *Data Processing*, *Barlow*, *Arnold Tours* and *Investment Company Institute*. Cf. *Warth v. Seldin*, *supra*, 421 U.S. at 501, 95 S.Ct. 2197.²⁸

27. Its logic was questioned in Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1380-83 (1973).

28. As is suggested in Judge Mansfield's concurrence, the argument may be made that Congress did not intend to give private persons the right to sue HUD for noncompliance with its duty of affirmative action, because 42 U.S.C.

What the courts are asked to do here, to require the agencies to reevaluate the grant approvals in the light of the nondiscriminatory, fair-housing mandate,²⁹ is well within the traditional role of judicial review of agency action. No better authority may be referred to than our own *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert.denied*, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966), the landmark case that ultimately furnished the basis for National Environmental Protection Act³⁰ review of project alternatives. It is too obvious to require citation that it is well within the traditional model of judicial review that an agency be required to review an action, involving an expenditure of public funds for purely private or local advantage, to assure that statutory guidelines have been adhered to.

This is not an issue of constitutional involvement as in *Schlesinger v. Reservists Committee to Stop the War*, *supra* (Article I, § 6 prohibition by members of Congress asserted), or in *United States v. Richardson*, *supra* (Article I, § 9 violation through CIA appropriation asserted). See *The Supreme Court*, 1973 Term, 88 Harv.L. Rev. 41, 240-43 (1974). In such a case, to resolve the matter judicially may, as has been pointed out,³¹ remove the particular issue altogether from the political process, a danger which Mr. Justice Frankfurter and others before and after him have warned against in the course of treating the overall subject of judicial review. Here, however, the Congress has spoken, and judicial resolution of the controversy forecloses neither congressional nor executive action. The political

§ 3610 specifically authorizes enforcement of the Act against *private persons* and omits mention of § 3608, note 1 *supra*, which sets forth HUD's affirmative duties. We are unconvinced, however, that this narrow reading of reviewability under the civil rights statute is appropriate. Cf. *National Welfare Rights Org. v. Finch*, 139 U.S.App.D.C. 46, 429 F.2d 725 (1970) (private standing exists to challenge HEW ruling that state welfare laws conform to federal standards even though only review of HEW decision by states is expressly provided for by statute). See also Section 10(a) of the Administrative Procedure Act, 5 U.S.C.

processes would not be imposed upon, much less invaded, by the exercise of Article III power here concerned. In any case, assuming that our system of representative democracy makes the legislature the primary as well as the initial forum for resolving conflicting social and economic interests, if the Congress has spoken and the Executive has not heard the message, the judiciary's role in resolving the controversy is hardly a usurpation of power or an infringement of prerogatives.

One can hardly quarrel with the majority statement of abstract propositions, as they well set forth the rubric of the law of standing. One may regret the majority's application of those rules to this case, one very different, as I see it, from that which the majority perceives.

IRVING R. KAUFMAN, Chief Judge, dissenting, with whom GURFEIN, Circuit Judge, concurs:

I concur fully in my brother Oakes's scholarly opinion. I should like, however, to add the following thoughts.

Constitutional provisions, such as the "case or controversy" requirement of Article III, are not magic talismans, whose import is as immutable as the law of ancient Media and Persia. Rather, the words of the Constitution to a large extent derive their meaning from the perceived needs, desires and expectations of society.

It is legitimate—and, indeed, desirable—to view constitutional commandments, such as the standing requirement, as flexible and evolving over time.¹ The proper approach

§ 702(a), and *Stewart*, *supra* note 12, at 1726 n. 285.

29. Appellants seek injunctive relief, but this would be purely ancillary to the reevaluation sought.

30. 42 U.S.C. § 4332(2)(C)(iii).

31. See *Stewart*, *supra* note 12, at 1741.

1. The words of Chief Justice Warren, referring to the Eighth Amendment in *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958), are informative:

may best be shown by very briefly reviewing the courts' construction of other constitutional provisions, where this process is more obvious. The First Amendment guarantee of freedom of religion, for example, was, when drafted in 1789, almost certainly intended to refer exclusively to the worship of God.² But today the concept of religion has been expanded to protect, under some circumstances at least, not only the worship of a divinity or the refusal to recognize a divinity, but also some, if not all, deeply held moral convictions.³ Similarly, the First Amendment meaning of "speech" has come to include silent protest.⁴ And the definition of "search", as used in the Fourth Amendment, has in recent years been expanded beyond the physical intrusion which concerned the Framers,⁵ to encompass electronic eavesdropping.⁶

This expansive reading of the provisions of the Bill of Rights may plausibly be viewed as a process—which some argue has not reached its limit—by which courts have extended the protection accorded individual autonomy.⁷ A similar process may be discerned in the interpretation of the shibboleths of standing: "case or controversy",

[T]he words of the Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

2. This may be seen by examination of various colonial documents advocating religious freedom. The 1772 *Rights of the Colonists*, for example, espoused freedom of religion because of its concern with "various attempts which have been made and are now making, to establish an American Episcopate." The Bill of Rights: A Documentary History of 210 (Chelsea House, 1971). And the first document to protect freedom of religion, the Maryland Toleration Act of 1649, declared that it dealt with "matters concerning Religion and the honor of God" and granted freedom only to those "professing to beleive [sic] in Jesus Christ." *Id.* at 91, 93 (emphasis added). Of perhaps even greater significance, the Senate eliminated the words "nor shall the rights of conscience be infringed" from the First Amendment. *Id.* at 1146.
3. See, e. g., *U. S. v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965); *Welsh v. U. S.*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970); *U. S. v. Sisson*, 297 F.Supp. 902

and its corollary, "injury in fact". The past decade has seen a dramatic lowering of the barriers imposed by standing requirements to challenges to administrative action. Perhaps not by change, this movement toward broader standing has coincided with a spectacular increase in the size, scope and power of the bureaucracy of the executive branch—which has, some argue, heightened the need for judicial oversight. During these years, the archaic "legal interest" requirement of *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939) has been abolished, *Assoc. of Data Processing Service Org. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Standing to challenge administrative orders has been given to competitors, *id.*, and to consumers, *Office of Communication v. FCC*, 123 U.S.App.D.C. 328, 359 F.2d 994 (per Burger, J., 1966), and a showing of economic injury is no longer required. *U. S. v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

As this trend makes clear, judicial review is, today viewed as a legitimate means of ensuring that agencies observe congression-

(D.Mass.1969) (Wyzanski, J.), *appeal dismissed for want of jurisdiction*, 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970). Although *Seeger* and *Welsh* theoretically rested upon interpretations of the Selective Service statutes, the *Seeger* Court stated that a different holding would "classify different religious beliefs, exempting some and excluding others", thus presumably violating the guarantee of equal protection. 380 U.S. at 176, 85 S.Ct. at 859 (emphasis added).

4. See, e. g., *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966).
5. The Colonial tracts were concerned with the "insolence" of British officers who would "enter our houses, search, insult and seize at pleasure." The Bill of Rights: A Documentary History, *supra* n. 2, at 488-89.
6. Compare *Katz v. U. S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) with *Olmstead v. U. S.*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).
7. Cf. Henkin, *Privacy and Autonomy*, 74 *Col. L. Rev.* 1410 (1974).

al mandates.⁸ The case before us cannot be viewed in isolation from this trend.

Obviously, I do not suggest that we read the Art. III standing requirement out of existence, or that courts indulge in rendering what Justice Holmes once called "mere declaration[s] in the air."⁹ Nor, of course, do I urge that we ignore recent decisions of the Supreme Court, such as *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). But I do counsel against wooden application of the *Warth* precedent to an entirely different setting, and against extension of that holding to cover a situation which, as Judge Oakes's opinion demonstrates, is sharply distinguishable. Such an expansive reading of *Warth* unnecessarily (and without explanation) flies in the face of the recent trend favoring judicial oversight of the burgeoning administrative bureaucracy.

