00-6022, 00-6036

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Third-Party-Defendant

SHIRLEY C. BROWN, in her capacity as a member of the State Board of Regents; LORA BRADLEY CHODOS, in her official capacity as a member of the State Board of Regents; THOMAS FREY, in his official capacity as a member of the State Board of Regents; WILLARD A. GENRICH, In his official capacity as member of the State Board of Regents; NORMA GLUCK; EMLYN I. GRIFFITH, in her official capacity as a member of the State Board of Regents; FLOYD S. LINTON, in his official capacity as a member of the State Board of Regents; VINCENT TESE; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; SAMUEL PIERCE; SALVADORE SCALFINI, in his official capacity as a member of the State Board of Regents; THOMAS SOBOL; MARIO CUOMO; MARTIN C. BARRELL, in

(Caption continued on next page)

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

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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his official capacity as a member of the State Board of Regents; JAMES MCCABE, SR., in his official capacity as a member of the State Board of Regents; MIMI LEVIN LIEBER, in her official capacity as a member of the State Board of Regents; YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants-Appellees

CITY OF YONKERS,

Defendant-Appellant-Cross-Appellee

YONKERS BOARD OF EDUCATION,

Defendants-Appellants

v.

YONKERS FEDERATION OF TEACHERS,

Intervenor-Defendant

YONKERS BRANCH--NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiff-Intervenor-Appellee-Cross-Appellant

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1345. The City of Yonkers filed a timely notice of appeal from the district court's December 29, 1999, order (A-1700), and the Yonkers Branch of the National Association for the Advancement of Colored People (NAACP) filed a notice of cross-appeal (A-1751). This Court has jurisdiction pursuant to 28 U.S.C. 1292(a)(1).

ISSUE PRESENTED

Whether the district court abused its remedial discretion by entering a third supplement to a long term plan order that specifies the kinds of actions contemplated by the Housing Remedy Order.

STATEMENT OF THE CASE

There have been about twenty appeals[1/] filed by the City of

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[1/] See district court docket sheet entries numbered 678, 701, 745-49, 745-51, 745-59, 745-74, 772, 775, 848, 878, 903, 1091, 1127, 1154, 1182, 1306, and 1340. Several of these appeals were subsequently withdrawn or dismissed by the City. Where this Court has reached the merits of the City's appeals, it has, with one exception, uniformly upheld the decisions of the district court. See United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988); United States v. Yonkers Bd. of Educ., 856 F.2d 7 (2d Cir. 1988); United States v. Yonkers Bd. of Educ., 927 F.2d 85 (2d Cir.), cert. denied, 502 U.S. 816 (1991); United States v. Yonkers Bd. of Educ., 946 F.2d 180 (2d Cir. 1991); United States v. City of Yonkers, 992 F.2d 320 (2d Cir. 1993); but see United States v. City of Yonkers, 181 F.3d 301, vacated on reh'g, 197 F.3d 41 (2d Cir. 1999). In United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988), rev'd in part on other grounds sub nom. Spallone v. United States, 493 U.S. 265 (1990), this Court affirmed the district court's contempt adjudication against the City, but modified the order to limit the contempt fines to $1 million per day. In addition to the City's own appeals, the City has funded an

(continued...)

Yonkers (City) from orders entered by the district court in the remedial phase of this ongoing civil rights litigation. The City's obligations arose from the district court's 1985 decision holding the City liable for intentional discrimination in housing and schools. See United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988). At issue in this appeal is the Third Supplemental Long Term Plan Order (Third SLTPO) entered by the district court that adopts additional remedial measures for desegregating the City's subsidized housing. The City argues that the Third SLTPO does not satisfy the standards set out in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), for modifying a consent decree, and that the district court's use of race is unconstitutional. The NAACP defends the Third SLTPO against arguments raised by the City and appeals the portion of the order granting the City additional credit under the Housing Remedy Order for serving Priority 1 households. The United States seeks to defend the district court's Third SLTPO against

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[1/](...continued)
unsuccessful appeal by members of its Parks Board, who sought to intervene in this case (see United States v. Yonkers Bd. of Educ., 902 F.2d 213 (2d Cir. 1990)), and has appealed from a decision in a related action in which the City (nominally a defendant) supported a private plaintiff's efforts to block implementation of the remedy in this case on environmental grounds (see D'Agnillo v. United States Dep't of Hous. & Urban Dev., 923 F.2d 17 (2d Cir.), cert. denied, 501 U.S. 1254 (1991)). In the City's last appeal of an order emanating from the housing portion of the case, this Court affirmed the district court's order rejecting the City's alternative housing proposal and appointing a special master to implement a supplemental long term plan order. United States v. Yonkers Bd. of Educ., 29 F.3d 40 (2d Cir. 1994), cert. denied, 515 U.S. 1157 (1995).

the Rufo and equal protection challenges raised by the City.

A. Lower Court Proceedings And Remedial Orders

In 1985, the City of Yonkers was held liable for intentionally segregating its public and subsidized housing and schools on the basis of race in violation of the Fair Housing Act, 42 U.S.C. 3601 et seq., and the Equal Protection Clause of the Fourteenth Amendment. Yonkers Bd. of Educ., 624 F. Supp. 1276. A year later, the district court entered the Housing Remedy Order (HRO) to remedy the constitutional violation and desegregate public and subsidized housing (A-574). The HRO enjoined the City from taking any action that would further racial segregation in public or subsidized housing and otherwise intentionally promoting racial residential segregation in Yonkers (A-576).[2/] Section 4 of the HRO required the City to provide acceptable sites for 200 units of public housing in East Yonkers (A-585-587), and Section 6 ordered the City to develop a long range plan for creating additional subsidized family housing (beyond the 200 units set out in Section 4 of the HRO) in residential areas in predominantly white East and Northwest Yonkers (A-589). The HRO created an Affordable Housing Trust Fund (AHTF) to foster private development of affordable housing, and ordered that such housing "advance racial and economic

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[2/] "A-_____" refers to pages in the Joint Appendix filed by the appellant City along with its opening brief. "City Br. ___" refers to pages in the City's brief. "NAACP Br. ___" refers to pages in the brief filed by cross-appellant NAACP. "U.S. Exhs. I and J" refer to the United States' exhibits entered into evidence at the district court's September 9, 1999, hearing.

integration" (A-588). Section 7 of the HRO set out occupancy priorities for public and subsidized housing (A-590-591).

The City refused to comply and appealed the HRO. This Court affirmed the district court's liability and remedy rulings. United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1184, 1236 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

In January 1988, the parties negotiated a consent decree in which the City agreed to take certain actions "in connection with a consensual implementation of Parts IV and VI of the [HRO]" (A-598). The City agreed to the creation of 800 units of subsidized housing by 1992 in order to fulfill its obligations under Part VI of the HRO (A-604), with benchmarks for creating 200, 400, and 600 subsidized housing units at the end of each of the first three years from the decree's entry date (A-604). The parties agreed that if these benchmarks were not met, plaintiff or plaintiff-intervenor could apply to the district court for an order requiring the City to adopt additional or substituted remedial measures to ensure that these goals are timely met (A-605). Soon after signing the First Remedial Consent Decree, the City sought to avoid compliance with its remedial obligations under the HRO and the terms that it agreed to in the decree. The City unsuccessfully sought to modify or vacate the consent decree and refused to negotiate a long term plan for implementing the HRO.

Because the City refused to take the actions set out in the First Remedial Consent Decree, the district court, on June 13,

1988, entered a Long Term Plan Order (LTPO) setting forth specific steps for the City to take in implementing the long term plan portion of the HRO (A-703). The LTPO set out the percentage of low-income units that should be included within any new multi-family housing development (A-704-705) and directed the City to ensure that assisted housing units are "dispersed [in a] manner [that] avoid[s] the undue concentration of both public and assisted units in any neighborhood of Yonkers" (A-706). Paragraph 4(f) of the LTPO ordered the City to give housing priority to individuals as follows:

> 1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City of Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first served basis;
>
> 2) residents of the City of Yonkers; and
>
> 3) persons employed in the City of Yonkers

(A-710). The City was entitled to housing credits towards achieving the goals of the First Remedial Consent Decree for placing these individuals in affordable units on this priority basis. The terms of the LTPO also awarded the City one credit towards the annual housing goal for every two units of new, affordable housing constructed in areas outside of East and Northwest Yonkers (A-716).

Over the next three years the City failed to implement the Long Term Plan and failed to provide the subsidized housing units

required by the HRO. Following a lengthy hearing in June and July, 1993, the district court entered, on October 5, 1993, the Supplemental Long Term Plan Order (SLTPO), setting out additional measures for remedying the City's ongoing housing segregation (A-723). The City appealed the district court's SLTPO, and this Court affirmed. United States v. Yonkers Bd. of Educ., 29 F.3d 40 (2d Cir. 1994), cert. denied, 515 U.S. 1157 (1995).

After three years the district court determined that the City was not providing the new subsidized housing contemplated under the SLTPO (A-751-752). On November 6, 1996, the district court entered a Second Supplemental Long Term Plan Order (Second SLTPO) that transferred to the City the "full and prime responsibility for the implementation of the Order," and reduced the responsibility of the Housing Special Master to a monitoring role (i.e., a Housing Monitor) (A-753, 760). In addition, the order set out the terms for first year construction of new affordable housing units at Cross Street (22 units), Hoover Road (25 units), and Yonkers Avenue (64 units of rental housing); required that the City provide 100 units of new and existing affordable housing to LTPO qualified individuals each year for six years (for a total of 600 units at the end of the designated period); and required the City to create a new department, the Affordable Housing Implementation Office, to facilitate and timely meet the objectives set out in the district court's housing orders (A-761-766). The Second SLTPO states that existing housing units that are part of the affordable housing

program must be structurally and fiscally sound, and located in a community that "furthers the integrative purposes of the LTPO" (A-764). Under the Second SLTPO, the district court reserved the right to modify the Order sua sponte or on request of any party if the court determines that "the goals set forth [in the Order] have not been realized and are not likely to be realized in the foreseeable future, absent such modification" (A-768).

B. Efforts To Implement The City's Affordable Housing Program

On February 4, 1988, the NAACP moved to enforce the Second SLTPO (A-773, 775). The NAACP argued that the City had provided only 50 of the 100 units required in Year 1 (1997) of the existing housing program and had not provided any housing opportunities under the new construction program (A-776-779). The City opposed the NAACP's motion and argued that for Year 1 it was entitled to 84 credits towards the first year goal of 100 (A-823). The United States proposed that the City provide information to the Housing Monitor that would allow for an assessment as to the proper credits due the City (A-835-837).

In response to the United States' request for information, the Yonkers Affordable Housing Department (YAHD) issued a report on February 24, 1998 (A-841). The YAHD reported that during Year 1 (1997), the City's existing housing program provided affordable housing opportunities to 18 Priority 1 households (29%), 42 Priority 2 households (68%), and two Priority 3 households (3%) (A-847; see also A-855-857).

The district court held a hearing on the motion on February

26, 1998, where the parties discussed the number of families housed under the existing housing program and the status of new affordable housing projects (A-864). After hearing the views of each of the parties, the district court found that there was "significant uncertainty * * * as to what the appropriate credits to the City * * * should be because of lack of adequate documentation" (A-918). The district court directed the City to provide to the United States and the NAACP reports and documentation on the housing opportunities provided to families under the program (A-918).[3/] The district court reconvened the parties on June 8, 1998, and discussed primarily the status of new construction of affordable housing units (A-921, 925-950).