Under the majority's decision, it is unlikely that there could ever be a plaintiff who will be allowed access to the courts to challenge HUD's abdication of its congressionally-imposed duty.¹⁰ Such a result may be logical, and even desirable, in a controversy more appropriately resolved by the political process. See *U. S. v. Richardson*, 418 U.S. 166, 179, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). But it is to be shunned in cases like this one which, in my brother Oakes's words, fall "well within the traditional model of judicial review."

GURFEIN, Circuit Judge, dissenting, with whom IRVING R. KAUFMAN, Chief Judge, concurs:

8. In contrast, as Judge Oakes's opinion points out, the taxpayers or citizens whose suits were thwarted by such cases as *U. S. v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), *Schlesinger v. Reservist Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), as well as *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), sought to have the courts intervene in areas in which

the subject matter is committed to the surveillance of Congress, and ultimately to the political process.

Richardson, *supra*, 418 U.S. at 179, 94 S.Ct. 2940

I concur in my brother's Oakes' trenchant analysis.¹ I would like to add that I consider his opinion as an important contribution to a debate that is of historic significance. This type of case may become a watershed in the struggle for civil rights, and I am sorry that we could not muster a majority in this court. The history of civil rights in the next quarter century may be written in terms of procedural roadblocks or we may see an expansion of the role courts will play reminiscent of the expansion in John Marshall's day. There is need for judicial action where Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out that legislative mandate. The contrary would give the Executive a silent veto not provided in the Constitution.

This is not a case where general taxpayers are seeking judicial relief against governmental action. The plaintiffs here are not suing as general taxpayers or as officious busybodies. Nor are they seeking to declare any statute or ordinance unconstitutional. They are within the class, minority citizens of the area, whom Congress has sought to help. They are aggrieved persons protesting administrative action in a literal sense. If these plaintiffs have no standing, then who does?

Of course, all black citizens of the entire United States are not in a class to be benefited by a HUD study of the housing policy of New Castle in Westchester County, New York. The class obviously must be more

9. *Giles v. Harris*, 189 U.S. 475, 486, 23 S.Ct. 639, 48 L.Ed. 909 (1903).

10. It is possible, however, that, even under the majority decision, an inner city near a town receiving a HUD grant may have standing to challenge the grant. Indeed, a town which unsuccessfully applied for a grant might, by analogy with those cases granting competitor standing, be allowed to sue.

1. I have not again reviewed the case authority since my brother Oakes has done that so well.

restricted. The issue, to my mind, is simply whether a county is too large an area for its minority inhabitants to be a discrete class with standing. Since there must be some judicial determination of the nature of the class which is harmed by federal inaction in the face of a clear mandate, it is those minority residents who are reasonably close to the housing opportunity, if it should open up, who have a stake in the Congressional mandate enacted for their benefit.

Local zoning ordinances of the type considered in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), have nothing to do with this case. The challenge there was a constitutional challenge to the local zoning laws. The laws were ostensibly not directed against the minority, but could be taken as directed against persons of low or moderate income. It was held that as a prelude to a constitutional claim of discrimination the plaintiffs must show injury in fact. Here Congress has ordered an administrative agency implementing a particular federal statute to determine whether racially discriminatory policies are being followed by towns which seek federal subsidies. If the finding is that such discrimination is practiced, the funds are to be withheld. But what happens if HUD fails to look into the matter as it is ordered to do, and, nevertheless, approves the federal funding? My brethren in the majority say nothing is to be done about it by anybody. But, as the Court said in *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." I believe that when Congress imposed on the Secretary of HUD the affirmative duty to administer all "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter," 42 U.S.C. § 3608(d)(5), it did not mean that HUD may disregard that mandate in its discretion. And those who have

an adversary stake in the inaction ought to be able to compel HUD to make whatever study the court finds is required. The analogy is found in the requirement of an environmental impact statement before a project is begun. The federal courts have taken jurisdiction in such cases. See *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). The present complaint presents no less a controversy.²

We talk of separation of powers. Yet, a narrow holding on standing can be the equivalent of a substantive repeal of the legislation. The issue is really not whether the courts should abstain by denying standing, but whether by rejecting standing the courts are impeding national policy as expressed in the legislative will.



**Max GRENADER et al.,
Plaintiffs-Appellants-Appellees,**

v.

**Milton SPITZ et al.,
Defendants-Appellees-Appellants,**

Bernard Cooper et al., Defendants.

Nos. 601, 661, Dockets 75-7592, 75-7601.

**United States Court of Appeals,
Second Circuit.**

Argued March 15, 1976.

Decided April 28, 1976.

Tenants who purchased stock in cooperative housing corporation brought suit

2. We are, of course, only at the pleading stage and we may not consider whether the appellants can prove their allegations.

dence presented establishes that Defendants have misappropriated Tracer's trade secrets.

Law, Plaintiffs are entitled to a Preliminary Injunction.



Jack C. CLEMES, Plaintiff,

v.

DEL NORTE COUNTY UNIFIED SCHOOL DISTRICT; Gene Edinger; Paul H. McCarthy; Debi Balzarini; Darlene Fosdick; and Karen Marcum, Defendants,

and

Commission On Professional Competence, Respondent,

and

Del Norte County Unified School District, Real Party in Interest.

No. C-93-1912 MHP (ENE).

United States District Court, N.D. California.

Jan. 25, 1994.

School teacher brought suit against school district and school district officials, alleging he was retaliated against as result of attempts to rectify improprieties that he witnessed on part of school district and its employees. School district and officials moved to dismiss. The District Court, Patel, J., held that: (1) school teacher, who was white male, had standing to sue under Title VI, Title IX, § 1981, and § 1982 based upon alleged retaliation arising from his attempt to vindicate rights of Native American and female students; (2) teacher did not have standing to maintain suit under § 1985 or § 1986; (3) § 1983 damage claims against school district and officials were barred by Eleventh Amendment; and (4) teacher stated claim under False Claims Act.

[8] All Tracer need show is that it made reasonable efforts to maintain confidentiality. *K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471, 474 (9th Cir.1974). The owner of a trade secret does not abandon his secret by limited publication of the secret for a restricted purpose. *Motorola, Inc. v. Computer Displays International, Inc.*, 739 F.2d 1149, 222 U.S.P.Q. 844, 852-53 (7th Cir.1984); or by disclosure to employees on a need-to-know basis. *Digital Development Corp. v. International Memory Systems*, 185 U.S.P.Q. 136 (S.D.Cal.1973). The limited disclosure required at test sites does not reveal the essence of the process claimed.

The License and Non-Disclosure Agreements obligated Defendants to maintain the Tracer Tight process confidential. Based on the provisions of the contracts between Tracer, NESCO and its officers Patterson and McCutchan, the information imparted by Tracer to Defendants was for use in the context of a confidential relationship.

Tracer has demonstrated, as set forth in detail in the Findings of Fact and Conclusions of Law, Defendants' misappropriation of the Tracer Tight process and the copying of Tracer's third-party performance evaluation of the Tracer Tight process and Tracer's Standard Operating Procedures Manual. Tracer has further substantiated its position that none of the information available to the Environmental Protection Agency, the United States Air Force, state agencies or in connection with prior patents demonstrates that Tracer's trade secrets were in the public domain before Tracer and NESCO entered into the License Agreement, nor that they have become part of the public domain thereafter. Regardless of the extent to which the general nature of Tracer's process had been publicly disclosed, Defendants resorted to copying and using Tracer's process in great detail rather than independently developing the same.