On January 19, 1999, the City submitted its Second SLTPO Monitoring Report setting out the City's proposed credits for existing housing units in Year 2 (1998) (A-1057). The City claimed credit for 89-1/2 units (see A-1068, 1153). Among the 89-1/2 units for which the City sought credit, seven (7.9%) housing units were occupied by Priority 1 households, 76 (85.4%) units by Priority 2 households, and six (6.7%) units by Priority 3 households (A-1167-1169). Occupying the 89 units were 30 black families, 25 Hispanic families, and 34 non-minority families (A-1167-1169).

A hearing was held on February 24, 1999 (A-1275), where the United States and NAACP expressed concern that only seven

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[3/] After the hearing, the parties agreed at a February 26, 1998, Monitor's meeting that the City should receive 81-1/2 credits in Year 1 (1997) (J.A. 1820).

Priority 1 households had been afforded housing opportunities in the second year of the program (A-1279). The NAACP further stated that during 1998 there were approximately 30 moves that did not further integration (A-1283). These moves did not entail minority families moving into non-minority neighborhoods, or non-minority families moving into minority neighborhoods (A-1283).[4/] The United States stated its concern over the predominant number of Priority 1 minority households that have not been afforded housing opportunities under the City's program (A-1297-1298).

The City argued that no order requires that it give preference to individuals in housing on the basis of race, and that under its program it cannot place persons in particular areas within the City based on race (A-1307-1308). The district court stated that while the affordable housing program has emphasized the goal of fostering home ownership, there is a "statistical demonstration * * * that priority 1 class members are not benefitting to the extent one would hope under the existing plan" (A-1312). The court requested the parties to submit "a proposed revision of the remedy order designed to increase the ability of priority 1 class members to have greater housing opportunity" (A-1315), and "more carefully define what is meant by furthering the integrative purposes of the order" (A-1309).

[4/] The remedial measures ordered by the district court are to redress the City's discrimination against minorities. The term "minority" refers to black and Hispanic individuals. See United States v. Yonkers Bd. of Educ., 837 F.2d at 1226. The term "non-minority" refers to other racial groups. Ibid.

An April 14, 1999 hearing dealt with the question whether certain proposed moves under the existing housing program further the racial integrative goals of the HRO (A-1337). After hearing argument, the district court adopted interim measures requiring that "no closings * * * take place unless there has been furnished to the Department of Justice * * * a statement of the basic terms and conditions of the proposed closing, including such matters as are relevant to determining whether or not the proposed transaction is consistent with the integrative purposes of the housing remedy order" (A-1361-1362; see also A-1364-1365).

In response to the district court's directive, the parties began developing proposals for improving the existing housing program to make it more responsive to the housing needs of Priority 1 households (see, e.g., A-1373). On May 27, 1999, the Housing Monitor released a memorandum finding that the City was entitled to 43 undisputed credits for Year 2 (1998) moves, and that there were 42 credits that remained in dispute (A-1386, 1390). On June 1, 1999, the district court entered an order awarding the City the 43 undisputed credits for Year 2 (A-1392). The court directed the parties to submit explanations as to whether the City should be awarded the remaining 42 credits (A-1393). The court also ordered the City to develop a proposal to "increase substantially the number of Priority 1 families served by the existing housing program" and ordered the United States and NAACP to respond to the City's proposal (A-1393).

In their responses (A-1402, 1441, 1445), the NAACP and

United States argued that the City was not entitled to the additional 43 credits because, among other things, 31 moves did not further the integrative purposes of the Second SLTPO, and 11 of the moves were into units sold through a housing program administered separately by the Yonkers Community Action Program (YCAP). The YCAP does not utilize the priority system set out in the LTPO. The City argued that it was entitled to credit for these moves and that the district court should award "double credit" for moves by Priority 1 households (A-1435).

The Housing Monitor met with the parties to discuss these issues, and, on July 26, 1999, submitted to the district court a summary of issues and recommendations (A-1465, 1467). The Housing Monitor's memorandum to the district court made various recommendations, including that the City be awarded 30 credits for existing housing placements and no credits for YCAP placements in Year 2 (1998). It also made recommendations on the City's Priority 1 outreach effort, the Rental Assistance Program, and future implementation of the existing housing program (A-1475-1481). On August 11, 1999, the Housing Monitor circulated the district court's tentative conclusions in response to the Housing Monitor's July 26, 1999, Summary of Issues and Proposals (A-1488, 1490).

C. District Court's September 9, 1999, Hearing

The court held a hearing September 9, 1999, on the status of the existing housing program (A-1516). The court heard evidence from the parties on the number of Priority 1 households that have participated in the three years that the program has operated, and the effect that the moves thus far have had on furthering integration in the City (A-1517-1545). The district court determined that the City's existing housing program's "accomplishments to date fall far short of what one hoped for" (A-1521). At the conclusion of the hearing the district court ordered the parties to confer and prepare a proposed order for the court (A-1544).

D. Third Supplemental Long Term Plan Order And Subsequent Amendments

On December 29, 1999, the district court entered a Third Supplemental Long Term Plan Order (Third SLTPO), to further implement the remedial housing orders in the case (A-1670). The district court denied the City's request for 11 credits in Year 2 (1998) for YCAP units sold in that year, because the YCAP program had not adopted the LTPO priority system (A-1674). The district court stated that "if the YCAP program adopts the LTPO priority system, the City would be eligible to receive credit in future years" (A-1674). With respect to the remaining 31 credits disputed by the plaintiffs as inconsistent with the racially integrative purposes of the remedial orders, the district court observed the following:

Twenty-nine (29) of the seventy-three (73) moves in 1998

> consisted of non-minority households moving to predominantly White neighborhoods (i.e. neighborhoods with less than 45% Black and Hispanic populations as of the 1990 census). Two (2) of the 1998 moves consisted of Black households moving to Runyon Heights, a predominantly minority neighborhood in Yonkers (i.e. a neighborhood with more than 45% Black and Hispanic populations as of the 1990 census). * * * Such moves do not further the racially integrative purpose of the Court's remedial orders in this case. Furthermore, only four (4) priority 1 households made moves in 1998

(A-1674). The court determined that in view of the "City's efforts [at] implement[ing] * * * outreach to * * * Priority 1 applicants," developing a rental housing component, and otherwise ensuring that moderate and low-income families can participate in the affordable housing program, the City would be awarded one credit for the two moves to Runyon Heights and 29 credits for the moves by non-minority families to predominantly white neighborhoods for a total of 30 credits out of the 31 disputed credits sought by the City (A-1674-1675).

The district court granted nearly all credits requested by the City in 1998 "on the condition and understanding that no future credits will be granted unless" the City creates housing opportunities that "further the racially integrative goals which are the essence of all the Court's prior housing remedy orders intended to counter the effects of prior racial discrimination in housing in Yonkers" (A-1675). With that underlying remedial purpose established, the district court ordered at paragraph 5 of the Third SLTPO that future credits would be awarded only under the following circumstances:

> a) For priority 1 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a black and Hispanic population which together totaled less than 45%;

b) For minority priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black and Hispanic population of less than 45%;

c) For non-minority priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a white population of less than 45%

(A-1675). Paragraph 6 of the Third SLTPO sets out an enhanced credit system for awarding the City credits for the placement of Priority 1 households (A-1676). Finally, the district court ordered, inter alia, the implementation of a rental component to the affordable housing program and a Priority 1 outreach program (A-1676-1678).

On January 21, 2000, the district court conducted a conference call with the parties to provide further clarification of the Third SLTPO (A-1739). The court entered an amendment to the Third SLTPO on January 24, 2000, stating that Paragraph 5 of that order "relates solely to the existing housing program and in no way alters the requirements for occupancy of new construction" (A-1750). On February 8, 2000, the district court entered a second amendment to the Third SLTPO (A-1755), changing the dates that construction is required to begin at the new construction sites, setting the total number of units permissible at these locations, and setting the maximum rental costs for these units (A-1755-1756).

STANDARDS OF REVIEW

The district court's Third SLTPO should be reviewed for abuse of discretion. Sands v. Runyon, 28 F.3d 1323, 1327 (2d Cir. 1994). The district court's legal conclusions should be

reviewed de novo and its findings of fact for clear error. Goosby v. Town Bd., 180 F.3d 476, 492 (2d Cir. 1999), cert. denied, 120 S. Ct. 982 (2000).

SUMMARY OF ARGUMENT

In this latest appeal, the City of Yonkers challenges a Third SLTPO entered by the district court which supplements prior orders upheld by this Court by adopting remedial measures tailored to increase affordable housing opportunities for Priority 1 households (persons who live or have lived in public or subsidized housing in the City). The Third SLTPO uses racial criteria to ensure that future moves occurring under the City's existing housing program result in minority households moving into predominantly non-minority communities, and non-minority households moving into predominantly minority communities.

For many years the City refused to implement any measures to remedy the segregated housing patterns that resulted from its decisions to confine public and subsidized housing to the predominantly black and Hispanic community of Southwest Yonkers. The City finally has implemented a remedy, but after three years its program has provided very few housing opportunities for Priority 1 households and has facilitated the moves of numerous non-minority households into non-minority neighborhoods. These results undermine the court's remedial goal of furthering housing desegregation in the City.

The district court has broad discretion to adopt measures for remedying the segregated housing patterns caused by the

City's intentional racial discrimination. The need for and propriety of race-based remedial measures is established by the district court's findings of intentional discrimination and this Court's affirmance of those findings. These findings of discrimination need not be revisited just because the City has taken yet another appeal. Rather, they fully establish a compelling governmental interest for the district court to employ race-based measures to implement an effective remedy. The racial criteria in the Third SLTPO is also fully consistent with the district court's prior remedial orders.

While the NAACP argues that the Third SLTPO is not a modification subject to the standards set out in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), this Court need not reach that question because the district court's remedial order easily satisfies Rufo's standards. The district court retained authority to modify the remedial orders of the case sua sponte by virtue of language set out in the Second SLTPO, which authorizes such action by the court upon its determination that the goals of the case "have not been realized and are not likely to be realized in the foreseeable future absent such modification." The district court determined that the remedy, as administered by the City, was not furthering the goal of providing affordable housing to the predominantly minority households classified as Priority 1, and that the moves taking place were not furthering racial integration in housing. These facts are not clearly erroneous, and necessitate that the remedial orders be slightly

modified to ensure that these dual, core goals are achieved. Moreover, consistent with Rufo, the racial criteria in the Third SLTPO is narrowly tailored to further the goals of the case.

ARGUMENT

THE DISTRICT COURT ACTED WELL WITHIN ITS REMEDIAL DISCRETION BY ADOPTING A RACE-BASED REMEDY THAT SATISFIES THE COURT'S COMPELLING INTEREST IN REMEDYING THE CITY'S ONGOING CONSTITUTIONAL VIOLATION, AND IS NARROWLY TAILORED TO ACHIEVE THE GOALS OF THE CASE

A. The District Court Has A Compelling Interest To Remedy A Constitutional Violation

The Supreme Court has made clear that federal courts have broad powers to remedy constitutional violations, and that in "fashioning and effectuating * * * [remedial] decrees, the courts will be guided by equitable principles." Brown v. Board of Educ., 349 U.S. 294, 300 (1955). In applying "equitable principles," the Supreme Court has set forth these guidelines: First, the remedy should be "determined by the nature and scope of the constitutional violation," and must be "related to the condition alleged to offend the Constitution"; second, the "decree must indeed be remedial in nature"; and third, the "federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." Milliken v. Bradley, 433 U.S. 267, 280-281 (1977). These equitable principles are "not limited to a school desegregation context," but are "premised on a controlling principle governing the permissible scope of federal judicial power." Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976). Once judicial authority is invoked over a

constitutional violator, the district court's equitable power to remedy past wrongs is broad, and continues until the district court has secured compliance with its orders. Milliken, 433 U.S. at 281; see also Berger v. Heckler, 771 F.2d 1556, 1568-1569 (2d Cir. 1985).