Based on the foregoing, in incorporation with the Findings of Fact and Conclusions of

the process both inside and out-
tiff's business, (2) the plaintiff's
velop the process and to pre-
ecy, (3) its value to the plaintiff
npetitors, and (4) the difficulty
could be duplicated by others.
ish Management Services, Inc.,
nsactions, Inc., 732 F.Supp.
N.Y.1989).

ential elements of Tracer's Con-
mation and Proprietary Equip-
plies, set forth in the "Outline
Tight Trade Secret Process,"
Tracer's leak detection system
whole. It is well established
neral concepts, each of which,
not protected as trade secrets,
nplementation involving a par-
ation of general concepts may
o a trade secret." *Id.* at 376
tek Computer Products, Inc. v.
L., 203 U.S.P.Q. 1020 (BNA
7)). The Court in *Cybertek*,
principles applied in *Winston*
o. v. *Minnesota Mining &*
Co., 350 F.2d 134, 140, 146
126 (9th Cir.1965), held:

ication of these basis mechani-
and their relationship to each
ere not publicly known, were
ly after painstaking research
e trial and error, and there-
ted a trade secret entitled to
In other words, the court
e specific embodiment of the
pts and approach into a com-
parts was protectable, even
some of them might well be
industry.

also shown that specific ele-
racer Tight process, as set
ings of Fact and Conclusions
o entitled to protection.

Misappropriation

on of the factors which deter-
nce of a trade secret and
as been a misappropriation
detection process, the evi-

Motion granted in part and denied in part.

1. Federal Civil Procedure ⇨1832

Although court ruling on motion to dismiss for failure to state claim is generally confined to consideration of allegations and pleadings, when complaint is accompanied by attached documents, such documents are deemed part of complaint and may be considered in evaluating merits of motion. Fed. Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Civil Procedure ⇨1829, 1832

On any motion to dismiss other than for failure to state claim upon which relief can be granted, court may consider matters outside pleadings, but must accept as true all material allegations of complaint and construe complaint in favor of plaintiff. Fed.Rules Civ. Proc.Rule 12, 28 U.S.C.A.

3. Federal Civil Procedure ⇨103.2

To have standing to assert statutory rights, plaintiff must first meet constitutional requirement of Article III that he has suffered injury-in-fact as result of allegedly illegal action. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Federal Civil Procedure ⇨103.4

As matter of prudential standing, plaintiff generally must assert his own rights and interests and not those of third party.

5. Federal Civil Procedure ⇨103.2

While Congress may grant standing to those who would otherwise be barred by prudential considerations, it may not reduce standing requirements below constitutional minimum requirement. U.S.C.A. Const. Art. 3, § 1 et seq.

6. Civil Rights ⇨202

White male teacher who claimed he was retaliated against by school district and others as result of his efforts to vindicate rights of students who were primarily female and Native Americans had Article III standing to pursue claims under Title VI, prohibiting discrimination in federally assisted programs, and Title VII, prohibiting discrimination in federally funded education programs. Edu-

cation Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; U.S.C.A. Const. Art. 3, § 1 et seq.

7. Civil Rights ⇨201

Conspiracy ⇨7.5(1)

White male teacher who claimed he was retaliated against for his efforts in vindicating rights of Native American students had standing to maintain § 1981 and § 1982 claims against school district and others, as he was only effective plaintiff to bring suit to redress injuries stemming from charged discrimination, but did not have standing to bring action under § 1985 or § 1986, because he was not member of protected class. 42 U.S.C.A. §§ 1981, 1982, 1985, 1986.

8. Federal Courts ⇨269

School teacher's § 1983 claims against school district and school district officials were barred by Eleventh Amendment, insofar as he sought back pay, compensatory damages, and punitive damages, as school district qualified as state agency and officials were sued only in their official capacity. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 11.

9. Federal Courts ⇨266.1

Provision of Civil Rights Restoration Act waiving Eleventh Amendment immunity in some circumstances did not abrogate immunity for suits under § 1983. 42 U.S.C.A. § 1983; Rehabilitation Act Amendments of 1986, § 1003, 42 U.S.C.A. § 2000d-7; U.S.C.A. Const.Amend. 11.

10. Federal Courts ⇨265, 272

Eleventh Amendment bar extends only to suits for retrospective relief; injunctive relief is permissible. U.S.C.A. Const.Amend. 11.

11. Limitation of Actions ⇨16

Where Congress has not established time limitation for federal cause of action, federal courts rely on state law to determine length of statute of limitations.

12. Limitation of Actions ⇨105(1)

California statute of limitations applicable to teacher's § 1983 claim was tolled while

teacher pursued administrative remedy. 42 U.S.C.A. § 1983.

13. United States ⇨122

Teacher who alleged he brought evidence of fraud in federally funded education programs to attention of his immediate supervisors, as well as to state officials and Department of Justice, and was retaliated against as result, stated claim under False Claims Act, though he did not pursue qui tam action or satisfy statutory procedures. 31 U.S.C.A. § 3730(b, h).

14. Mandamus ⇨87

Federal district court had no jurisdiction to hear teacher's claim seeking review, by way of petition for writ of mandamus, of administrative decision of California Commission on Professional Competence. West's Ann.Cal.C.C.P. § 1094.5.

15. Federal Courts ⇨14.1

It would be inappropriate for federal district court to exercise supplemental jurisdiction over school teacher's request for mandamus relief against California Commission on Professional Competence, as claim raised novel or complex issue of state law, and considerations of federalism and comity presented compelling reasons for declining jurisdiction. 28 U.S.C.A. § 1367(c)(1, 4).

16. Federal Courts ⇨14.1

Federal district court may not exercise supplemental jurisdiction over claim barred by Eleventh Amendment. 28 U.S.C.A. § 1367(c); U.S.C.A. Const.Amend. 11.

Christopher W. Katzenbach, Katzenbach & Khtikian, San Francisco, CA, for plaintiff.

Dorothy S. Landsberg, Kronick Moskowitz Tiedemann & Girard, John M. Laplante, Edson & Laplante, Sacramento, CA, for defendants.

OPINION

PATEL, District Judge.

On July 12, 1993, plaintiff Jack Clemen brought suit against defendants Del Norte

1. The following facts are undisputed by the parties,

County Unified School District, Gene Edinger, Paul H. McCarthy, Debi Balzarini, Darlene Fosdick and Karen Marcum, alleging injuries arising from plaintiff's attempts to rectify certain improprieties that he witnessed on the part of the school district and its employees. Mr. Clemen sued under a host of statutes, including 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986; 42 U.S.C. § 2000d *et seq.* ("Title VI"); 20 U.S.C. § 1681 ("Title IX"); and 31 U.S.C. § 3730(h) ("False Claims Act"). Mr. Clemen also petitioned the court for a writ of mandamus to review an administrative hearing at which his employment was terminated.

Defendants have now moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss plaintiff's complaint on the following grounds: 1) Mr. Clemen has no standing to bring an action based upon violations of Title VI or Title IX because he is not a member of a class protected by those statutes; 2) Mr. Clemen fails to state a claim under 42 U.S.C. §§ 1981, 1982, and 1985 because he is not a member of a class protected by those statutes; 3) Mr. Clemen's claims under 42 U.S.C. §§ 1983, 1985 and 1986 are barred by the Eleventh Amendment to the Constitution; 4) Mr. Clemen has not stated facts sufficient to establish a claim under the False Claims Act; and 5) Mr. Clemen's claims under 42 U.S.C. §§ 1983, 1985 and 1986 are barred by the statute of limitations.

Defendants have also moved pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss Mr. Clemen's claim for a writ of mandamus for lack of subject matter jurisdiction.

Having read and considered the arguments and submissions of the parties, and for the reasons set forth below, the court issues the following memorandum and order.

BACKGROUND¹

Mr. Clemen was a teacher in the Del Norte County Unified School District ("District") for approximately 25 years. In 1989 he was assigned as teacher, and at various times designated Coordinator, for the Independent Studies Program. The Independent Studies

ties, except as otherwise noted.

Program was established by the District to provide educational services to students outside of the formal educational structure of the schools maintained by the District. A substantial number of the students enrolled in the program were Native Americans. The students were also predominantly female. The program was funded with both federal and state education monies.