The constitutional violation in this case is the racially segregated housing pattern that resulted largely from the City's intentionally confining subsidized housing in and adjacent to Southwest Yonkers. The district court's decision to supplement the LTPO and specify the types of moves that "further the integrative purposes" of the HRO is wholly consistent with remedying the constitutional violation that was adjudicated by the district court in 1985, and affirmed by this Court in 1987.

1. The Adjudicated Findings Of Intentional Racial Discrimination Support The District Court's Decision To Employ A Race-Based Remedy

After conducting a trial that lasted nearly 100 days, the district court concluded that the City had intentionally maintained and promoted residential racial segregation by confining virtually all of its subsidized housing to the predominantly minority section of the City in Southwest Yonkers. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1288-1376 (S.D.N.Y. 1985). The district court found that between 1949 and 1982, the City located 6,644 or 97.7% of the City's 6,800 existing units of subsidized housing in Southwest Yonkers. Id. at 1290. The effect of the City's decisions is an "extreme concentration of subsidized housing that exists in Southwest

Yonkers [that] is matched by an extreme concentration of the City's 18.8% minority population." Id. at 1291.

The district court also made ample findings that the City's decisions to confine subsidized housing in and around Southwest Yonkers was part of an intent to segregate black and Hispanic families from white communities in East and Northwest Yonkers. The district court noted the testimony of one city official who stated that "his constituents equated public housing with minorities," and that race was "definitely" a factor in much of the "opposition that arose during the site selection process." Id. at 1311. The district court found a pattern of extensive community opposition to any proposal by the City to locate subsidized or public housing in any heavily white community outside of Southwest Yonkers, id. at 1295-1300, 1306-1326, and determined that "there can be no serious doubt that the opposition to [subsidized housing in the white communities] was, on the whole, racially influenced." Id. at 1315. Evidence showed that city officials had acquiesced to community opposition for about 20 years, from 1960 to 1980, which led to the confinement of subsidized family housing in Southwest Yonkers. The district court found that as a result of these intentional actions by the City, "[n]ot one of the City's twenty-seven subsidized housing projects for families [was] located in any of the overwhelmingly white neighborhoods of East and Northwest Yonkers." Id. at 1364. Based on the volume of evidence at trial, the district court concluded that "race * * * had a

chronic and pervasive influence on decisions relating to the location of subsidized housing in Yonkers." Id. at 1376.

This Court affirmed the district court's factual determination that the "the City's decisions to locate low-income housing only in or adjacent to areas already having high concentrations of minority residents was a contributing cause of the extreme condition of residential segregation." United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1219 (2d Cir. 1987). The Court determined that "[t]he demographic effect of concentrating minority-intended housing in the already concentrated minority areas was predictable" and led to an overwhelming increase in the minority population, and a simultaneous decrease in the white population, in Southwest Yonkers. Id. at 1220. This Court affirmed the district court's determination that the community opposition to subsidized housing outside or away from Southwest Yonkers and the City's pattern of acquiescence to that opposition "preserve[d] racially segregated neighborhoods." Id. at 1221.

In this case, the condition that offends the Constitution is the continued segregation in subsidized and public housing that perpetuated segregated housing patterns in the City and flowed from the City's intentional racial discrimination in housing. The district court's adoption of the Third SLTPO is not an abuse of discretion because it is tailored to remedy the ongoing violation by making integrated housing opportunities available to minority occupants of subsidized housing outside of Southwest Yonkers and in predominantly white communities in the City.

2. The City's History Of Intentional Racial Discrimination Establishes A Compelling Governmental Interest For The Race-Based Remedy

The City invokes (City Br. 43-54) the doctrine of strict scrutiny, and argues that there is no compelling governmental interest justifying the racial criteria set out in the Third SLTPO. However, in light of the City's adjudicated history of intentional segregation, the district court is not required to ignore these findings and look for some new factual predicate, i.e., compelling governmental interest, to justify the use of race-based remedial measures.

Of course, this Court has already affirmed the use of race-conscious remedies to correct the effects of the City's intentional segregation. For instance, in Yonkers Bd. of Educ., 837 F.2d at 1215, this Court affirmed the district court's use of race-based school enrollment requirements. The district court's remedial order in the school case defined a "desegregated school" as a magnet school whose minority enrollment was within 15 percentage points of the system-wide proportion of minority students for the first year of that school's operation, and within 10 percentage points thereafter, or a non-magnet school whose minority population was within 20 percentage points of the system-wide proportion. The City was ordered to take specific measures to "maximize the extent to which the integrative goals * * * [could] be reached." Ibid.

In any case, "[i]t is now well established that government bodies, including courts, may constitutionally employ racial

classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." United States v. Paradise, 480 U.S. 149, 166 (1987); see also Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 480 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) ("The Court is in agreement that * * * remedying past or present racial discrimination * * * is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program") (O'Connor, J., concurring in part and concurring in the judgment).

In Paradise, the Supreme Court addressed the constitutionality of a one-black for one-white promotion requirement that was ordered by the district court as a remedy for a court-determined finding that a state agency had, for almost 40 years, systematically excluded blacks from employment as state troopers. The Supreme Court held that the remedy was permissible under the Fourteenth Amendment and "survives even strict scrutiny analysis [because] it is narrowly tailored" to serve a "compelling [governmental] purpose." 480 U.S. at 166-167 (internal quotations omitted). The Court held that the district court "unquestionably has a compelling interest in remedying past and present discrimination by a state actor." Id. at 167. In view of the district court's numerous findings of intentional discrimination in the City's public and subsidized housing, there has already been established a compelling governmental interest for use of racial criteria to cure the City's unconstitutional

condition.[5/] E.g., Brewer v. West Irondequoit Cent. Sch. Dist. No. 99-7186, 2000 WL 641052, at *15 (2d Cir. May 11, 2000) ("reduction of racial isolation resulting from de facto segregation can be a compelling government interest justifying racial classifications").