Mr. Clemes alleges that around September 1990 he learned from the parents of some of the Independent Studies students that the other teacher for the Program, defendant Debbie Balzarini, was not teaching the students assigned to her. Upon investigation Mr. Clemes alleges that he discovered that defendant Balzarini was making false entries in student records and forging the signatures of students and parents on Independent Studies Program documents, including records of teaching sessions for students and contracts for the Independent Studies Program teaching services. Mr. Clemes reported this activity to defendant Paul McCarthy, principal in charge of the Independent Studies Program, and to defendant Gene Edinger, superintendent of the Del Norte School District.²

Mr. Clemes alleges in essence that Mr. McCarthy and Mr. Edinger told him to mind his own business and stop reporting on illegal activities of his colleagues. After that, according to Mr. Clemes, both Mr. McCarthy and Mr. Edinger aided and assisted Ms. Balzarini's fraud with the intent of allowing the District to collect state and federal financial assistance for educational services under false pretenses.

Mr. Clemes subsequently took his complaints about defendant Balzarini, as well as defendants McCarthy and Edinger, to the office of the District Attorney for Del Norte County and to the Department of Justice. This led to Mr. Clemes' testimony before a Del Norte County grand jury about the forgeries and fraud, apparently to consider issuing indictments against some of the defendants now before this court. From the facts presented to this court it appears that no indictments issued. Mr. Clemes maintains

that the District Attorney withheld the majority of Mr. Clemes' documentation from the tribunal, such that the grand jury failed to appreciate the true scope of the fraud involved.

Mr. Clemes also advised the Governing Board of the District of the alleged misconduct. Mr. Clemes maintains that the Governing Board has refused to review or consider the evidence of the fraud.

Finally, in January 1993 Mr. Clemes filed a complaint with the Office of Civil Rights, United States Department of Education, alleging discrimination by the District against Native Americans, minorities and females in educational programs.

From August 31, 1992 through November 4, 1992, the District, through the Commission on Professional Competence, held adversary administrative hearings before a three-person panel to consider whether to terminate Mr. Clemes' employment. Mr. Clemes maintains that the hearings failed to provide him with due process. On April 23, 1993 Mr. Clemes was terminated from employment with the District.

Mr. Clemes alleges that some or all of the defendants improperly attempted to influence the investigations conducted by the above administrative and judicial bodies. Briefly, Mr. Clemes alleges that the District concealed evidence from the State Controller's office during an audit of the District and the Independent Studies Program; that defendant McCarthy improperly met in private with members of the grand jury; that defendant Edinger instructed or advised the members of the District's Governing Board not to review Mr. Clemes' evidence and to destroy the documents he provided; that agents of the District had ex parte communications with the chair of the Commission panel; and that the assistant to the chair of the Commission panel had improper conversations with the Office of Civil Rights and the investigator in charge of the investigation concerning Mr. Clemes' allegations. Mr. Clemes also alleges that certain defendants improperly attempted to influence him to remain silent about the

2. Plaintiff also alleges that defendant Balzarini was conducting a private business, known as the

"Diet Center," with the tacit approval of the District and defendants McCarthy and Edinger.

fraud, threatening among other things termination from his job.

As a result of Mr. Clemen's actions, some or all of the defendants allegedly subjected Mr. Clemen to discrimination and retaliation. These acts included: three charges of unprofessional conduct, pursuant to section 44938 of the California Education Code; placement on administrative leave, beginning January 1992; termination from employment; insertion of additional language on Mr. Clemen's application for house refinancing to the effect that his termination was "likely," thus resulting in denial of the loan; alteration of employment verification documents such that Mr. Clemen is unable to obtain a teaching credential in another state; and physical and verbal assaults. In addition, Mr. Clemen maintains that defendants caused the wrongful denial of ninety-six days of disability; caused injury to his property; interfered with the delivery of his mail; monitored his activities, mail and communications; encouraged others to make baseless complaints against him; and warned students that contact with Mr. Clemen would jeopardize receipt of their degrees.

As a consequence of the various acts allegedly taken against him, Mr. Clemen seeks damages to remedy the loss of wages and benefits, both past and future, and to remedy the damage to his reputation and standing in the community. He also seeks recompense for the humiliation, anxiety, mental suffering and distress that he has suffered; for his inability to refinance his home; and to cover the cost of litigation. In addition to damages, Mr. Clemen seeks the following equitable relief: 1) restoration of his employment as a teacher and restoration of any certificates or licenses lost as result of the defendants' action; 2) preliminary and permanent injunctions enjoining defendants from taking retaliatory or discriminatory actions against him; 3) other and further equitable relief to restore his reputation and to undo the harm and damage to his career, reputation and standing.

LEGAL STANDARD

[1] A motion to dismiss for failure to state a claim will be denied unless it appears

that the plaintiff can prove no set of facts which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Fidelity Fin. Corp. v. Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 949, 93 L.Ed.2d 998 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Ind., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.), cert. denied sub nom. *Wyo. Community Dev. Auth. v. Durning*, 484 U.S. 944, 108 S.Ct. 330, 98 L.Ed.2d 358 (1987).

[2] On any other motion to dismiss under Rule 12(b), the court may consider matters outside the pleadings, but must accept as true all material allegations of the complaint and construe the complaint in favor of the plaintiff. See Fed.R.Civ.P. 12; *Warth v. Seldin*, 422 U.S. 490, 501-02, 95 S.Ct. 2197, 2206-07, 45 L.Ed.2d 343 (1975) (considering the issue of standing). Each ground for dismissal will be considered in turn.

DISCUSSION

I. Standing

Defendants launch a generalized attack on Mr. Clemen's ability to sue for injuries incurred for seeking to vindicate the rights of female and minority students. Specifically, defendants challenge Mr. Clemen's standing to bring claims under Title VI and Title IX, arguing that because he is not himself the target of personal discrimination, he cannot sue under these provisions. In a related argument, defendants argue that Mr. Clemen has failed to state a claim under 42 U.S.C. §§ 1981, 1982, and 1985 because he is not a member of a class protected by those stat-

utes.³ Although defendants frame this latter argument as a "failure to state a claim," it is essentially a standing argument and the court will consider it as such.

[3-5] In order to have standing to assert statutory rights, a plaintiff must first meet the constitutional requirement of Article III that he have suffered injury-in-fact as a result of the allegedly illegal action. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S.Ct. 1114, 1121, 71 L.Ed.2d 214 (1982). Courts have also developed "prudential" standing requirements. For instance, a plaintiff generally must assert his own rights and interests and not those of third parties. *See Warth v. Seldin*, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 2205-06, 45 L.Ed.2d 343 (1975). While Congress may grant standing to those who would otherwise be barred by prudential considerations, it may not reduce the standing requirements below the constitutional minimum requirement. *See id.*

A. Title VI and Title IX

[6] Mr. Clemes is apparently claiming a violation of Title VI on the ground that his injuries stem from his attempts to vindicate the rights of students who are primarily Native Americans.⁴ His Title IX claim apparently rests on the basis that the students are also primarily female.⁵ Mr. Clemes does not allege that he was directly discriminated against because of his race or his sex. Although caselaw concerning standing under Titles VI and IX for those who are not themselves direct targets of discrimination is sparse, an analysis of available precedent under those provisions and under analogous provisions of the Civil Rights Act of 1964 reveals that Title VI and Title IX should properly be interpreted broadly with respect to standing.

Standing

3. Defendants in their moving papers did not make the latter argument with respect to 42 U.S.C. § 1985; they did however make this argument in their reply papers. The court therefore addresses this argument as well.