B. The District Court's Use Of Racial Criteria In The Third SLTPO Is Consistent With The Remedial Purposes Of The Court's Prior Orders

The City (City Br. at 35-38) argues that the Third SLTPO is inconsistent with the district court's prior remedial orders. This argument is wholly without merit.

1. Prior Remedial Orders Sought To Advance Racial Integration In Housing

Each of the district court's prior remedial orders was adopted for the purpose of undoing the effects of the City's past practice of racially segregating housing in Yonkers. For instance, Part I of the original 1986 HRO enjoins the City from further action that blocks or limits the availability of subsidized housing in East or Northwest Yonkers, or that confines subsidized housing to Southwest Yonkers, on the basis of race or national origin (A-576). The HRO enjoins the City from "intentionally promoting racial residential segregation in

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[5/] The City argues that the district court erred by failing to apply strict scrutiny. In view of the history of this case, it was not necessary for the district court to "walk through" such a formalistic inquiry. But whether the Third SLTPO satisfies strict scrutiny is a legal question subject to de novo review. Accordingly, even if the district court had erred by not engaging in strict scrutiny analysis, this Court can make that assessment in view of the factual findings made by the district court to support adoption of the additional remedial measures.

Yonkers" and created the City's Affordable Housing Trust Fund to support and create housing opportunities that "advance racial and economic integration" (A-576, 588) (emphasis added). Moreover, the occupancy priorities as set out in the HRO gave first and second priority for public and subsidized units in predominantly white East Yonkers to persons wait-listed for such housing and to families with children who were then living in public and subsidized housing in Southwest Yonkers (A-590-591). Indeed, at the time that the HRO was entered by the district court, persons on the waiting list for public housing and families already living in Southwest Yonkers were overwhelmingly minority. Thus this provision of the HRO was specifically designed so that the unconstitutional conditions imposed on these minority families housed in subsidized units would be corrected by making affordable housing opportunities available in a way that would racially integrate the City's housing patterns. This goal was reiterated in the 1988 LTPO which states that first priority for subsidized housing opportunities outside of Southwest Yonkers be given to individuals who live or have lived in public or subsidized housing in the City (A-710). The purpose of furthering racial integration in subsidized housing is also set out in the Second SLTPO, which states that housing units provided under the existing housing program must "further[] the integrative purposes of the LTPO" (A-764) (emphasis added).

2. The District Court May Employ Appropriate Race-Based Remedial Measures In This Case

The City argues further (City Br. at 37-38) that the district court's remedial discretion is limited in this case to utilizing methods that are exclusively "race neutral" and that will further economic integration of housing. As has been shown, this argument disregards this Court's affirmance of the extensive factual findings that the City discriminated against persons in subsidized housing on the basis of race, and the fact that the City's measures -- which took years to implement -- are not having the effect of racially integrating Priority 1 black and Hispanic occupants of subsidized housing into the City's predominantly white communities. See, e.g., Yonkers Bd. of Educ., 837 F.2d at 1215 (Court affirms the use of race-based school enrollment requirements to integrate City schools).

First, the City was not found liable under the Fourteenth Amendment of the U.S. Constitution and the Fair Housing Act for discriminating on the basis of economic means. The district court and this Court found that the City engaged in a pattern and practice of confining subsidized housing units in and adjacent to Southwest Yonkers based on the race of persons who would occupy these units. See pp. 18-20, supra. Indeed, while the City engaged in a pattern and practice of segregating subsidized family housing in Southwest Yonkers because of the race of the occupants of such housing, the City was, by contrast, willingly locating subsidized housing for senior citizens in the predominantly white residential sections of the City with "little

or no community opposition." Yonkers Bd. of Educ., 624 F. Supp. at 1370; Yonkers Bd. of Educ., 837 F.2d at 1189.

While nonracial measures may be appropriate in other contexts, the facts of this case show that for at least ten years the City failed to implement any kind of remedy. The City is now halfway into a six year existing housing program that, to this date, has not provided sufficient housing to the predominant number of black and Hispanic households in the Priority 1 category, and has failed to achieve the goal of integrating these families in any significant numbers into non-minority communities in the City. In fact, the existing housing program has had the opposite effect in that nearly half of its participants in Year 2 (1998) have been non-minority households, and these households have been placed in affordable housing units in non-minority communities (see U.S. Exh. I). By August of Year 3 (1999), almost two-thirds of the households participating in the program made non-integrative moves (see U.S. Exh. J). The district court thus acted well within its discretion in tailoring the remedial orders and requiring that the City be awarded credit only for moves for that have the effect of furthering integration. See, e.g., Hills, 425 U.S. 284 (Supreme Court let stand a remedial order which, to end discrimination in public housing, required housing to be built in non-black neighborhoods in Chicago).

C. The Court's Third SLTPO Satisfies Rufo Standards And Is Narrowly Tailored To Achieve The Goals Of The Case

The City argues (City Br. 38-43) that the district court's Third SLTPO does not comply with Rufo v. Inmates of Suffolk

County Jail, 502 U.S. 367 (1992). As the NAACP points out (NAACP Br. 37), it is arguable that the district court's adoption of the Third SLTPO is not a modification to the HRO. This Court need not reach this question because, even if it is a modification of the LTPO, it clearly satisfies Rufo standards.