4. Title VI provides in relevant part:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation, be denied the benefits of, or be subjected to discrimination

In *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir.), cert. denied, 459 U.S. 857, 103 S.Ct. 127, 74 L.Ed.2d 110 (1982), the Second Circuit upheld standing for an organization that sued under Title VI. The organization produced theatrical and artistic productions designed to reach the black and hispanic communities and claimed that county officials had denied it federally administered funds on the basis of racial animus. *Id.* at 703. The organization sued under Title VI, as well as under 42 U.S.C. §§ 1981, 1983, and 1985. The court upheld standing for the organization, reasoning that although the organization did not allege discrimination against it because of its own "race," it did allege discrimination against it because of the race of others with which it had a relationship. The court noted that the language of Title VI prohibits discrimination "on the ground of race" generally, and not specifically on the ground of race of the plaintiff. *Id.* at 705.

The provisions of Title IX are similarly broad, directing that "no person" may be discriminated against or denied benefits "on the basis of sex." 20 U.S.C. § 1681. As the Supreme Court has noted in interpreting Title IX, "if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language." *North Haven Board of Educ. v. Bell*, 456 U.S. 512, 521, 102 S.Ct. 1912, 1918, 72 L.Ed.2d 299 (1982) (holding that discriminatory employment practices are cognizable under Title IX) (citation and internal brackets omitted). Furthermore, courts have repeatedly noted the similarities between Titles VI and IX and have often looked to caselaw interpreting one provision as precedent in cases involving the second. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 694-96, 99 S.Ct. 1946,

under any program or activity receiving Federal assistance.

5. Title IX of the Education Amendments of 1972 provides in relevant part:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

1956-57, 60 L.Ed.2d 560 (1979) (detailing similarities between the provisions).

Other decisions interpreting the analogous provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* ("Title VIII" or "Fair Housing Act") are more plentiful, and likewise support the decision in *Hudson Valley*. See *Guardians Assoc. v. Civil Services Comm'n*, 463 U.S. 582, 634, 103 S.Ct. 3221, 3249, 77 L.Ed.2d 866 (1983) (Marshall, J., dissenting) (describing Title VII as a "useful guidepost" for a Title VI analysis); see also *Eastman v. Va. Polytechnic Inst. and State Univ.*, 939 F.2d 204, 208 (4th Cir.1991) ("nothing in the legislative history of Title VI points to any reason why the anti-discrimination statutes should not be treated similarly in [regard to remedies]"). For example, in *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), the Supreme Court upheld the standing of a white tenant who brought suit under section 810(a) of Title VIII, alleging discrimination by the owner of an apartment complex against nonwhite rental applicants. The Court reversed the lower court's holding that standing is limited to "persons who were objects of discriminatory housing practices." *Id.* at 208, 93 S.Ct. at 366. The Court noted that the provision at issue allowed suit by any "person aggrieved," which was elsewhere defined as "[a]ny person who claims to have been injured by a discriminatory housing practice." *Id.* The Court also based its holding on the legislative history and structure of the Act, both of which evidenced a congressional intent to encourage private enforcement of the Act's provisions. *Id.* at 209-11, 93 S.Ct. at 366-68. The Court concluded that Congress intended "to define standing [under Title VIII] as broadly as is permitted by Article III of the Constitution." *Trafficante*, 409 U.S. at 209, 93 S.Ct. at 367 (citing *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir.1971)). The Court found the injury required by Article III in the damage stemming from the white plaintiff's inability to live in an integrated setting. See *Trafficante*, 409 U.S. at 211, 93 S.Ct. at 367-68.

In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100, 103 n. 9, 99 S.Ct. 1601, 1607-08, 1609 n. 9, 60 L.Ed.2d 66 (1979), the Supreme Court extended this holding to 42 U.S.C. § 3612, another provision of Title VIII. Although that provision did not contain the same language allowing suit by any "person aggrieved," the Court nonetheless held that Congress had intended to define standing just as broadly as under the provision of the Fair Housing Act interpreted in *Trafficante*. *Id.* at 108-09, 99 S.Ct. at 1612-13. Accordingly, the Court held that standing under that provision was not limited to direct victims of discrimination. See *id.* at 115, 99 S.Ct. at 1615.

Circuit courts, including the Ninth Circuit, have made similar holdings for cases brought under Title VII. For instance, in *Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir.1976), cert. denied, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1100 (1977), the Ninth Circuit held that a white woman had standing to sue her employer for discrimination against blacks and hispanics, finding the case "logically indistinguishable" from *Trafficante*. *Id.* at 469. The court noted that *Trafficante* had itself relied on a Title VII case, *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971), in reaching its conclusion as to the standing of plaintiffs not directly discriminated against. The *Waters* court, similar to the *Trafficante* court, found the requisite injury for standing from the loss of associational benefits that would come from a racially integrated workplace. *Id.* at 469. See also *Chicano Police Officers Ass'n v. Stover*, 526 F.2d 431, 437 (10th Cir.1975) (indirect injuries stemming from discrimination against others can provide standing under Title VII), *vacated on other grounds*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976).

As the above cases indicate, courts have consistently found that Congress, in enacting the above civil rights provisions intended to extend standing under those provisions to a broad class of plaintiffs. There is no doubt that Mr. Clemes satisfies the absolute minimum requirement of Article III—that the plaintiff have suffered an injury-in-fact. Mr. Clemes has certainly alleged an injury; in

fact, he has alleged many. Those injuries would also certainly be redressed if he were granted the relief that he seeks. The court therefore holds that Mr. Clemes may proceed with his cause of action under both Title VI and Title IX.

B. 42 U.S.C. §§ 1981, 1982, 1985

[7] Mr. Clemes' claims under these provisions of Title 42 are similar to his claims under Title VI and Title IX, in that he does not allege that he is himself a member of a class directly protected by these provisions, but instead alleges that he suffered injuries that stemmed from discrimination against the students, who, as Native Americans, do belong to a protected class. The issue before this court is, again, whether such a relationship is sufficient to confer standing on Mr. Clemes under 42 U.S.C. §§ 1981⁶, 1982,⁷ and 1985.⁸

In *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), the Supreme Court upheld the standing of a white man to sue under 42 U.S.C. § 1982 for injuries stemming from discrimination against a black man. Plaintiff Sullivan owned a house in a neighborhood in Virginia. Defendant, a corporation, operated a community park and playground for the benefit of nearby residents. A membership in the corporation entitled members and their families to use the recreational facilities. If a mem-

ber leased his home, he could assign his membership to the tenant subject to approval from the corporation board. Sullivan bought a second home in the area and leased his first home to a black man. When he attempted to assign his membership to the black tenant, the corporation's membership objected to the assignment because the tenant was black. Sullivan protested and the board revoked both his memberships. See *id.* at 234-35, 90 S.Ct. at 403-04.

Sullivan sued under 42 U.S.C. §§ 1981 and 1982. The Court, discussing only section 1982, held that the plaintiff had standing to sue for his own expulsion from the corporation:

If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1902. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson*, 346 U.S. 249, 259, 73 S.Ct. 1031, 1036, 97 L.Ed. 1586, that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.

Sullivan, 396 U.S. at 237, 90 S.Ct. at 404.⁹

Although the *Sullivan* Court did not explicitly extend its holding that non-minorities

6. Section 1981 provides in relevant part:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...."

7. Section 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

8. Section 1985(2) and (3) provide in relevant part:

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein ... or to injure such party ... in his

person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court ...; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory ...

(3) If two or more persons in any State or Territory conspire or go in disguise ... on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

9. Defendants are thus incorrect in asserting that the plaintiff's standing in *Sullivan* was premised on the his own right to convey property. The Court specifically stated that it was Sullivan's

may sue for injuries incurred trying to vindicate the rights of minorities to actions under section 1981, lower courts have done so. For instance, in *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir.), *reh'g denied*, 520 F.2d 409 (2d Cir.1975), the Second Circuit upheld standing for a white man under section 1981 who alleged that his employer forced him into retirement for selling his house to a black man.¹⁰ See also *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1446-47 (10th Cir.1988) (upholding standing under section 1981 for white man fired for helping black employee bring EEOC claim). As the Sixth Circuit stated in the case of an white employee fired for protesting the termination of a black employee, "although [plaintiff] was not fired because of his race, it was a racial situation in which he became involved that resulted in his discharge...." *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268 (6th Cir.1977). The court held this was sufficient to state a cognizable claim under section 1981.¹¹

The Ninth Circuit has not addressed this issue at length. In *Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir.1982), the Ninth Circuit refused to extend standing to a white man suing for racial discrimination under 42 U.S.C. §§ 1981, 1982, and 1983. The

expulsion from the corporation for attempting to vindicate minorities' rights that gave him standing.