The district court's decision to specify the remedial measures in the Third SLTPO is clearly correct under Rufo and is entitled to significant deference as an exercise of the court's broad remedial authority. The district court retained authority to modify the HRO sua sponte. See Williams v. Edwards, 87 F.3d 126, 131 (5th Cir. 1996) ("A consent decree may be judicially modified, over a party's objection, when the court has reserved the power to modify and articulates the long-term objective to be accomplished."). Under the Second SLTPO, which was "negotiated and agreed to by the parties," the district court "reserve[d] the right to modify [the Second SLTPO] sua sponte [where the district court determined] * * * after a hearing, that the goals set forth herein have not been realized and are not likely to be realized in the foreseeable future, absent such modification" (A-768-769). The facts and circumstances before the district court fully warranted modification to the Second SLTPO since, absent the modification, the goals of the case would not be fully realized.

The Supreme Court in Rufo recognized that the "upsurge in institutional reform litigation since Brown v. Board of Education, 347 U.S. 483 (1954), has made the ability of a district court to modify a decree in response to changed

circumstances all the more important," and that "in implementing and modifying such decrees * * * a flexible approach is often essential to achieving the goals of reform litigation." 502 U.S. at 380-381. Justice O'Connor explained in her concurring opinion in Rufo that equitable principles apply to modifications of consent decrees, and that a district court has "substantial discretion" to modify a final judgment. 502 U.S. at 393; see also United States v. Eastman Kodak Co., 63 F.3d 95, 101 (2d Cir. 1995); Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33, 38 (2d Cir. 1993), cert. denied, 513 U.S. 809 (1994).

Rufo laid out the framework for reviewing modifications to consent decrees, and the Court held that such modifications are appropriate where "changed factual conditions make compliance with the decree substantially more onerous," "when a decree proves to be unworkable because of unforeseen obstacles," or "when enforcement of the decree without modification would be detrimental to the public interest." 502 U.S. at 384. The district court's modification of the HRO and SLTPO satisfies the Rufo standard. There is ample evidence showing a significant change in factual circumstances that make compliance with the HRO and subsequent LTPO "more onerous" and demonstrate that without the additional remedial measures set out in the Third SLTPO the remedy would be "unworkable" and would not further the underlying purposes of the HRO. Moreover, the modification crafted by the district court is tailored to satisfy the remedial goals of the case.

1. Changed Factual Circumstances Prevented The Prior Remedy From Achieving The Goals Of The Case

The district court in this case correctly determined that because of changed factual circumstances -- the lower than expected participation by Priority 1 households and the large number of non-minority households using the program's resources to move into affordable housing units in predominantly non-minority communities -- the remedy was not meeting the goals of the case. There are ample facts to support this determination.

During hearings preceding the district court's adoption of the Third SLTPO, the United States and NAACP showed that the City's implementation of existing remedial measures were not effective in providing affordable housing opportunities for Priority 1 applicants, the individuals most aggrieved by the City's discriminatory actions. The City's Report on the status of the existing housing program showed that 18 Priority 1 households were afforded housing opportunities during the first year (1997) of the six-year program (p. 7, supra). At a hearing on February 24, 1999, and as confirmed in the Final LTPO Report prepared by YAHD, the district court was informed that during Year 2 (1998) of the existing housing program, only seven Priority 1 households had been provided housing (see p. 8-9, supra; see also A-1051). Recent reports by the City showed that by October 22, 1999, in Year 3 (1999) of the existing housing program, only four Priority 1 households were provided affordable housing under the City's program (A-1597).

Moreover, during the three years that the existing housing

program has been in operation, only about one-half of the moves in Year 2 (1998) and one-third in Year 3 (1999) furthered the integrative purposes of the remedial orders by moving qualified minority families into predominantly non-minority neighborhoods outside Southwest Yonkers and, by contrast, moving qualified non-minority households into minority neighborhoods. While there was no data broken down by race to document the integrative effect of the City's existing housing program in Year 1 (1997) (J.A. 1526), information provided by the City in Year 2 (1998) revealed that among 58 moves for which the City received credit, all of the 27 moves by non-minority households were to predominantly white communities, and 6 of the 31 moves by minority households were to predominantly minority communities adjacent to Southwest Yonkers and to the predominantly minority Runyon Heights community in East Yonkers (see U.S. Exh. I; see also J.A. 1524-1525). At the September 9, 1999, hearing, the district court heard evidence that in Year 3 (1999) of the program, all ten non-minority households participating in the program moved into non-minority communities, and among the 16 moves by minority households, six were into communities in or adjacent to Southwest Yonkers or Runyon Heights (see U.S. Exh. J; see also J.A. 1524-1525).

Consistent with the significant segregative damage that the City's discriminatory practices had on racial housing patterns, the HRO and subsequent remedial measures in this case "seek[] pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate

significant rights of a public nature." Eastman Kodak Co., 63 F.3d at 101 (quotations and citations omitted). Because the district court found that the existing housing program, as administered by the City, was not achieving the integrative goals of the case -- in fact only half of the moves under the program thus far have furthered integration -- the district court acted well within its discretion to modify the program by ordering the terms set out in the Third SLTPO.

2. The Third SLTPO Is Narrowly Tailored To Achieve The Remedial Objectives Of The Case

Contrary to the City's claim (Br. 41), the Third SLTPO is narrowly tailored to the changed circumstances and is designed to ensure that the goals of the HRO and subsequent remedial orders are achieved. The factors for determining whether the racial classification set out in the Third SLTPO is narrowly tailored include: (1) the efficacy of alternative remedies; (2) the duration of the remedy and whether it is subject to periodic review; (3) program flexibility; (4) the manner in which race is used; and (5) the effect of the program on non-beneficiaries. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 507-510 (1989); Paradise, 480 U.S. at 171-186. When considered against these factors, the Third SLTPO is sufficiently tailored to satisfy the district court's compelling interest in ensuring that moves occurring under the City's existing housing program have the effect of integrating the City's segregated housing patterns.