10. The Second Circuit noted that although the Supreme Court in *Sullivan* rested its holding on 42 U.S.C. § 1981, the similar language and history of that provision and 42 U.S.C. § 1982 suggest that the two provisions should be read consistently. *DeMatteis*, 511 F.2d at 312 n. 9.

11. Courts considering analogous situations under 42 U.S.C. § 1983 have likewise upheld standing for non-minority plaintiffs. See, e.g., *Wilson v. City of N. Little Rock*, 801 F.2d 316 (8th Cir.1986) (injury arising from commercial relationship); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir.1983) (injury arising from prospective relationship); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9 (1st Cir.1979) (injury arising from prospective relationship); see also *Yester-years, Inc. v. Waldorf Restaurant, Inc.*, 730 F.Supp. 1341, 1355 (D.Md.1989) (collecting cases).

12. It is unclear whether *Halet* should in fact be interpreted so restrictively. In a later case involving standing under Title VII and under 42

plaintiff in *Halet* alleged that an apartment complex's "adults-only" policy violated his right to live with his family and was racially discriminatory, since it impacted minorities to a greater extent than non-minorities. In a brief paragraph, the Ninth Circuit held that the plaintiff had no standing to raise the claims of racial discrimination. *Id.* at 1308. Finding that plaintiff was "in no better position to bring this action" than a minority family, the Ninth Circuit, citing *Sullivan*, held that the plaintiff had no standing. *Id.*

Although *Halet* appears to interpret *Sullivan* somewhat more restrictively than other circuits, it is still clear that Mr. Clemes has standing to bring the instant action under 42 U.S.C. §§ 1981 and 1982. Even assuming that *Halet* stands for the proposition that a non-minority plaintiff may bring suit under 42 U.S.C. §§ 1981 or 1982 *only* where there is no minority plaintiff who could do so, Mr. Clemes clearly meets that criteria.¹² In the words of *Halet*, Mr. Clemes is asserting "[his] own rights and interests"; he claims he was personally injured by defendants' discriminatory acts. *Halet*, 672 F.2d at 1308. The injuries that he alleges and for which he seeks redress are all injuries that are personal to him: humiliation and suffering, loss of

U.S.C. §§ 1981 and 1985(3), the Ninth Circuit noted that "[t]he guarantees of § 1981 and Title VII against racial discrimination are coextensive...." *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1022 (9th Cir.1983) (citation omitted). Given that the Ninth Circuit has explicitly extended standing to non-minorities under Title VII, see *supra*, the *Gomez* case would tend to lend support to the argument that section 1981 must also be interpreted as incorporating a broad definition of standing.

Moreover, *Sullivan* itself does not appear to support a restrictive interpretation of standing under section 1982. Although *Sullivan* quoted from another case in which the white plaintiff was "the only effective adversary," the Court did not limit standing to such situations. *Sullivan*, 396 U.S. at 237, 90 S.Ct. at 404 (quoting *Barrows v. Jackson*, 346 U.S. at 259, 73 S.Ct. at 1036). In *Sullivan*, after all, the black man to whom *Sullivan* attempted to convey his corporation membership was also a plaintiff; the white plaintiff was not the only potential litigant. See also *Winston*, 558 F.2d at 1270 (upholding the standing of a white man fired for protesting the discriminatory firing of a black co-worker, despite the fact that the black co-worker had himself also brought suit.).

job and reputation. Clearly none of the students who were allegedly direct targets of discrimination would have standing to bring these claims. It is true that these students could themselves bring suit to redress the discrimination against them, just as the minority tenants in *Halet* could have brought suit to stop the discrimination against them. Unlike the putative plaintiff in *Halet*, however, Mr. Clemes' suit springs from a different injury—namely, the retaliation against him for seeking to vindicate the rights of others. This injury stems from the defendants' discrimination, yet it cannot be redressed by the direct targets of that discrimination. Mr. Clemes is the only effective plaintiff to bring this suit and thus this court finds that he is a proper plaintiff under 42 U.S.C. §§ 1981 and 1982.¹³

On the other hand, the Ninth Circuit has clearly held that in order to bring an action under the conspiracy provision of 42 U.S.C. § 1985, a plaintiff must be a member of a protected class. In *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir.), cert. denied, 454 U.S. 967, 102 S.Ct. 510, 70 L.Ed.2d 383 (1981), the Ninth Circuit refused to extend standing under 42 U.S.C. § 1985(3) to a group of non-minority plaintiffs. In that case, a group of sheriff's deputies sought to bring suit against an unincorporated "posse" that had been attempting to stop labor organizers from organizing. In attempting to do so, the members of the posse had fired on the deputies. The deputies filed suit under section 1985(3), claiming that the defendants conspired against them,

motivated by class-based animus against the members of labor organizations. The Ninth Circuit held that it need not decide whether labor organizations were a protected class under that provision because plaintiffs themselves were not a member of the protected class:

The law of this circuit is clear: the plaintiff must be a member of the class discriminated against to claim the benefits of § 1985(3).

Id. at 721.

Therefore, Mr. Clemes has no standing to bring suit under 42 U.S.C. § 1985(3) for injuries he sustained as a result of class-based animus against others. The provisions of section 1985(2), under which Mr. Clemes also sues, are substantially identical to the provisions of section 1985(3), and this court sees no reason to construe the two provisions differently with respect to standing. The court thus also holds that Mr. Clemes has no standing to proceed under 42 U.S.C. § 1985(2).

Defendants did not specifically challenge Mr. Clemes' standing to sue under 42 U.S.C. § 1986.¹⁴ However, no cause of action under 42 U.S.C. § 1986 will lie unless a cause of action under 42 U.S.C. § 1985 can be established. See, e.g., *Jews for Jesus v. Jewish Comm'n Relat. Council*, 968 F.2d 286 (2d Cir.1992). Because this court dismisses Mr. Clemes' claim under section 1985, it also dismisses his claim under section 1986.

this order. However, given this observation plaintiff should consider the wisdom of proceeding on this claim and whether the injuries he seeks to redress are not adequately addressed by his other causes of action.

14. Section 1986 provides in relevant part:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured ... for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented.

13. Defendants seek to dismiss Mr. Clemes' claim under 42 U.S.C. § 1982 only on the basis that he is not a direct target of discrimination. Although the court finds this argument unpersuasive, it notes that it seems doubtful that Mr. Clemes has alleged facts to support a claim under section 1982 in any case. That provision ensures equal treatment to "inherit, purchase, lease, sell, hold, [or] ... convey real and personal property." Presumably, Mr. Clemes' cause of action under this statute is based on his allegation that defendants' actions against him resulted in his inability to re-finance his house. At most this allegation, if proven, would show that defendants interfered with Mr. Clemes' right to contract, an injury that would give him standing under section 1981, not section 1982. Because defendants have not moved to dismiss on this basis, the court will not reach the section 1982 claim in

II. 42 U.S.C. § 1983

Defendants next argue that plaintiff's claim under 42 U.S.C. § 1983¹⁵ is barred by the Eleventh Amendment and by the statute of limitations.

A. The Eleventh Amendment

[8] The Eleventh Amendment bars federal court suits that seek retrospective money damages against state agencies. See *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, reh'g denied, 416 U.S. 1000, 94 S.Ct. 2414, 40 L.Ed.2d 777 (1974). Defendants argue that all of the defendants are "state agencies" for purposes of the Eleventh Amendment, and thus that Mr. Clemen's claims against them are barred.

The school district is clearly a state agency. In *Belanger v. Madera Unified School Dist.*, 963 F.2d 248 (9th Cir.1992), cert. denied, — U.S. —, 113 S.Ct. 1280, 122 L.Ed.2d 674 (1993), the Ninth Circuit squarely held that a school district in California was a state agency for eleventh amendment purposes.¹⁶ Mr. Clemen argues that notwithstanding *Belanger*, the school district in this case is not a state agency, since one factor relevant to the question of whether an entity is an agency of the state—namely whether a money judgment would be satisfied from state funds—is different here than in *Belanger*. In fact, the *Belanger* court stated that whether one knew if the judgment would be paid from state funds or local funds or a combination of both was immaterial in California since the state's centralized school funding system commingles state and local revenues in a common fund under state control. *Id.* at 251-52.

15. Section 1983 provides in relevant part:

Any person who, under color [of law causes] any citizen of the United States ... to [be] depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

16. The Ninth Circuit applied the "Mitchell test" in making its determination as to whether an entity is a state agency for eleventh amendment purposes. See *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir.1988), cert. denied, 490 U.S. 1081, 109 S.Ct. 2102, 104

The individual defendants also clearly fall within the scope of the Eleventh Amendment. State officials sued in their official capacity enjoy the same eleventh amendment protection as is afforded to states. Although literally persons, "a suit against a state official is not a suit against the official but rather is a suit against the official's office." *Will v. Mich. Dept. State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45 (1989) (citing *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985)). "As such, it no different from a suit against the State itself." *Will*, 491 U.S. at 71, 109 S.Ct. at 2311. As the District is a state agency, to the extent to which Mr. Clemen seeks to sue the individually named defendants in their official capacity for retrospective relief, those claims are also barred by the eleventh amendment. On the basis of Mr. Clemen's complaint, this court finds that all defendants are sued in their official capacities.

[9] Mr. Clemen argues that, even if the Eleventh Amendment does apply to these defendants, Congress has waived this immunity for actions under 42 U.S.C. § 1983. Mr. Clemen is correct in asserting that Congress may waive Eleventh Amendment immunity, but is incorrect in asserting that it has done so with respect to suits under section 1983. If Congress wishes to abrogate Eleventh Amendment immunity, it must do so unequivocally. See *Dellmuth v. Muth*, 491 U.S. 223, 227-28, 109 S.Ct. 2397, 2399-2400, 105 L.Ed.2d 181 (1989). Mr. Clemen argues that the 1987 Civil Rights Restoration Act, 100 Stat. 1845, provides such an unequivocal statement.¹⁷ As part of that Act, Congress

L.Ed.2d 663 (1989). The five factors enumerated in *Mitchell* are:

[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity. *Mitchell*, 861 F.2d at 201 (citing *Jackson v. Haya-kawa*, 682 F.2d 1344, 1350 (9th Cir.1982)).

17. Prior to the enactment of this provision, the Supreme Court had ruled that the Eleventh Amendment bar applies to suits against the state

added the following amendment to the Rehabilitation Act:

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d. Because the Independent Studies Program receives federal funds, reasons Mr. Clemes, his suit under section 1983 may proceed.

The circuits which have considered whether this amendment abrogates immunity for suits under section 1983 have clearly found to the contrary. As stated in *Kohnman v. Bd. of Trustees of Univ. of Ill.*, 951 F.2d 765 (7th Cir.1991), "[s]ection 1983 is a different creature than the three statutes listed in [2000d-7] ... [u]nlike these statutes, [1983] does not specifically prohibit discrimination by recipients of federal financial assistance...." *Id.* at 768. The court thus held that section 2000d does not provide the type of clear congressional statement necessary to abrogate Eleventh Amendment immunity. See *id.*; see also *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1141, 1201 n. 37 (11th Cir.) (affirming that Eleventh Amendment bars suit under 42 U.S.C. § 1983 but not under 42 U.S.C. § 2000d, *cert. denied*, — U.S. —, 111 S.Ct. 2238, 114 L.Ed.2d 479 (1991)). This court agrees with those courts that have concluded that section 2000d-7 does not strip states of the immunity provided by the Eleventh Amendment for suits under 42 U.S.C. § 1983.

[10] Defendants are therefore correct that all of the defendants fall under the Eleventh Amendment. This fact alone is insufficient, however, to dismiss plaintiff's claims. The Eleventh Amendment bar ex-

or state officials which arise under 42 U.S.C. § 1983. See *Quern v. Jordan*, 440 U.S. 332, 339, 99 S.Ct. 1139, 1144, 57 L.Ed.2d 358 (1979).

18. Mr. Clemes also seeks attorneys' fees. To the extent that these fees are related to his seeking of

tends only to suits for retrospective relief, injunctive relief is permissible since "official-capacity actions for prospective relief are not treated as actions against the State." *Kennedy v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985). Mr. Clemes seeks back pay, compensatory and punitive damages. These forms of relief are all retrospective and therefore are barred. *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 57 L.Ed.2d 358 (1979); *Sauceda v. Wash. Dep't of Labor & Ind.*, 917 F.2d 1216, 1218 (9th Cir.1990). Mr. Clemes also seeks reinstatement, however, which is an equitable remedy and is therefore permissible.¹⁸ The only appropriate defendants against whom Mr. Clemes may seek relief on this claim are defendant Edinger and defendant McCarthy.

Accordingly, Mr. Clemes' claim under 42 U.S.C. § 1983 against the District and against individual defendants Balzarini, Fosdick, and Marcum are dismissed in their entirety. Mr. Clemes is given leave to amend, however, in order to allege that these individually named defendants are liable in their individual capacity. Mr. Clemes is also given leave to amend his complaint in order to allege that defendants Edinger and McCarthy are liable in their individual capacity, should he so desire.

B. Statute of Limitations

[11, 12] Defendants have also moved this court to dismiss Mr. Clemes' section 1983 claim as barred by the statute of limitations. Where Congress has not established a time limitation for a federal cause of action, federal courts rely on state law to determine the length of the statute of limitations. *Hoesterly v. City of Cathedral City*, 945 F.2d 317, 318 (9th Cir.1991) (citing *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985)), *cert. denied*, — U.S. —, 112 S.Ct. 1941, 118 L.Ed.2d 546 (1992). Applying relevant California law, the statute of limitations for plaintiffs' federal civil rights claims is one

injunctive relief, he is not categorically barred from recovery. See *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), *reh'g denied*, 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83 (1979).

year. See *McDougal v. County of Imperial*, 942 F.2d 668, 672-74 (9th Cir.1991).

While it is true that certain of the alleged discriminatory acts in Mr. Clemes' complaint occurred in January 1992, more than a year before the filing of the complaint on May 21, 1993, under California's equitable tolling doctrine the statute may be tolled pending the pursuit of a formal legal remedy. *Donoghue v. Orange Co.*, 848 F.2d 926, 930 (9th Cir. 1987). The pursuit of an administrative hearing constitutes such a remedy. *Id.* at 931. If there is "timely notice [in filing the first claim], lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff," the statute is properly tolled. *Donoghue*, 848 F.2d at 931 (quoting *Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir.1983)).

As there is no dispute by the defendants that these criteria have not been met in the instant case, and as the administrative hearings took place from August 31, 1992 to November 4, 1992, less than a year from filing the complaint on May 23, 1993, this court declines to dismiss Mr. Clemes' section 1983 claim as time-barred.