The history of this case makes clear that the City's prior "race-neutral" remedial measures did not further the integrative

purposes of the HRO and subsequent remedial orders. Indeed, the district court clearly explored the efficacy of alternative remedies because the Third SLTPO was ordered only after the district court found that the City's approach was unsuccessful in providing affordable housing opportunities in a manner that would further integration. See p. 7-11, supra; see also Paradise, 480 U.S. at 170-171 (Supreme Court affirmed district court ordered, race-conscious relief "upon a defendant with a consistent history of resistance to the District Court's orders, and only after the Department failed to live up to its court-approved commitments").

The Third SLTPO is subject to regular review because the district court retains authority over the case. The remedial measure thus satisfies this element of narrow tailoring as well. Moreover, the Third SLTPO is no less flexible than the district court's preceding remedial orders. However this most recent order is better tailored to ensure that the goals of the case are achieved.

The use of racial criteria in the Third SLTPO is also narrowly tailored in that it bears a proper relationship to remedying the unconstitutional housing conditions that continue to exist in the City. Southwest Yonkers, as well as the Runyon Heights section of East Yonkers, continues to be overwhelmingly populated by black and Hispanic residents (see U.S. Exhs. I and J). The district court found, and this Court affirmed, that the segregated residential conditions were caused in large part by a series of decisions by City officials to confine subsidized

housing to these areas. In seeking to undo the effects of the City's discriminatory decisions, the district court acted well within its discretion by requiring the City to enhance efforts to afford housing opportunities to Priority 1 households -- families who resided in public and subsidized housing at the time of the City's discriminatory actions, and who are overwhelmingly minority. These remedial measures will further the goals of the case by ensuring that moves under the City's program desegregate the City's subsidized housing.

Finally, the effect on non-beneficiaries is nominal. At the outset, the existing housing program is designed to provide Priority 2 and 3 households affordable housing units only after the City determines that no qualified Priority 1 households are available to purchase the unit. In terms of the administration of the Third SLTPO, non-minority households who qualify to participate in the program are no greater burdened in being required to move into predominantly minority communities in East and Northwest Yonkers than are qualified minority households who, under the order, must move into predominantly non-minority communities in these sections of the City. The City's argument (Br. 45-46) that non-minority households are more greatly burdened because there are fewer predominantly minority communities in East and Northwest Yonkers in which to move has little merit since the City's compliance with the Third SLTPO will create a greater need for housing for minority households in non-minority communities in East and Northwest Yonkers. A map

entered into evidence at the September 9, 1999, hearing, showed that in 1998, among 58 families who purchased homes under the City's existing housing program, 31 (53.5%) were black and Hispanic and 27 (46.5%) were non-minority (see U.S. Exh. I). By August 16, 1999, among 26 households that had purchased homes under the City's program for that year, 16 (61.5%) were black and Hispanic and 10 (38.5%) were non-minority (see U.S. Exh. J). Thus, over half of the homes purchased in Years 2 and 3 of the program were by black and Hispanic households. As the City implements the terms of the Third SLTPO, and a greater number of Priority 1 households are targeted for participation, the number of black and Hispanic households participating in the program will invariably outpace the number of non-minority households.

The NAACP argues (NAACP Br. 53-54) that the district court abused its discretion in granting the City enhanced credit under the HRO for providing housing opportunities to Priority 1 households. While the United States did not seek to appeal this aspect of the Third SLTPO, the United States agrees with the NAACP that awarding the City enhanced credit under these circumstances is inappropriate. Under Section 6 of the Third SLTPO, the City receives enhanced credit for meeting its annual goal of providing housing opportunities to Priority 1 households (A-1676). The City's credits are diminished if the Priority 1 goal is not met in any given year (A-1676). Indeed, the district court's obligation in this case is to ensure that Priority 1 households are provided affordable housing under the City's

remedial program, especially since these individuals lived in public and subsidized housing at the time of the City's discrimination (A-710). The enhanced credit system employed by the district court, however, "rewards the [City] for [its past] dilatory * * * tactics" and failures at implementing an effective remedy, Reed v. Rhodes, 179 F.3d 453, 478 (6th Cir. 1999) (Cole, J., dissenting), and is thus an abuse of discretion..

3. The City Had Notice That The Court Was Considering Modifying The LTPO

Finally, the City asserts (City Br. at 40-41) that it had no notice of the district court's intent to modify the Second LTPO. This claim is without merit, as the parties were fully aware of the district court's interest in tailoring the remedy to address the core remedial goals of the HRO and subsequent orders.

At the February 24, 1999, hearing, the district court instructed the parties to propose revisions to the HRO to increase housing opportunities for Priority 1 applicants. (A-1315). At the subsequent April 14, 1999, hearing, the district court heard the parties' views on whether certain proposed moves under the existing housing program furthered the racial integrative goals of the housing remedial orders. The district court observed that while qualifying white families can participate in the existing housing program, "that does not mean that the racially integrative impact of a move is irrelevant" (A-1342). While the parties proposed revisions to the HRO to increase housing opportunities for Priority 1 households, the district court adopted interim measures to ensure that future

closings would foster integration in the City's subsidized housing program (A-1343-1344; see also p. 10, supra).

Moreover, the parties briefed the district court on the problems that have prevented Priority 1 households from gaining greater participation in the program and the integrative nature of moves that have occurred under the program. See A-1466 (Housing Monitor's Summary of Issues and Proposals); A-1483 (NAACP Letter to the District Court dated July 30, 1999); A-1486 (United States' Letter to the District Court dated Aug. 4, 1999); A-1498 (NAACP Letter to the District Court dated Aug. 18, 1999); A-1488 (Housing Monitor's Memorandum dated Aug. 11, 1999); A-1510 (NAACP's Letter to the District Court dated Aug. 20, 1999); A-1506 (City's Letter to the District Court dated Aug. 20, 1999). In view of these facts, the City was clearly aware that the district court was considering modifying the LTPO.

CONCLUSION

For the foregoing reasons, the district court's Third SLTPO should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set out in Fed. R. App. Pro. 32(a)(7)(B). The brief was prepared using WordPerfect 7.0, and contains 9,301 words.

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CERTIFICATE OF SERVICE

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