III. False Claims Act

[13] Mr. Clemes also seeks relief under 31 U.S.C. § 3730(h), a provision of the False Claims Act. The False Claims Act sets up an elaborate mechanism by which private citizens may bring so-called "*qui tam* suits" on behalf of the government against defendants who have defrauded the government. See 31 U.S.C. § 3729 *et seq.* Section 3730(h), the provision under which Mr. Clemes has filed, provides relief for any employee who is retaliated against "because of lawful acts done by the employee . . . in furtherance of

an action under this section." ¹⁹ The relief available includes reinstatement, back pay and attorneys' fees.

Defendants argue that because Mr. Clemes has not met any of the procedural requirements set forth in section 3730(b) or filed a *qui tam* suit against defendants, he is therefore not covered by the protections of section 3730(h). This court does not believe that Congress intended for this section to be read so restrictively. To begin with, the language of section 3730(h) states broadly that it covers retaliation for acts done "in furtherance of an action under this section." There is certainly no requirement in the language of the statute itself that a plaintiff have exhausted all of the requirements of section 3730(b) or have actually filed a *qui tam* suit.

Furthermore, such a narrow reading would be inconsistent with the purposes of the False Claims Act. Congress enacted the False Claims Act in order to discourage fraud against the government and to encourage persons with knowledge of fraud to come forward. See H.R.Rep. No. 660, 99th Cong., 2d Sess., 22 (1986). It would be inconsistent with these dual goals to impose upon section 3730(h) some sort of exhaustion requirement, as defendants appear to urge. Whistleblower statutes have traditionally been broadly construed, see *Neal v. Honeywell, Inc.*, 826 F.Supp. 266, 270 (N.D.Ill.1993), and this court sees no reason to break from tradition in this instance in order to read the statute in a manner which its plain language does not support. Other courts to consider the issue have reached the same conclusion that the retaliation provisions of the False Claims Act are available to whistleblowers whether or not they have pursued a *qui tam* action or

19. The False Claims Act, 31 U.S.C. § 3730(h) provides in its entirety:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to

all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

taken the steps outlined in 31 U.S.C. § 3730(b). See *id.*; see also *United States ex rel. Kent v. Aiello*, 836 F.Supp. 720 (E.D.Cal. 1993), 93 Daily Journal D.A.R. 16611.

For purposes of this motion, it is unnecessary to delineate the exact reach of section 3730(h). Mr. Clemes alleges that he brought evidence of fraud against the government to the attention of his immediate supervisors, as well as to state officials and the Department of Justice. On the basis of these facts, this court is unable to say that Mr. Clemes can prove no set of facts that would entitle him to relief under 31 U.S.C. § 3730(h). Therefore defendants' motion to dismiss must be denied.

IV. Writ of Mandamus

[14] Mr. Clemes seeks in his complaint a writ of mandamus to review the administrative decision of the Commission on Professional Competence. California Code of Civil Procedure § 1094.5 unquestionably provides for the right to judicial review of a statutorily mandated administrative order or decision. *Boren v. State Personnel Board*, 37 Cal.2d 634, 637, 234 P.2d 981 (1951). However, this is a state remedy, not a federal remedy. This court therefore has no jurisdiction to hear this claim.

V. Supplemental Jurisdiction

Apparently realizing that many of his claims are untenable in federal court, Mr. Clemes attempts to persuade this court to exercise its supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) in order to have these claims heard in this forum nonetheless.²⁰ Section 1367(c) sets forth the occasions when it is appropriate for a federal court to decline to exercise supplemental jurisdiction:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

20. Section 1367(a) states in relevant part: in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

[15] Mr. Clemes first argues that this court should exercise supplemental jurisdiction to hear his claim for a writ of mandamus. Subsections (1) and (4) of section 1367, cited above, both provide reasons to decline supplemental jurisdiction over Mr. Clemes' state mandamus claim. Mandamus proceedings to compel a state administrative agency to act are actions that are uniquely in the interest and domain of state courts. It would be entirely inappropriate for a federal court, through exercise of its supplemental jurisdiction, to impose itself upon such proceedings. Considerations of federalism and comity, not generally present with typical "pendent" state claims, loom large in the case of state mandamus proceedings. Accordingly, the court declines to exercise supplemental jurisdiction over this claim.

[16] At the hearing on this motion, plaintiff appeared to make an even more astonishing argument with regard to supplemental jurisdiction and the eleventh amendment bar to plaintiff's section 1983 claim. Plaintiff's argument is that although suits under 42 U.S.C. § 1983 cannot be brought against states in federal court, they can be brought in state court. Such a claim in state court, the argument runs, is a "state claim." The final step in this amazing feat of illogic is the argument that the federal court can, by exercising supplemental jurisdiction, bring the claim back to federal court—a section 1983 claim against the state for money damages in federal court.

This argument is so frivolous it is hard to know where to attack it first. To begin with, "the State and arms of the State, which have traditionally enjoyed Eleventh Amendment

action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

unity, are not subject to suit under 28 U.S.C. § 1332 in either federal court or state court."

Howlett By and Through Howlett v. Rose, 499 U.S. 356, 365, 110 S.Ct. 2430, 2437, 110 L.Ed.2d 332 (1990) (emphasis added). More

importantly, plaintiff's argument turns supplemental jurisdiction, a mere procedural

into a weapon to obliterate the Eleventh Amendment. As noted above, the Supreme

Court has held that Eleventh Amendment immunity is not to be abrogated absent a

clear and unequivocal statement by Congress. *Muth v. Muth*, 491 U.S. 223, 227-28, 109

L.Ed.2d 2397, 2399-2400, 105 L.Ed.2d 181 (1990). No such language is to be found in

section 1367. Congress enacted section 1367 as part of the Judicial Improvements Act, for

the purpose of allowing litigants to economically resolve related matters in a single fo-

rum. Judiciary Comm., H.R.Rep. No. 101-558, 101st Cong., 2d Sess. (1990), reprinted

in 90 U.S.C.C.A.N. 6860, 6874. This effort to streamline procedural aspects of judicial

process does not in any way support the substantive alteration of Eleventh Amendment

prudence. Therefore, this court refuses Mr. Clemes'

attempt to make an end-run around the Eleventh Amendment by twisting the supple-

mental jurisdiction statute to bring his claim under 42 U.S.C. § 1983 back into federal

court.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED:

That defendants' motion to dismiss plaintiff's claims arising under 42 U.S.C. §§ 1985 and 1986 is GRANTED;

That defendants' motion to dismiss plaintiff's claims arising under 42 U.S.C. §§ 1981 and 1982, and under Title VI and Title IX is DENIED;

That defendants' motion to dismiss plaintiff's claim under 42 U.S.C. § 1983 is GRANTED as to defendants Del Norte Pool District, Balzarini, Fosdick, and McCarthy, and DENIED as to defendants Edinger and McCarthy;

That defendants' motion to dismiss plaintiff's claim arising under the False Claims Act is DENIED;

5) that defendants' motion to dismiss plaintiff's motion for a writ of mandamus is GRANTED.

Plaintiff is granted leave to amend his claim under 42 U.S.C. § 1983 to allege that the individually named defendants are liable in their individual capacity.

IS SO ORDERED.



SAVE MART SUPERMARKETS,
Plaintiff,

v.

UNDERWRITERS AT LLOYD'S LONDON, Sphere Drake Insurance PLC, and Does 1 through 50, inclusive, Defendants.

No. C-93-1025 SAW.

United States District Court,
N.D. California.

Jan. 27, 1994.

Employer sued property, casualty, and crime insurer to secure coverage for employment discrimination claims under policy. Insurers moved for summary judgment. The District Court, Weigel, J., held that: (1) insurers had no duty to defend; (2) insurers had obligation to pay defense costs only after determination that underlying action was covered; (3) genuine issue of material fact existed as to whether discrimination claims were excluded by policy exception for personal injuries to employees injured in course of employment; (4) genuine issue of material fact existed regarding whether claims were for intentional misconduct; and (5) discrimination claims were not covered by faithful performance clause.

Insurers motion for summary judgment denied in part and granted in part; employ-